OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 16 September 1993 *

Mr President,
Members of the Court,

A —Introduction

1. The plaintiff in the proceedings before the national court, Owens Bank Limited (hereinafter referred to as 'the plaintiff'), is domiciled in St Vincent and the Grenadines, [1] where it is registered as a company and as a bank.

Bracco Industria Chimica SpA is a pharmaceutical undertaking domiciled in Italy. The chairman and managing director of that undertaking is Dr Fulvio Bracco, who is domiciled in Italy. I will refer hereinafter to Dr Bracco and to the undertaking managed by him as 'the defendants'.

2. On 29 January 1988 the defendants were found liable by the High Court of Justice of St Vincent to repay a loan amounting to nine million Swiss francs which had allegedly been granted by the plaintiff to the defendants at the end of January 1979. In those proceedings the plaintiff relied in particular on certain documents showing the signature of Dr Bracco and on evidence given by one of its employees, who testified to the handing over of the money. The documents contained *inter alia* a clause providing that the High Court of St Vincent should have jurisdiction to decide disputes arising from the grant of the loan.

The defendants asserted in the course of those proceedings that the documents submitted by the plaintiff were forgeries and that witnesses had given false evidence in the proceedings. However, the High Court of St Vincent held that the defendants had failed to raise that objection in good time, and found for the plaintiff. The defendants' appeal against that judgment was dismissed by the Court of Appeal of St Vincent on 12 December 1989.

3. On 11 July 1989 the plaintiff applied to a court in Milan for an order declaring the St Vincent judgment enforceable. The defendants pleaded before the Italian court *inter alia* that the plaintiff had obtained the judgment at issue by fraud. Those proceedings (hereinafter referred to as 'the Italian

* Original language: German.

1 — As is well known, this State, a member of the Commonwealth, is situated in the eastern part of the Caribbean (the main island, St Vincent, lies approximately 160 km west of Barbados and about 130 km to the north east of Grenada). In 1990 its estimated population was 116 000, covering a total area of 388 square kilometres (*The New Encyclopædia Britannica*, Micropædia, Volume 10, 15th edition, Chicago *et al.* 1992).

enforcement proceedings' [2]) had still not been concluded when the House of Lords ordered that the matter be referred for a preliminary ruling. According to information provided by the defendants, the Italian court, in a decision which is not yet final, has in the meantime rejected the plaintiff's application for a declaration as to the enforceability of the St Vincent judgment, but without thereby deciding the question whether the plaintiff obtained that judgment by fraud.

4. As long ago as November 1988 the defendants brought a civil action against the plaintiff in Italy (hereinafter referred to as 'the Italian civil proceedings'), in which they applied *inter alia* for a declaration that there was no debt owed by them to the plaintiff. At the time of the oral procedure before the Court of Justice, no final decision had yet been given in those proceedings either.

5. In addition to those proceedings and the enforcement proceedings in England, to which I propose imminently to turn my attention, the dispute between the defendants and the plaintiff has led to a series of further proceedings which do not need to be gone into further here. However, mention should be made of the (not yet final) judgment of a Milan court of 21 June 1991 in criminal proceedings against Mr Nano and Mr Layne. [3] In a detailed and carefully reasoned decision, the Italian court concludes that the documents submitted by the plaintiff are forgeries.

6. On 7 March 1990 the plaintiff applied for an order for the enforcement in England, pursuant to section 9 of the Administration of Justice Act 1920, of the St Vincent judgment. In those proceedings (hereinafter referred to as 'the English enforcement proceedings') too, the defendants asserted that the judgment to be enforced had been obtained by the plaintiff by fraud. At the same time, relying on Articles 21 and 22 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (hereinafter referred to as 'the Brussels Convention'), they applied for a declaration by the English court declining jurisdiction or an order staying the English enforcement proceedings pending the conclusion of the Italian enforcement proceedings. The defendants based their application on the ground that the question whether the plaintiff had obtained the St Vincent judgment by fraud needed to be examined in both the English and the Italian enforcement proceedings.

7. Under English law there are a number of ways in which foreign judgments (that is to

2 — The concept of 'enforcement proceedings' signifies, both here and hereafter, proceedings for a declaration that a judgment of a foreign court is enforceable, not execution proceedings, that is to say, proceedings for the compulsory enforcement of a judgment (for further details, see paragraph 15).

3 — Mr Nano is the person who claims to have negotiated the alleged loan agreement with the defendants and to have handed over the money; Mr Layne is one of the directors of the plaintiff.

say, judgments not given in England or Wales) may be recognized and enforced: [4]

— Under section 9 of the Administration of Justice Act 1920, judgments of the courts of certain States (including St Vincent and the Grenadines) ordering the defendant to pay a sum of money may be recognized in England by means of entry in a register. The effect of such recognition is that the foreign judgment can in principle be enforced in the same way as a judgment given by an English court.

Similar provisions are contained in the Foreign Judgments (Reciprocal Enforcement) Act 1933.

— Judgments of the courts of other Contracting States which are parties to the Brussels Convention and judgments of the courts of other parts of the United Kingdom may be recognized and enforced under the provisions of the Civil Jurisdiction and Judgments Act 1982.

— At common law, proceedings may be brought in certain cases on the basis of a foreign judgment. These are ordinary civil proceedings, the special characteristic of which is that the action is based not on the original claim (e.g. the claim for repayment of a loan) but on the foreign judgment ordering the defendant to make payment. [5]

8. The registration and/or recognition of a foreign judgment pursuant to section 9 of the Administration of Justice Act 1920 is prohibited *inter alia* where the judgment in question has been obtained by fraud. [6] The same applies where the recognition of a judgment would be contrary to English public policy. [7] Where in such a case a judgment has nevertheless been initially recognized, such recognition can be challenged. [8] The court seised of the matter may order any issue arising in such proceedings to be tried. [9]

4 — See the detailed account contained in *Dicey and Morris on the Conflict of Laws*, edited by L. Collins and others, 11th edition, Volume 1, London 1987, pp. 425 et seq. (Common Law), 477 et seq. (Administration of Justice Act 1920) and 490 et seq. (Civil Jurisdiction and Judgments Act 1982); also *Cheshire and North's Private International Law*, edited by P.M. North and J.J. Fawcett, 12th edition, London/Dublin/Edinburgh 1992, p. 345 et seq.

5 — This represents a form of *actio judicati*, a familiar concept in Roman law and *jus commune*.

6 — Section 9(2)(d) of the Administration of Justice Act 1920.

7 — See section 9(2)(f) of the Administration of Justice Act 1920.

8 — Section 9(4)(b) of the Administration of Justice Act 1920, in conjunction with RSC (Rules of the Supreme Court) Order 71, rule 9.

9 — RSC, Order 71, rule 9(2): 'The Court hearing such application may order any issue between the judgment creditor and the judgment debtor to be tried in any manner in which an issue in an action may be ordered to be tried.'

The court also enjoys a certain measure of discretion with regard to the way in which such interlocutory proceedings are organized.[10] This is evident from the decision in the case of *Société Coopérative Sidmetal* v *Titan International Ltd.*[11] That case concerned the registration in England of a Belgian judgment. The Belgian undertaking, which had been unsuccessful in the initial proceedings, had served in those proceedings a third party notice on an English company (its supplier). In the proceedings before the court in London the English company asserted that the Belgian court had not had jurisdiction in the matter. The English court ordered a trial of that question, in which the English company should stand as plaintiff.

The second order (hereinafter referred to as 'the registration order') ordered the St Vincent judgment to be registered immediately pursuant to the Administration of Justice Act 1920, but also gave liberty to the defendants to apply to set aside the registration if they had grounds for doing so. The High Court further ordered execution on the judgment thus recognized should not issue until after the first hearing of the main proceedings or, if an application were made by the defendants to set aside the registration, until such application had been disposed of.

9. On 7 March 1990 the High Court (Mr Justice Sheen) made two orders. The first order concerned a preventive measure (known as a *Mareva* injunction) which was granted on the plaintiff's undertaking to issue proceedings in the form approved by the High Court. Those proceedings, which sought the registration in England of the judgment given in St Vincent (and at the same time the continuation of the injunction), were issued in the High Court by the plaintiff on the same day.

10. The defendants entered an appearance to those proceedings and made various applications, in which — as already mentioned — they relied in particular on the Brussels Convention. On 19 July 1990 the High Court (Sir Peter Pain) held that the Brussels Convention did not apply to the English enforcement proceedings.[12] On 9 November 1990 the High Court further ordered that there be a trial of the issue between the parties on the question whether the registration order and all subsequent proceedings should be set aside on the ground that the St Vincent judgment fell within those cases in which, pursuant to section 9(2)(d) (fraud) or section 9(2)(f) (infringement of public policy) of the Administration of Justice Act

10 — *The Supreme Court Practice* (1993), Volume 1, Part 1 (London 1992) refers in Note 71/9/2 to RSC Order 33, rules 3 and 4(2). Order 33, rule 3 provides: 'The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.' Order 33, rule 4(2) is worded as follows: 'In any such action different questions or issues may be ordered to be tried at different places or by different modes of trial and one or more questions or issues may be ordered to be tried before the others.'

11 — [1966] 1 QB 828. That judgment was given on the basis of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

12 — Summary of the judgment in *The Times Law Reports*, 29 August 1990.

1920, a judgment may not be registered in England. [13]

11. The plaintiff and the defendants appealed against those decisions (the defendants against the decision of 19 July and the plaintiff against the decision of 9 November 1990). The Court of Appeal dismissed the appeals on 27 March 1991. [14] It held that the Brussels Convention had no application to proceedings for the recognition and enforcement of the judgments of non-contracting States and in particular to proceedings under the Administration of Justice Act 1920. Even if the Brussels Convention did apply, Articles 21 and 22 were not applicable to the present case.

The Court of Appeal further confirmed that there should be a trial of the question whether the St Vincent judgment had been obtained by the plaintiff by fraud.

12. The plaintiff and the defendants appealed to the House of Lords against those parts of the decision of the Court of Appeal which were not in their favour. The plaintiff's appeal was dismissed by the House of Lords on 1 April 1992. [15] With regard to the defendants' appeal, the national court took the view that it was necessary to seek a ruling from the Court of Justice.

13. The House of Lords has consequently referred the following questions to the Court of Justice for a preliminary ruling:

1) Does the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the 1968 Convention') have any application to proceedings, or issues arising in proceedings, in Contracting States concerning the recognition and enforcement of the judgments in civil and commercial matters of non-contracting States?

2) Do Articles 21, 22 or 23 of the 1968 Convention, or any of them, apply to proceedings, or issues arising in proceedings, which are brought in more than one Contracting State to enforce the judgment of a non-contracting State?

3) If the court in a Contracting State has the power to stay proceedings under the 1968 Convention on the grounds of *lis*

13 — The passage from the order of the High Court which is of interest here is worded as follows: 'That issues be tried between the Plaintiff and the Defendants as to whether the Registration Order and all proceedings subsequent thereto should be set aside on the grounds that the judgments proposed to be registered fall within one or more of the cases in which a judgment may not be ordered to be registered under Section 9 of the Administration of Justice Act 1920 that is to say the cases set out in Section 9(2)(d) and 9(2)(f) thereof.'

14 — [1991] 4 All ER 833; [1992] 2 WLR 127.

15 — [1992] All ER 193; [1992] 2 WLR 621.

pendens, what are the *communautaire* principles which should be applied by a national court in determining whether there should be a stay of the proceedings in the national court second seised?

B — Opinion

Preliminary observation

14. Before considering the questions referred by the House of Lords, I will attempt to define the problems needing to be dealt with in this case. This appears to me all the more necessary since at the hearing before this Court the defendants' representative alleged that the Commission and the United Kingdom [16] were guilty of serious misunderstandings, and consequently denied that the arguments of those two parties were of relevance to these proceedings.

15. The defendants have rightly pointed out that this case concerns proceedings to establish the *conditions* in which a judgment given in a State which is not a party to the Brussels Convention [17] (hereinafter referred to as a 'non-contracting State') may be enforced by execution. In other words, these are proceedings in which a judgment of a court of a non-contracting State is to be declared enforceable in one of the Contracting States which are parties to the Brussels Convention (hereinafter referred to as 'Contracting States'). [18] The present case, however, does not concern *execution* consequent upon a declaration of enforceability, that is to say, the enforcement *per se* of the judgment.

16. The House of Lords seeks to know, first, whether the Brussels Convention has any application to proceedings for a declaration as to the enforceability in a State which is a party to the Brussels Convention of a judgment given in a non-contracting State (see the first question referred for a preliminary ruling). Following on from this is the further question whether — and if so, how — the provisions of the Brussels Convention concerning *lis pendens* and related actions (Articles 21 to 23) are to be applied where concurrent applications are made in more than one Contracting State for a declaration as to the enforceability of a judgment of a non-contracting State (see the second and third questions referred for a preliminary ruling).

17. However, the defendants have rightly asserted that the scope of the questions referred for a preliminary ruling is not limited to the foregoing. The House of Lords further seeks from the Court an answer to the question whether the provisions of the

16 — Apart from the defendants, only the Commission and the United Kingdom have taken part in the proceedings before the Court of Justice.

17 — The version of the Brussels Convention which is applicable here is the version as amended by the Accession Conventions of 9 October 1978 and 25 October 1982. The text of that version is printed in OJ 1983 C 97, p. 2.

18 — Decisions in which the courts of one State declare a decision given in another State to be enforceable are also termed 'exequatur' decisions.

Brussels Convention (or some of them) can apply to 'issues' arising in proceedings for the recognition and enforcement of a judgment of a non-contracting State.

The significance of this in relation to the present case is as follows: the English courts have ordered that there should be a trial of the issue whether the plaintiff obtained the St Vincent judgment by fraud. [19] That question is also occupying the Italian court, which has to decide whether to declare the judgment enforceable in Italy. Does this mean that one of those courts must decline jurisdiction in favour of the other court or stay the proceedings before it pursuant to the provisions of Articles 21 to 23 of the Brussels Convention until the other court has decided the question needing to be resolved? In the following paragraphs I propose to deal with both aspects of the questions referred for a preliminary ruling.

18. In their written observations, and particularly in the oral procedure before the Court, the defendants have asserted that the question of possible fraud was also raised in the Italian civil proceedings. [20] It also appears to have been argued by the defendants in the proceedings before the High Court and the Court of Appeal. [21]

The judgment of the House of Lords referring the questions for a preliminary ruling refers throughout to 'the English enforcement proceedings' and 'the Italian enforcement proceedings'. [22] Since the Italian civil proceedings are mentioned only once in the judgment [23] but are not otherwise referred to, it might be assumed that the House of Lords does not wish the Court to deal with that aspect in its answer to the questions referred for a preliminary ruling.

However, for the sake of completeness I propose briefly to consider that factor as well.

19. Finally, it should be borne in mind that the English enforcement proceedings are for a declaration as to the enforceability of a judgment pursuant to the provisions of the Administration of Justice Act 1920. However, the questions referred for a preliminary ruling by the House of Lords relate generally to proceedings concerning 'the recognition and enforcement of the judgments in civil and commercial matters of non-contracting States'. Consequently, I propose, in setting forth my arguments, to refer initially to the actual circumstances of this case but thereafter to suggest to the Court an answer to the preliminary questions which is applicable to all proceedings in which it is sought to enforce a judgment of a non-contracting State in Contracting States which are parties to the Brussels Convention.

19 — As we have seen, the High Court further ordered that the question whether it would be contrary to English public policy to recognize the St Vincent judgment should be tried as a preliminary issue (see above, paragraph 10 and footnote 13).

20 — See paragraph 4 above.

21 — See the summary of the defendants' submissions contained in the judgment of the Court of Appeal (Parker LJ), [1991] 4 All ER 833 at 840a.

22 — Those terms are respectively defined in paragraphs 6 and 9 of the judgment making the reference. According to those definitions, they signify the proceedings for a declaration as to the enforceability of the judgment in England, on the one hand, and in Italy, on the other.

23 — Paragraph 7 of the judgment making the reference.

Applicability of the Brussels Convention

Permissibility of double execution

20. The parties which have taken part in the proceedings before this Court are agreed that a decision by which a court in a Contracting State recognizes and declares enforceable a decision given in another State cannot itself be recognized and declared enforceable pursuant to Title III of the Brussels Convention in another Contracting State.

21. In so far as the original decision constitutes a decision of a court of a Contracting State which falls under the Brussels Convention, that position is clear from the Convention itself.[24] Thus it is possible, for example, for a judgment of a Belgian court ordering the defendant to pay damages for breach of contract to be enforced in France pursuant to Article 31 of the Brussels Convention 'when... the order for its enforcement has been issued there'. The effects of that declaration of enforceability are restricted to the State in whose courts that declaration has been made. Where the judgment is also to be enforced in Spain, it must first be declared enforceable by the Spanish courts.

This is apparent both from the wording of Article 31 ('there') and from the nature of such proceedings. A declaration of enforceability enables the enforcement of a foreign judgment to take place in a given Contracting State. Consequently, it must of necessity be reserved to the organs of the State in which the judgment is to be enforced. According to the second paragraph of Article 34 in conjunction with Article 27(1) of the Brussels Convention, an application for a declaration of enforceability may be refused *inter alia* where recognition of the judgment would be 'contrary to public policy in the State in which recognition is sought'. Of course, that concept does not have exactly the same meaning in each Contracting State. Consequently, in the example given above, the French courts' decision to declare the Belgian judgment enforceable in France cannot in any way bind the Spanish courts. If the judgment is also to be enforced in Spain, the judgment creditor must apply to the competent Spanish court for a declaration of enforceability. That court will then decide independently whether the judgment may be enforced in Spain.

22. The same applies in relation to the recognition and enforcement of judgments of the courts of non-contracting States. A decision by a Contracting State whereby a judgment of a non-contracting State is declared enforceable takes effect only in that Contracting State. Where the judgment of the non-contracting State is also to be enforced in another Contracting State, the judgment creditor must apply to the courts of that Contracting State for a declaration that the judgment of the non-contracting State is enforceable in that Contracting State. Both cases concern proceedings governed solely by the law of the Contracting State in question, including any conventions existing between that Contracting State and the non-contracting State. On the other hand, Title III of the Brussels Convention does not apply to those proceedings. This means, in

24 — See, for example, P. Schlosser, *Doppelexequatur zu Schiedssprüchen und ausländischen Gerichtsentscheidungen?*, IPRax 1985, pp. 141, 143; J. Kropholler, *Europäisches Zivilprozeßrecht*, 3rd edition, Heidelberg 1991, Art. 25, paragraph 16.

particular, that the decision of Contracting State A by which the judgment of the non-contracting State is declared enforceable in that Contracting State cannot be enforced in Contracting State B pursuant to Article 31 et seq. of the Convention.

To permit such 'double execution' would — as the United Kingdom has rightly pointed out — create the danger that a judgment creditor could circumvent the conditions laid down by a Contracting State for the recognition of judgments of the courts of the non-contracting State in question. If, for example, Contracting State A makes the recognition and enforcement of a judgment of the courts of a non-contracting State conditional on certain criteria, whereas judgments from that non-contracting State are declared enforceable unconditionally in Contracting State B, the judgment creditor could first obtain a declaration of enforceability in Contracting State B and then (pursuant to Article 31 of the Brussels Convention) enforce the judgment without difficulty in Contracting State A by virtue of the decision obtained in Contracting State B. I share the United Kingdom's view that it is not the aim of the Brussels Convention to enable judgment creditors to engage in such 'forum shopping'. [25]

Support for the view that a decision given in a Contracting State by which a judgment given in another State is declared enforceable cannot itself be declared enforceable in another Contracting State is also to be found in the virtually unanimous opinions of legal writers. [26]

23. In my view, this view also applies where the judgment of the non-contracting State is not declared enforceable as such in the Contracting State but is made the basis of civil proceedings. [27] The decision regarding such an *actio judicati* is also apt to facilitate the enforcement of the judgment of the non-contracting State in the Contracting State in question. If it were permissible for such a decision to be declared enforceable in another Contracting State on the basis of the provisions of Title III of the Brussels Convention, this would not only provide the judgment creditor with the opportunities,

25 — This view is endorsed in *Compétence judiciaire et effets des jugements dans le marché commun* by G. Droz, Paris 1972, p. 270 et seq. (paragraph 437).

26 — G. Droz, loc. cit. (footnote 25 above), p. 270 (paragraph 437); see also, by the same author, *Pratique de la Convention de Bruxelles du 27 Septembre 1968*, Paris 1973, p. 62 (paragraph 138); R. Geimer, *Anerkennung gerichtlicher Entscheidungen nach dem EWG-Übereinkommen vom 27.9.1968*, RIW 1976, pp. 139, 145; by the same author, *Das Anerkennungsverfahren gemaß Art. 26 Abs. 2 des EWG-Ubereinkommens vom 27. September 1968*, JZ 1977, pp. 145, 148; by the same author, *Internationales Zivilprozeßrecht*, Cologne 1987, p. 472 (paragraph 2310); R. Geimer and R. Schutze, *Internationale Urteilsanerkennung*, Vol. I, 1st half volume, Munich 1983, p. 985; D. Martiny in: *Handbuch des internationalen Zivilverfahrensrechts*, Volume III/2, Tübingen 1984, p. 38 (paragraph 64); P. Gothot and D. Holleaux, *La Convention de Bruxelles du 27 Septembre 1968*, Paris 1985, p. 134 et seq. (paragraph 238); S. O'Malley and A. Layton, *European Civil Practice*, London 1989, p. 678 (paragraph 25.33); J. Kropholler, loc. cit. (footnote 24 above), p. 259 (paragraph 19); H. Schack, *Internationales Zivilverfahrensrecht*, Munich 1991, p. 339 (paragraph 936); P. Gottwald in: *Munchener Kommentar zur Zivilprozeßordnung*, Volume 3, Munich 1992, Art. 25, paragraph 10. For another view, see R. Schutze, *Die Doppelexequierung ausländischer Zivilurteile*, ZZP 77 (1964), p. 287 et seq.; by the same author, RIW 1984, p. 734 et seq.; for a doubting view, see F. Juenger, *La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale* in: *Revue critique de droit international privé* 1983, pp. 37, 48.

27 — For confirmation of this, see P. Gothot and D. Holleaux, loc. cit. (footnote 26 above), p. 135 (paragraph 239); J. Kropholler, loc. cit. (footnote 24 above), p. 259 (paragraph 16); H. Schack, loc. cit. (footnote 26 above), p. 340 (paragraph 936). For a different view, see S. O'Malley and A. Layton, loc. cit. (footnote 26 above), p. 680 (paragraph 25.36). A conciliatory view is expressed by G. Droz, loc. cit. (footnote 25 above), p. 271 (paragraph 437), footnote 1 (who submits that a decision regarding an *actio judicati* may only be enforced in another Contracting State if it has been given in compliance with the jurisdictional provisions of the Brussels Convention).

described above, of circumventing the rules applying to recognition but would also — as will be shown hereafter — throw into disarray the jurisdictional system laid down in the Convention. [28]

situation arising where a Contracting State refuses to recognize a decision of another Contracting State on account of its irreconcilability with a decision given in a dispute between the same parties in the State in which recognition is sought.

Scope of the Brussels Convention

24. The defendants essentially put forward two arguments in support of their view that the provisions of the Brussels Convention apply to 'proceedings, or issues arising in proceedings, in Contracting States concerning the recognition and enforcement of the judgments in civil and commercial matters of non-contracting States'. They maintain, first, that this is apparent from the wording of Article 1 of the Convention. In their view, Article 16(5) also shows that proceedings concerning the enforcement of judgments fall within the scope of the Brussels Convention. Second, they submit that the principles and objectives of the Convention necessitate such an interpretation: the Convention is intended to facilitate the recognition and enforcement of decisions of the courts of Contracting States in civil and commercial matters and to strengthen the legal protection of persons established in the Community; in addition, it is intended to contribute to the proper administration of justice in the Community by preventing parallel proceedings before the courts of different Contracting States and precluding, in so far as possible and from the outset, the possibility of a

The defendants draw attention in this connection to the adverse consequences which would, in their view, arise if the provisions of the Brussels Convention were not to apply. In their defence in both the English and the Italian enforcement proceedings, they raised the objection that the plaintiff obtained the St Vincent judgment by fraud. If the Brussels Convention, and in particular the provisions of Section 8 of Title II on *lis pendens* and related actions, were inapplicable, the defendants would be faced with having to prove in both sets of enforcement proceedings that their arguments represented the true facts. If the plaintiff were to apply for a declaration as to the enforceability of its judgment in yet another Contracting State, the defendants would have to prove yet again, in the enforcement proceedings before the courts of that State, that the plaintiff had obtained the St Vincent judgment by fraud. Thus the same question would have to be resolved by several different courts. The defendants would consequently incur considerable additional costs in the litigation.

28 — See paragraphs 34 et seq. and 44 below.

The wording of Article 1

25. The first sentence of the first paragraph of Article 1 of the Brussels Convention provides that the Convention 'shall apply in civil and commercial matters whatever the nature of the court or tribunal'. Article 1 goes on to list various areas of law which do not fall within the scope of the Convention; these are of no relevance to the present case.

26. The defendants point out that the scope of the Brussels Convention was intended to be as wide as possible. The Jenard Report states in that connection:

'... the solution adopted implies that all litigation and all judgments relating to contractual and non-contractual obligations which do not involve the status or legal capacity of natural persons, wills or succession, rights in property arising out of a matrimonial relationship, bankruptcy or social security must fall within the scope of the Convention, and that in this respect the Convention should be interpreted as widely as possible.' [29]

27. The wording of the provision under consideration here and the statement quoted in the immediately preceding paragraph suggest that the proceedings in civil and commercial matters referred to therein must concern claims in civil or commercial law (for example a claim for repayment of a loan), but not proceedings for the recognition and enforcement of judgments. [30] It is true, however, that the wording of Article 1 does indeed admit of the interpretation advanced by the defendants. In that regard, it should be noted in particular that Article 1 forms Title I of the Brussels Convention, which defines its scope. Since Title III of the Convention governs the recognition and enforcement of judgments, the view might be taken that analogous proceedings fall within the scope of the Convention. [31]

The scheme and objectives of the Convention

28. In my view, however, it is apparent from the schematic context and objectives of the Brussels Convention that it is not applicable to proceedings of the kind with which we are here concerned. In that connection, I propose initially to deal below only with proceedings for the recognition and enforcement of judgments of non-contracting States. [32]

29 — Report by Mr P. Jenard on the Brussels Convention, OJ 1979 C 59, p. 1, at p. 10. This view is confirmed by the Report of Professor P. Schlosser on the Convention on the Accession of Denmark, Ireland and the United Kingdom, OJ 1979 C 59, p. 71, at p. 82 (paragraph 23).

30 — See the supporting view expressed by D. Martiny, loc. cit. (footnote 26 above). That author accepts — but without stating any detailed reasons — that decisions given in a Contracting State whereby a decision of a non-contracting State is recognized or declared enforceable do not constitute decisions in 'civil or commercial matters'.

31 — See in this connection the judgment of the Bundesgerichtshof of 4 June 1992 (NJW 1992, 3096). In that judgment, the highest German civil court states that proceedings for a declaration that a foreign judgment is enforceable constitute an 'ordinary civil action' on the basis of Paragraph 722 of the German Code of Civil Procedure, that is to say, normal civil proceedings (loc. cit., p. 3097).

32 — As to the issues which may arise in such proceedings, see paragraph 47 et seq., below.

29. I am of the view that the question how a judgment of a court of a non-contracting State can be declared enforceable and enforced in the Community is not dealt with, and should not be dealt with, by the Brussels Convention.

30. It should be pointed out, first of all, that according to Article 25 of the Convention, 'judgment' means, for the purposes of the Convention, any judgment given by a '*court or tribunal of a Contracting State*'. As regards the relationship between such judgments and the judgments of non-contracting States, Article 27(5) contains an important indication. According to that provision, a judgment of a Contracting State may not be recognized in another Contracting State

'if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the State addressed.'

That provision shows, first, that the Convention itself is based on the assumption that there are cases in which recognition of a judgment given on the basis of the Convention may be refused in another Contracting State on the ground that it is irreconcilable with a judgment given in a non-contracting State. Second, the reference in that provision to the conditions necessary for its recognition *in the State addressed* shows that the question of the recognition of judgments given in non-contracting States is intended to be reserved to the respective laws of the Contracting States. The Brussels Convention merely governs the consequences arising from the existence of a recognized or recognizable judgment of a non-contracting State and a judgment of a Contracting State which is irreconcilable with it — and that conflict is decided in favour of the earlier judgment given in the non-contracting State. [33]

31. The Commission has in addition rightly pointed out that the Brussels Convention does not affect the right of Contracting States to conclude agreements with non-contracting States concerning the recognition and enforcement of judgments. Whether this results from Article 57, [34] to which the Commission refers, or from other provisions and considerations is a question we need not go into here. [35] At all events, it is clear in the final analysis that the recognition and enforcement of judgments of non-contracting States are matters reserved to the respective laws of the Contracting States (including any existing agreements with non-contracting States).

That interpretation also accords with the Convention's objective of simplifying the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, as laid down in Article 220 of the EEC Treaty (which is the legal basis for the Brussels Convention) and in the preamble to the Convention. As I have already stated, decisions whereby a judgment is recognized and declared enforceable in one Contracting State may not be declared enforceable in another Contracting State.

33 — See also in this regard G. Droz, loc. cit. (footnote 26 above), p. 334.

34 — Article 57 provides that the Brussels Convention is not to affect any recognition and enforcement conventions in relation to particular matters.

35 — Given that Article 57 of the Convention refers to 'particular matters', it is possible that that provision does not cover bilateral treaties of a general nature concluded between States. However, the previous version of Article 58 shows that the Brussels Convention (apart from the exception described in Article 58) does not affect such treaties either.

Consequently, the application of the Convention to such proceedings would be of no relevance in that regard to the achievement of the aforesaid objective.

32. On the other hand, the reference by the Commission to the Court's judgment in the *Hagen* case seems to me to be less significant in the present context. In that judgment, the Court stated *inter alia*:

'It should be stressed that the object of the Convention is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters *in intra-Community relations* (...).' [36]

The Commission appears to be seeking to infer from that statement and from the wording of Article 220 of the EEC Treaty that the Convention is not applicable to proceedings having a connection with non-contracting States. I have reservations about subscribing to that view. However, it does not appear necessary to me to go further into that question here. First, it can hardly be denied that there exists in the present case the intra-Community link which is necessary according to the view mentioned, since the recognition and enforcement of the St Vincent judgment is a matter with which the courts of two Contracting States are concerned. Second, the Court will probably have an opportunity of considering this question in the '*Harrods*' case now pending before it. [37]

33. Furthermore, attention should be drawn to the connection between Title II ('Jurisdiction') and Title III ('Recognition and Enforcement') of the Brussels Convention. The simplified procedure laid down by the Convention for the enforcement of the judgments of one Contracting State in another Contracting State is 'the counterpart of Title II'. [38] The establishment of rules concerning jurisdiction and of the procedural provisions consequent thereon (particularly Articles 21 to 23) serves to facilitate the recognition and enforcement of the decisions given in the respective proceedings. As I have already stated, however, a decision given in a Contracting State whereby a judgment of a non-contracting State is declared enforceable takes effect only in the territory of that Contracting State. Such an enforcement decision cannot itself be declared enforceable in another Contracting State. [39] Consequently, no *irreconcilability* can ever arise between such decisions given in more than one Contracting State. If the judgment given in the non-contracting State is declared enforceable in Contracting State A but enforcement is refused in Contracting State B, the result is merely that the judgment creditor can enforce in Contracting State A but not in Contracting State B.

However, irreconcilability could of course arise between judgments given in different Contracting States with regard to the relationship between such an enforcement decision and a decision given on the basis of the Convention (in the Italian civil proceedings, for example) (see paragraph 60 below).

36 — Judgment in Case C-365/88 *Hagen* [1990] ECR I-1845, paragraph 17 (emphasis added).

37 — Case C-314/92 *Ladenimor v Intercomfinanz*. These proceedings also arise from a reference by the House of Lords for a preliminary ruling.

38 — Jenard Report, cited above (footnote 29), p. 61. See also in this connection my Opinion in Case 220/84 *AS-Autoteile Service v Malhé* [1985] ECR 2268, p. 2270.

39 — See paragraph 20 et seq., above.

34. Above all, however, it appears to me significant that Title II of the Convention makes no reference to jurisdiction in proceedings of the type with which we are here concerned. If the Brussels Convention were applicable to proceedings for the recognition and enforcement of judgments given in non-contracting States, it would also, in accordance with its inherent logic, have laid down rules specifying which courts should have jurisdiction to decide such proceedings.

35. However, no such jurisdictional provisions exist. Article 2 of the Convention provides that persons domiciled in the territory of a Contracting State are in principle to be sued in the courts of that State. Clearly, that jurisdictional rule is not framed to cover proceedings for the recognition and enforcement of judgments given in non-contracting States. The adoption of a contrary view would mean that such a judgment could in principle be enforced *only* in the State in which the debtor is domiciled. However, not even the defendants are in any doubt that a judgment creditor is entitled to choose the State in which he wishes to enforce the judgment obtained by him, provided of course that the State in question recognizes that judgment. The United Kingdom rightly points out in that regard that there may certainly be cases in which a judgment is enforced in more than one State. [40]

36. The only other jurisdictional provision of the Convention which could be taken into consideration here is Article 16(5). [41] According to that provision, exclusive jurisdiction, regardless of domicile, is granted,

'in proceedings concerned with the enforcement of judgments, [to] the courts of the Contracting State in which the judgment has been or is to be enforced.'

37. In the case of *AS-Autoteile Service* v *Malhé* [42] the Court had an opportunity for the first time to state its view on the interpretation of that provision. The question at issue in that case was whether actions to oppose enforcement pursuant to Paragraph 767 of the German Code of Civil Procedure fall within Article 16(5). The Court answered that question in principle in the affirmative.

38. The decision in the case of *Reichert and Kockler*, [43] concerning the French law concept of an *actio pauliana*, is much more illuminating. In its judgment the Court stated:

'In that regard, it is necessary to take into account the fact that the main reason for giving exclusive jurisdiction to the courts of the

40 — Where, for example, enforcement in State A does not result in full satisfaction of the judgment creditor's claim, because the debtor does not possess sufficient assets in that State, the judgment creditor is of course quite at liberty, as regards the balance, to apply for enforcement in another State (in which the debtor possesses other assets). As to Article 4, see paragraph 41 and footnote 55, below.

41 — It goes without saying that Article 18 of the Convention does not constitute a viable jurisdictional rule in cases such as this. According to that provision, a court of a Contracting State may in certain cases have jurisdiction if the defendant enters an appearance before that court. However, a judgment debtor finding himself in a position similar to that of the defendants in the present case will almost invariably contest an application for a declaration of enforceability, since he would otherwise have to reckon with the application being granted and the judgment being enforced.

42 — Case 220/84 [1985] ECR 2267.

43 — Case C-261/90 [1992] ECR I-2149.

place of enforcement is that only the courts of the Member State in whose territory the enforcement is required may apply the rules *concerning the action to be taken within that territory by the authorities responsible for carrying out such enforcement.'* [44]

The Court went on to quote the Jenard Report, which states that the expression 'proceedings concerned with the enforcement of judgments' means those proceedings which can arise from 'recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments'. [45]

As Mr Advocate General Gulmann stated in his Opinion, proceedings to which Article 16(5) of the Convention apply are thus proceedings relating directly to enforcement. [46]

39. However, as the defendants' representative again emphasized in the oral procedure before the Court, proceedings for a declaration as to the enforceability of judgments concern not the enforcement itself but the stage in the proceedings which precedes such enforcement. Consequently, such proceedings do not fall within the ambit of Article 16(5). [47] This also accords with the principle that, where any doubt exists, provisions such as Article 16(5) are — as an exception to the general rule laid down in Article 2 — to be narrowly interpreted. [48]

40. Even if the foregoing is not accepted and it is sought instead to place a wide interpretation on the expression 'proceedings concerned with the enforcement of judgments', Article 16(5) could not be applied here. According to the definition contained in Article 25, the term 'judgment' means, for the purposes of the Convention, only a judgment given by a court or tribunal of a *Contracting State*, [49] whereas the present case concerns the enforcement of a judgment of a *non-contracting State.* [50]

41. The defendants are wholly conscious of the fact that the jurisdictional system laid down in Title II of the Convention is not appropriate to cases of the type with which we are here concerned. In order nevertheless to achieve the desired result, and in particular to establish the applicability of Articles 21 to 23 of the Convention, they suggest that the jurisdiction of the courts of the Con-

44 — Ibid. (footnote 43 above), paragraph 26. The official English translation is not yet available.

45 — Ibid. (footnote 43 above), paragraph 27. See the Jenard Report, cited above (footnote 29), p. 36). The Jenard Report for its part relies at this point on A. Braas, *Précis de procédure civile*, Volume I, 3rd edition, Brussels/Liège 1944, p. 422 (paragraph 808).

46 — [1992] ECR I-2160, p. 2164.

47 — See also A. Braas, loc. cit. (footnote 45 above), in which the author differentiates between execution ('exécution') and a declaration of enforceability ('exequatur'). A more cautious view is expressed by P. Kaye in *Civil jurisdiction and enforcement of foreign judgments*, Abingdon 1987, p. 956 et seq.

48 — See J. Kropholler, loc. cit. (ffotnote 24 above), p. 156 (paragraph 3), and also the judgment of the Court referred to in paragraph 42 below.

49 — See paragraph 30 above.

50 — I acknowledge that a different view is taken by D. Lasok and P. Stone in *Conflict of laws in the European Community*, Abingdon 1987, p. 252: according to them, Article 16(5) is also applicable where the judgment to be enforced has been given in a non-contracting State.

tracting States in such cases is to be determined by analogy with Articles 57 and 4 of the Convention. [51]

42. That construction cannot be accepted. In cases in which the Brussels Convention is applicable, the Convention itself lays down which court has jurisdiction. The Jenard Report states in this regard:

'Moreover, the purpose of the Convention is also, by establishing common rules of jurisdiction, to achieve, (...) in the field which it was required to cover, a genuine legal systematization which will ensure the greatest possible degree of legal certainty. To this end, the rules of jurisdiction codified in Title II determine which State's courts are most appropriate to assume jurisdiction, taking into account all relevant matters.' [52]

As the Court has ruled, the Convention contains a number of jurisdictional rules aimed at achieving that objective, which list *exhaustively* those cases in which a person may be sued outside the State in which he is domiciled. [53] According to those rules, the general principle is that a person is to be sued in the courts of the State in which he is domiciled (Article 2 of the Convention); derogation from that principle is permissible only in the cases expressly referred to in the Convention:

'Consequently, the jurisdictional rules derogating from that general principle may not give rise to an interpretation going beyond the hypotheses envisaged by the Convention.' [54]

43. The solution suggested by the defendants is therefore irreconcilable with the objectives which the Brussels Convention aims to achieve, in particular the objective of legal certainty. Consequently, it must follow that the Convention does not contain any appropriate jurisdictional provisions in respect of proceedings for the recognition and enforcement of the judgments of non-contracting States. [55] This confirms that the Convention is not applicable to such proceedings.

44. The same applies in my view to cases in which the law of a Contracting State provides that a judgment of a non-contracting State can be enforced by means of an *actio judicati*. In respect of those cases also, the Convention manifestly does not contain any appropriate jurisdictional rules.

45. The question whether at least Articles 21, 22 or 23 of the Convention may nevertheless be applied to proceedings of this kind, and the arguments submitted in that regard, will be considered later. [56]

51 — Article 4 provides that if the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State is in principle to be determined by the law of that State.

52 — Loc. cit. (footnote 29 above), p. 15.

53 — See the judgment in Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 13.

54 — Ibid. (footnote 53 above), paragraph 14 (the official English translation is not yet available).

55 — Such a jurisdictional rule would have to apply generally to cases concerning declarations as to the enforceability of judgments given in non-contracting States. Consequently, it goes without saying that Article 4 of the Convention — which applies only to defendants who are not domiciled in a Contracting State — cannot fulfil that role.

56 — See paragraph 54 et seq. below.

46. The above considerations confirm my view that the jurisdictional rules contained in the Convention, and its Title II as a whole, are framed so as to cover only the 'original' proceedings in which no decision has yet been given, and not to proceedings for the enforcement of decisions which have already been given. [57]

The only provision which could stand in the way of such an interpretation is Article 16(5), the contents of which are discussed above. As the United Kingdom has pointed out, that provision represents an extraneous element, which does not seem to fit in properly with the other provisions of Title II. [58] Apart from the fact that that provision constitutes a basically self-evident rule, [59] its subject-matter is such that its proper place is in Title III of the Convention. It only becomes applicable where a judgment which has already been given is to be enforced or has already been enforced. The only reason for the incorporation of that provision in Title II appears to have been a wish to itemize exhaustively in that Title *all* matters of jurisdiction. [60] In my view, therefore, its existence does not alter the fact that, with the exception of Article 16(5), the matters of jurisdiction forming the substance of Title II of the Convention concern jurisdiction in the institution of original actions.

47. I now turn to the question whether the Brussels Convention is applicable to individual issues arising in proceedings for the recognition and enforcement of judgments given in non-contracting States. As mentioned above, in the proceedings in which the reference for a preliminary ruling was made the High Court ordered that two aspects of the enforcement proceedings should be tried, namely the question whether the plaintiff obtained the St Vincent judgment by fraud and the question whether it would be contrary to public policy to recognize that judgment in England.

48. On a purely formal view, it is indeed possible to conclude that those interlocutory proceedings concern proceedings in civil and commercial matters within the meaning of Article 1 of the Brussels Convention, and that the rules laid down in the Convention, including Articles 21 to 23, may be applicable to those proceedings.

That view was argued very eloquently by the defendants' representative in the oral procedure before the Court. However, it should not in my view be followed.

49. It should be borne in mind, first, that the application of the jurisdictional provisions of the Brussels Convention to individual issues

57 — See the supporting view expressed by R. Geimer in *EuGVÜ und Aufrechnung: Keine Erweiterung der internationalen Entscheidungszustandigkeit — Aufrechnungsverbot bei Abweisung der Klage wegen internationaler Unzuständigkeit*, IPRax 1986, pp. 208, 209; D. Lasok and P. Stone, loc. cit. (footnote 50 above), p. 197.

58 — See paragraph 9 of the observations of the United Kingdom ('a somewhat anomalous provision') and A. Struycken, *The rules of jurisdiction in the EEC Convention on jurisdiction and enforcement of judgments in civil and commercial matters*, in: Netherlands International Law Review 1978, pp. 354, 360 ('Its proper place in the Convention is rather, as an Article 25A, at the beginning of Title III').

59 — See the supporting view expressed by I. Schwander in *Die Gerichtszustandigkeiten im Lugano-Übereinkommen*, in: I. Schwander (editor), *Das Lugano-Ubereinkommen*, pp. 61, 92 (on Article 16(5) of the Lugano Convention, the contents of which are the same).

60 — See G. Droz, loc. cit. (footnote 25 above), p. 107 (paragraph 162).

or, more precisely, to proceedings concerning individual issues would have inappropriate results.

50. Were those proceedings to constitute proceedings in civil and commercial matters within the meaning of Article 1, the rules on jurisdiction contained in the Convention would also be applicable to those proceedings. As the defendants have quite rightly pointed out in their written observations, consideration would only have to be given to the jurisdiction, laid down in Article 2, of the courts of the State in which the defendant is domiciled. In the present case, this would mean that the Italian courts would have jurisdiction to decide the question whether the plaintiff obtained the St Vincent judgment by fraud. The English courts would then be entitled to decide that question only if they were competent to do so pursuant to a jurisdiction agreement. [61] In normal circumstances, the result of this would be that in the event of the judgment debtor being a person domiciled in a Contracting State, the courts of a Contracting State in which it was sought to enforce a judgment of a non-contracting State would no longer be in a position to decide the question of enforceability on their own.

This cannot, however, be right. The facts of the original case need be altered only slightly for the absurdity of this solution to become apparent: were the defendants domiciled not in Italy but in France, for example, the French courts would have to decide the issue in question, although enforcement of the judgment of the non-contracting State is to take place in Italy and in England.

51. Above all, however, it should be noted that the defendants are rather arbitrarily breaking down the proceedings brought by the plaintiff for a declaration of enforceability into two or even more parts, and are suggesting that the trial ordered by the High Court constitutes completely separate proceedings. I am doubtful that such an approach is appropriate. The proceedings ordered by the High Court are intended to settle points of doubt which have arisen *in the course* of the proceedings for a declaration of enforceability and fit *into the context* of those proceedings. In my view, therefore, it is much more natural to speak in that regard of *interlocutory proceedings*, as I have hitherto done. Consequently, the present case may be said to involve a single set of proceedings which admittedly comprises several stages but which can hardly be divided up into several separate sets of proceedings. At all events, I agree with the view, so expressively put by Sir Peter Pain, that the Convention is not applicable to such proceedings. [62]

52. The question whether these proceedings constitute under English law an integral part of the enforcement proceedings, or whether they amount instead to separate proceedings, is of course a matter to be decided by the English courts alone. However, the question whether they constitute proceedings *within*

61 — As to Article 18, see footnote 41 above.

62 — 'The answer to this, in my view, is that no provision is made as to such a hybrid creature in the convention' (unpublished transcript of the judgment of 19 July 1990, p. 10).

the meaning of the Convention falls in my view to be decided solely on the basis of the Convention itself. It should be particularly borne in mind in that connection that otherwise the question whether the Convention is applicable would depend to a large extent on national law. Is the Convention applicable where, as in English law, a separate trial is held to decide an issue, but inapplicable where under the law of a Contracting State all questions arising have to be settled in one and the same set of proceedings? Were it accepted that even in the latter cases the Convention can be applied to individual issues, difficult problems of demarcation would result. The Commission and the United Kingdom have rightly pointed out the threat to legal certainty which those problems would present.

53. In my view, therefore, issues arising in proceedings for the recognition and enforcement of the judgments of non-contracting States are to be treated no differently from those proceedings themselves: the Brussels Convention is applicable in neither case. This is also the view of the United Kingdom and of the Commission.

The second question

54. In asking its second question, the House of Lords seeks to know whether Articles 21, 22 or 23 are applicable to proceedings of the kind with which we are here concerned. That question needs to be considered in the light of the decisions given in these proceedings in the courts below. Both the High Court and the Court of Appeal were of the view that Articles 21 to 23 of the Convention were inapplicable, even if the Convention itself were to apply.

The answer to the second question in itself results, therefore, from the arguments relating to the first question. If the Convention itself is inapplicable, then the same should also apply to the provisions relating to *lis pendens* and related actions which fall to be considered here.

55. The defendants assert, however, that the Convention should be applicable even where its rules as to jurisdiction do not apply. In so saying, the defendants appear to be arguing that *Articles 21 to 23* of the Convention can be applied even where the jurisdiction of the courts seised derives not from the provisions of the Convention but from the national law of the State in question. They place particular reliance in that regard on the judgment of the Court in the case of *Overseas Union Insurance.* [63]

56. That case concerned a dispute between a number of reinsurance undertakings domiciled in the Community and an insurance undertaking domiciled in the United States. The American undertaking brought an action against the reinsurers before the Paris

63 — Case C-351/89 [1991] ECR I-3317.

Tribunal de Commerce for payment pursuant to the reinsurance contracts. The reinsurers asserted that the French court did not have jurisdiction. They also applied to the High Court in London for a declaration that they were not liable to perform any of the obligations contained in the reinsurance contracts. The High Court stayed the proceedings pending before it pursuant to the second paragraph of Article 21 of the Convention until such time as the French court had decided whether it had jurisdiction.

The reinsurers appealed against that decision. The Court of Appeal thereupon sought from the Court a preliminary ruling *inter alia* on the question whether Article 21 applied irrespective of the domicile of the parties. The background to that question was the fact that the American undertaking was domiciled outside the Community and that the jurisdiction of the English courts therefore fell to be determined by English law in accordance with Article 4 of the Convention.

57. The Court pointed out that Article 21 contains no reference to the domicile of the parties to a dispute and concluded:

'Consequently, it appears from the wording of Article 21 that it must be applied both where the jurisdiction of the court is determined by the Convention itself and where it is derived from the legislation of a Contracting State in accordance with Article 4 of the Convention.' [64]

58. In my view, however, that statement has no bearing on the present case. Contrary to the view advanced by the defendants, the decision in the *Overseas Union Insurance* case concerned a situation which is not comparable to that in this case. The Court was expressly concerned with proceedings in relation to which the jurisdiction of the courts in question derives — by virtue of Article 4 — *from the Convention itself*. That is not the position in the present case.

59. It is however true that the Court made a very general reference in that judgment to those provisions, and particularly Article 21, on which the defendants rely:

'(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 possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought. It follows that, in order to achieve

64 — Ibid. (footnote 63 above), paragraph 14.

those aims, Article 21 must be interpreted broadly so as to cover, in principle, all situations of *lis pendens* before courts in Contracting States, irrespective of the parties' domicile.' [65]

60. It therefore comes as no surprise to learn of the view expressed by legal writers that Article 21 of the Convention is generally applicable where the same dispute is pending before the courts of different Contracting States, irrespective of whether the courts seised derive their jurisdiction from the provisions of the Convention or from any other provisions. [66] Articles 21 to 23 of the Brussels Convention could therefore be thought to apply to cases of the kind with which we are here concerned, either directly or analogously. [67] Let us suppose that one of the Italian courts (either the court required to decide on the declaration of enforceability in Italy or the court before which the Italian civil proceedings are pending) comes to the conclusion that the plaintiff committed a fraud, and let us further assume that that decision can in principle be recognized in England. [68] If the English courts have decided in the meantime that the St Vincent judgment can be enforced in England, one might expect that the Italian decision just referred to could no longer be recognized, since it would be irreconcilable with the English enforcement decision. A situation would then arise such as the Brussels Convention seeks to prevent. In order to avoid this risk, the (direct or analogous) application of Articles 21 to 23 is indeed conceivable.

61. There appears to me to be no doubt that Articles 21 to 23 constitute general rules which *may* in principle be applied even in cases where their application is not expressly laid down by the Convention. As evidence of this, it is necessary only to refer to the genesis of Article 25(2) of the 1978 Accession Convention. [69] The aim of that provision was to ensure the uniform interpretation of Article 57. [70] To that end, Article 25(2)(a) of the Accession Convention provides that a court which founds its jurisdiction on a special convention pursuant to Article 57 must in any event apply Article 20 of the Brussels Convention. [71] It is to be inferred from the Schlosser Report that the question of the applicability of Article 21 was deliberately left open, in order to leave the solution 'to legal literature and case law'. [72]

62. In my view, however, it is not necessary in the present case to consider further the

65 — Ibid. (footnote 63 above), paragraph 16. A similar statement is to be found in the judgment in Case 144/86 *Gubisch Maschinenfabrik v Palumbo* [1987] ECR 4861 (paragraph 8). See also the judgment in Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraph 18.

66 — See P. Gothot and D. Holleaux, loc. cit. (footnote 26 above), p. 123 (paragraph 217); G. Muller in *Der internationale Rechtsverkehr in Zivil- und Handelssachen* by A. Bulow, K.-H. Bockstiegel, R. Geimer and R. Schutze, Munich (as at 1991), p. 606/169; H. Gaudemet-Tallon, *Revue critique de droit international privé* 1991, pp. 769, 774.

67 — This also appears to be the view expressed by A. Briggs in *The Law Quarterly Review* 1991, pp. 531, 534; he calls for a 'purposive construction' of the Convention.

68 — Since the Italian enforcement decision cannot itself be recognized and enforced in other Contracting States, the decision in question could — according to the view advanced here — only be that of the court seised of the Italian civil proceedings.

69 — That provision was added to Article 57 of the Convention, becoming paragraph 2 thereof, pursuant to the Accession Convention of 26 May 1989.

70 — As to Article 57, see footnote 34 above.

71 — Article 20 provides that where a defendant domiciled in a Contracting State does not enter an appearance to the proceedings and the court's jurisdiction is not derived from any other provision of the Convention, the court must declare of its own motion that it has no jurisdiction.

72 — Loc. cit. (footnote 29 above), p. 140 (paragraph 240).

construction advanced by the defendants. In order for Articles 21 to 23 to be applicable at all, it is in my view necessary for the proceedings in question to be covered by the Convention, at least as regards their subject-matter. As I have already stated, this is not the case where *enforcement proceedings* are concerned. The Convention is framed to cover ordinary 'original' actions. It does not cover proceedings for the recognition and enforcement of judgments given in non-contracting States. As regards individual *issues* requiring to be settled in such proceedings, these may be regarded as proceedings for the purposes of the Convention only where they are severed from their connection with the enforcement proceedings. For the reasons stated above, this does not appear to me to be appropriate.

63. Consequently, it is only *in the alternative* that I propose to consider below which of the provisions of Articles 21 to 23 might be relevant if it were assumed, contrary to the view put forward here, that those provisions were applicable to cases of this kind. It will also be shown in that connection that the argument advanced by the defendants in the oral procedure, to the effect that a refusal to apply those provisions would result in a 'gaping hole' in the legal protection enjoyed by them, is not persuasive. Admittedly, the defendants are correct in saying that it would be inconvenient for them to have to prove in each Contracting State in which the plaintiff sought to enforce the St Vincent judgment that the plaintiff obtained that judgment by fraud. However, the United Kingdom has rightly pointed out that the resulting disadvantages can in many cases be offset by the application of national rules of procedure, without there being any need to apply the provisions of the Convention in respect of *lis pendens* and related actions. In my view, the present case illustrates this.

64. As regards the *enforcement proceedings* themselves, only Article 22 might then be relevant. The English enforcement proceedings are concerned solely with the question whether the St Vincent judgment can be enforced in *England*. Similarly, the Italian enforcement proceedings concern the question whether the judgment can be enforced in *Italy*. Consequently, even on a wide interpretation of Article 21, as endorsed by the Court, [73] the subject-matter of the dispute is not the same, as it is required to be by that article. The same is true of the relationship between the English enforcement proceedings and the Italian civil proceedings. Here too, the subject-matter of the dispute might not be the same, within the meaning of Article 21.

65. Article 23 is inapplicable for the same reason. Admittedly, it is in the nature of things for the English courts to have exclusive jurisdiction to decide whether to allow enforcement to take place in England just as the Italian courts should have exclusive jurisdiction with regard to the question whether the judgment may be declared enforceable in Italy. To that extent it is understandable, given the circumstances, that the Commission should rely in its alternative submis-

73 — See the judgment in *Gubisch*, cited above (footnote 65).

sions on Article 16(5). [74] However, Article 23 appears to concern those cases (surely not very numerous) where the courts of different Contracting States have exclusive jurisdiction to decide *the same* dispute. Because the effects of an enforcement decision are restricted to the individual Contracting State, that is not the case here. It would clearly be inappropriate to apply Article 23: if the English courts subsequently seised in this case had to decline jurisdiction in favour of the Italian courts, the plaintiff would be unable, temporarily at any rate, to obtain a declaration in England that the judgment given in its favour was enforceable.

66. According to the first paragraph of Article 22, where related actions are brought before the courts of different Contracting States, any court other than the court first seised 'may, while the actions are pending at first instance, stay its proceedings'. [75] For the purposes of that provision, actions are deemed to be related 'where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings' (paragraph 3 of Article 22).

67. Consequently, Article 22 gives the court other than the court first seised the *possibility* of staying its proceedings, but does not oblige it to stay them. [76] The result would be the same if the national rules of procedure were applied instead of Article 22 of the Convention.

Parker LJ, who delivered the unanimous judgment of the Court of Appeal in this case, pointed out that under English law a finding by the Italian courts that the plaintiff had committed a fraud could affect the English enforcement proceedings by creating an issue estoppel. [77] It followed, in the Court of Appeal's view, that the English courts were empowered to stay the English proceedings on the question of fraud until that issue had been determined in Italy. [78] Following careful reflection, the High Court had decided not to stay the English enforcement proceedings, since, first, there was in its opinion no certainty that the Italian courts would decide the question of fraud at all, and, second, it took the view that no such decision could be expected in the foreseeable future. Although the Court of Appeal was quite prepared to

74 — However, contrary to the view expressed by the Commission, I remain of the view, in these alternative submissions, that Article 16(5) is not applicable to enforcement proceedings (see paragraph 39 above).

75 — The second paragraph of Article 22 provides that a court other than the court first seised may also, on the application of one of the parties, decline jurisdiction 'if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions'. That provision (which is not wholly easy to comprehend) plays no part in the present proceedings (see the wording of the third preliminary question) and does not therefore need to be discussed further here.

76 — With regard to the points of view to be taken into account here, see the considerations in respect of the third preliminary question.

77 — [1991] 4 All ER 833, p. 853 et seq. An issue estoppel means that a matter of fact or law determined by a foreign court may not be further contested before the English courts. See generally in this regard Dicey and Morris, loc. cit. (footnote 4 above), p. 432 et seq.

78 — 'Accordingly, in our judgment there must be a power in the English court to stay the trial in England of the main issue whether the St Vincent judgment was obtained by fraud pending the trial of the same issue in Italy. It could be productive of great injustice to allow the issue to go ahead in England when the same issue could be better tried in Italy and the Italian decision could be determinative of the issue for the purposes of the English proceedings' (loc. cit. - footnote 77 above - p. 855, at e and f).

acknowledge the arguments in favour of having that issue decided by the Italian courts, and attached considerable weight to them, [79] it upheld that decision.

The application of Article 22 of the Brussels Convention could very well have led to precisely the same result. [80]

68. Within the context of these alternative observations, let us now turn to the question of which provisions could be applied to individual *issues* arising in proceedings for the recognition and enforcement of the judgments of non-contracting States. In principle, both Article 21 and Article 22 would fall to be considered here. [81] I will be brief in this regard, since otherwise I would have to enter the realm of speculation. It is true that the defendants have repeatedly asserted that the question whether the plaintiff obtained the St Vincent judgment by fraud has arisen both in the Italian enforcement proceedings and in the Italian civil proceedings. However, as the High Court and the Court of Appeal have already stated, there is not even any certainty that the Italian courts will decide that question at all. Consequently, it is not possible to determine whether Article 21 or Article 22 might be applicable in the present case. It can only be stated in general terms, therefore, that Article 21 would apply if the proceedings involved 'the same cause of action', whilst Article 22 would be applicable if the proceedings concerned only related actions.

69. If it is assumed that only Article 22 could be at all applicable in the present case (which seems likely to me), the result must be that the court second seised would have to decide in its discretion whether to stay its proceedings. It should be pointed out in that regard that the same result could very well be achieved on the basis of the respective national rules of procedure.

The position would of course be different if Article 21 of the Convention could be applied. It should be noted in that regard that, as is well known, the Court interprets that provision very widely. In particular, the judgment in the *Gubisch* case should be borne in mind here. [82]

In that case the court second seised would have to decline jurisdiction of its own motion in favour of the court first seised.

70. In the present case, that would mean that in this respect — I am referring in this connection only to the issue of fraud — the English courts would have to decline jurisdiction in favour of the Italian courts, since there is no dispute that the latter were seised first. There can hardly be any doubt that this would produce a sensible result. The issue would be decided by the Italian courts, which are probably in the best position to determine it: the native tongue of the most important persons involved is Italian, as is

79 — 'In our judgment the English courts should adopt a communautaire, and not a national and chauvinistic, approach to the determination of this question' (loc. cit. — footnote 76 above — p. 856 et seq.).

80 — See paragraph 76 et seq. below.

81 — Clearly, there does not exist the requisite concurrent *exclusive* jurisdiction to decide such issues which is needed in order for Article 23 to apply.

82 — Loc. cit. (footnote 65 above).

that of most of the witnesses. The domicile or seat of the defendants and of most of the witnesses is in Italy. Almost all of the relevant documents are in Italian. Of those documents, the most important ones are in the custody of the Italian courts and apparently cannot be released until the conclusion of the criminal proceedings. In addition, the experts appointed by the Italian courts and by the parties are Italian and have produced their reports in their native language.

71. It is clear, though, that this result would be due only to the fact that the Italian courts were seised first. However, had the plaintiff applied to have its judgment declared enforceable in England or another Contracting State *before* those questions came before the Italian courts, then under Article 21 those courts would have had jurisdiction, and not the Italian courts, although the latter are much closer to the facts of the case which are to be determined. The application of the Brussels Convention would thus result in the issue in question being indeed decided by the courts of *a single* Contracting State, but they would not be the courts of the Contracting State which, in terms of proximity to the subject-matter, appears almost predestined to deal with the matter.

72. As we have already seen, Title II of the Brussels Convention lays down rules of jurisdiction to determine which courts should most appropriately decide the dispute, taking all relevant matters into account. [83] For that reason, the conflict arising from the fact that pursuant to Title II two competent courts are seised of the same matter can be resolved quite simply by the Convention by conferring jurisdiction under Article 21 on the court first engaged. However, where, as in the present case, the jurisdiction of one (or both) of those courts derives not from the provisions of Articles 2 to 18 of the Convention but directly from *national law*, that relatedness will be lacking. In those circumstances, the application of Article 21 *may* produce appropriate results, but will not necessarily do so.

Here too, therefore, we find confirmation that Articles 21 to 23 — and the Convention as a whole — are based on original jurisdiction and are not suited to proceedings for the recognition and enforcement of judgments given in non-contracting States or to issues arising in such proceedings.

73. Like the Commission, I am not convinced by the defendants' submission, upon which they place particular emphasis, that this could result in high costs for them because of the possible multiplicity of proceedings. The very reason for the fact that there could be many sets of proceedings lies in the fact that a judgment creditor can enforce, or can at least attempt to enforce, his judgment in more than one State.

83 — See paragraph 42 above.

The third question

74. The national court's third question seeks to ascertain the principles of Community law which are applicable where a court other than the court first seised is deciding whether to stay its proceedings. This is therefore a reference to the criteria to be observed in the context of Article 22 of the Convention. In the light of my proposed answer to the first preliminary question, I will deal only in the alternative with the problems addressed here.

75. The decision required in the context of Article 22 of the Convention is a *discretionary decision.* It goes without saying that the circumstances of each individual case are particularly important here. The national courts must bear in mind that the aim of this provision is 'to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might arise therefrom', as the Court stated in its judgment in *Overseas Union Insurance.* [84] It would therefore be appropriate in case of doubt for a national court to decide to stay its proceedings under Article 22. [85]

76. Furthermore, there are three factors which may be relevant to the exercise of the discretion vested in national courts by virtue of Article 22, but this does not mean that other considerations may not also be important:

— the extent of the relatedness and the risk of mutually irreconcilable decisions;

— the stage reached in each set of proceedings; and

— the proximity of the courts to the subject-matter of the case.

77. Clearly, the closer the connection between the proceedings in question, the more necessary it would appear for the court second seised to stay its proceedings. If other factors are of some relevance to the proceedings pending before the court first seised, it may be appropriate for the court second seised not to stay its proceedings. [86] It would also appear sensible, for example, for a court to decline to stay its proceedings on the grounds that only an interim measure can be taken in those proceedings and that there is therefore no risk of irreconcilable decisions. [87] The more the proceedings are related, however, and the greater the risk of the courts arriving at irreconcilable decisions, the more likely it will be that the court second seised should stay its proceedings in accordance with Article 22.

84 — Loc. cit. (footnote 63 above), paragraph 16.

85 — See in this regard the judgment of the High Court (Ognall J) of 31 January 1990 in the case of *Virgin Aviation Services Limited* v *CAD Aviation Services*, [1991] International Litigation Procedure 79, in which the court held that there was a strong presumption in favour of allowing an application for a stay ('...signifies that the strong presumption where an application is made for a stay, lies in favour of the applicant' — loc. cit., p. 88).

86 — See in this regard the judgment of the Oberlandesgericht Karlsruhe of 4 August 1977, RIW 1977, p. 718 et seq. (Digest of case-law relating to the European Communities, D Series, I-5.3 - B 8).

87 — See the judgment of the Hof van Beroep te Antwerpen of 18 October 1979, Belgische Rechtspraak in Handelszaken 1980, pp. 181, 187 (Digest, I-22 - B 2).

78. Contrary to the defendants' view, it is also legitimate for the court second seised to have regard, when reaching its decision regarding a possible stay, to the stage reached in the parallel proceedings. The proceedings before the court first seised should of course have reached a more advanced stage than the proceedings before the court subsequently seised of a related action. Where this is not the case, however, and where there is no prospect of a decision in the first set of proceedings, there is nothing to prevent the court subsequently seised from taking account of this when arriving at its discretionary decision.

79. Finally, it goes without saying that in the exercise of such discretion regard may be had to the question of which court is in the best position to decide a given question. [88]

C — Conclusion

80. I therefore propose that the Court should answer the questions submitted by the House of Lords for a preliminary ruling as follows:

The Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is not applicable to proceedings concerning the recognition and enforcement of judgments in civil and commercial matters given in non-contracting States, nor to issues arising in such proceedings.

88 — See the judgment of the Arrondissementsrechtbank 's-Gravenhage of 1 February 1985, Schip en Schade 1985, pp. 251, 254 (Digest, I-22 B 8) and the judgment of the Danish Sø- og Handelsretten of 5 September 1991, upheld by the judgment of the Højesteret of 19 February 1992 (Ugeskrift for Retsvæsen 1992, p. 403 et seq.).