JUDGMENT OF THE COURT (Fifth Chamber)

8 May 2003 *

In Case C-111/01,

REFERENCE to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Gantner Electronic GmbH

and

Basch Exploitatie Maatschappij BV,

on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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,

* Language of the case: German.

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),

THE COURT (Fifth Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann and S. von Bahr, Judges,

Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Gantner Electronic GmbH, by A. Concin and H. Concin, Rechtsanwälte,

— Basch Exploitatie Maatschappij BV, by T. Frad, Rechtsanwalt,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Italian Government, by U. Leanza, acting as Agent, and O. Fiumara, avvocato dello Stato,

— the United Kingdom Government, by G. Amodeo, acting as Agent, and D. Lloyd Jones QC,

— the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Gantner Electronic GmbH, Basch Exploitatie Maatschappij BV, the United Kingdom Government and the Commission, at the hearing on 10 July 2002,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2002,

gives the following

Judgment

1 By order of 22 February 2001, received at the Court on 12 March 2001, the Oberster Gerichtshof (Austrian Supreme Court) referred for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Protocol'), three questions on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), 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) ('the Convention').

2 Those questions have been raised in proceedings between Gantner Electronic GmbH ('Gantner'), a company incorporated under Austrian law, and Basch Exploitatie Maatschappij BV ('Basch'), a company incorporated under Netherlands law, following the termination of their commercial relations.

Legal framework

The Convention

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

4 The rules on jurisdiction are laid down in Title II of the Convention. Section 8 of Title II entitled '*Lis pendens* — related actions' is intended to prevent conflicting judgments and thus to ensure the proper administration of justice in the Community.

5 Article 21 of the Convention, dealing with *lis pendens*, provides 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.'

6 Article 22 of the Convention, which deals with related actions, provides as follows:

'Where related actions are brought in 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.

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.

For the purposes of this Article, 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.'

National laws

7 Under Netherlands and Austrian law set-off always requires a unilateral declaration by one party to the other. Statutory set-off, characterised by the extinction of mutual claims by operation of law, which is well known in other

European national laws, does not exist in Netherlands and Austrian law. The declaration may be made either extra-judicially or in the course of proceedings. It has retroactive effect: the two claims are considered to be extinguished on the day on which the conditions for set-off are met and not on the day on which set-off is declared, and the court confines itself to making a declaration that set-off has been effected.

The dispute in the main proceedings and the questions referred for preliminary ruling

8 Gantner manufactures and markets carrier pigeon clocks. In the course of its commercial relations with Basch, it supplied Basch with its goods for resale in the Netherlands.

9 Taking the view that Basch had not paid the price of the goods delivered and invoiced up to June 1999, Gantner terminated their commercial relations.

10 By document of 7 September 1999, notified to Gantner on 2 December 1999, Basch brought an action before the Arrondissementsrechtbank (District Court) Dordrecht (Netherlands) in which it sought an order requiring Gantner to pay to it NLG 5 555 143.60 (EUR 2 520 814.26), primarily in respect of damages. Basch argued that, as Gantner had terminated a contractual relationship which had lasted more than 40 years, the period of notice ought to have been longer.

11 According to the order for reference, Basch considered that it was owed NLG 5 950 962 (EUR 2 700 428.82). However, it deducted from that sum NLG 376 509 (EUR 170 852.34), corresponding to the claims by Gantner that it considered to be justified, and accordingly limited its claim to NLG 5 555 143.60 (EUR 2 520 814.26). Basch accordingly effected a set-off by way of a declaration of intent.

12 In the proceedings before the Arrondissementsrechtbank Dordrecht, Gantner did not plead a counterclaim in its defence against Basch.

13 By document of 22 September 1999, notified to Basch on 21 December 1999, Gantner brought an action before the Landesgericht (Regional Court) Feldkirch (Austria) for an order requiring Basch to pay to it ATS 11 523 703.30 (EUR 837 460.18), corresponding to the sales price of the goods delivered to Basch up to 1999 which remained unpaid.

14 Basch argued that the claim should be dismissed. It contended that the portion of Gantner's claim that it considered to be justified, that is to say, EUR 170 852.34, was extinguished by the extra-judicial set-off that it had effected in the Netherlands. In regard to the balance of Gantner's claim (EUR 666 607.84), Basch argued that if, contrary to all probability, that claim was upheld, it would in any event be set off by the balance of its own claim for damages, which was the subject-matter of the dispute pending before the Arrondissementsrechtbank Dordrecht. Furthermore, Basch asked the Landesgericht to stay proceedings on the ground of *lis pendens* under Article 21, or on the ground that the proceedings constituted related actions within the meaning of Article 22 of the Convention.

15 The Landesgericht refused to suspend in their entirety the proceedings pending before it. It did, however, decide to stay its decision on the defence plea raised by Basch alleging set-off against the debt that it sought to recover before the Arrondissementsrechtbank Dordrecht.

16 Basch appealed to the Oberlandesgericht (Higher Regional Court) Innsbruck (Austria) against the Landesgericht's decision not to stay the proceedings in their entirety.

17 Taking the view that the defence plea alleging extra-judicial set-off effected by Basch in the Netherlands was capable of giving rise to *lis pendens* in regard to the two actions, the Oberlandesgericht set aside the first-instance decision in so far as it dismissed Basch's application for a stay on the basis of Article 21 of the Convention. On the other hand, the Oberlandesgericht upheld the dismissal of Basch's application for a stay of proceedings on the basis of Article 22 of the Convention, which thus became final.

18 Gantner appealed against that decision to the Oberster Gerichtshof.

19 The Oberster Gerichtshof takes the view, in the first place, that the respective claims of Basch and Gantner are not based on identical or similar facts. Before the Netherlands court, Basch seeks compensation for loss resulting from Gantner's wrongful termination of an alleged concession contract. In the proceedings which it subsequently brought before the Austrian courts, Gantner seeks payment of the sales price of goods delivered during the period prior to the termination of commercial relations. Conceptually, those claims are not based on conflicting assessments of the same facts and actions, but have different factual bases giving rise to different rights.

20 The Oberster Gerichtshof is, however, unsure whether, taking account of the relevant case-law of the Court (see Case 144/86 *Gubisch Maschinenfabrik* [1987] ECR 4861, paragraphs 16 to 18, and Case C-406/92 *The Tatry* [1994] ECR I-5439, paragraphs 30 to 34), there any grounds for holding that the requirements for *lis pendens* have been met in this case.

21 Second, the Oberster Gerichtshof points out that Basch relies on a contract for an indefinite period, whereas Gantner argues that there was a succession of sales contracts.

22 In that regard, the application brought by Basch before the Netherlands court raises the question of the existence of a contract for an indefinite period only as a preliminary issue. It is thus necessary to determine whether the decision which will be given by the Netherlands court, on an issue which legal theory in Austria still predominantly regards as being merely a preliminary issue, will have binding force for the subsequent proceedings in Austria. The Oberster Gerichtshof states that this question is highly controversial in Austrian law.

23 The Oberster Gerichtshof accordingly decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1 Does the concept of "the same cause of action" in Article 21 of the Brussels Convention extend also to the defence of the defendant that he has extinguished a part of the claim sued for by extra-judicial set-off, where the part of this counterclaim that is allegedly not extinguished is the subject-matter of a legal dispute between the same parties on the basis of an action that has already been brought earlier in another Contracting State?

2 In the examination of the question whether "the same cause of action" has been brought, are exclusively the pleadings of the plaintiff in the proceedings initiated by a later action decisive and the defence and submissions of the defendant therefore irrelevant, in particular also the defence of the

procedural objection of set-off concerning a claim that is the subject-matter of a legal dispute between the same parties on the basis of an action that has already been brought earlier in another Contracting State?

3. Where, on the basis of an action to enforce a contract seeking damages for unlawful termination of a long-term obligation, the question as to whether such a long-term obligation existed at all is decided, is that decision also binding in subsequent proceedings between the same parties?'

The first two questions

24 By its first two questions, which it is appropriate to examine together, the national court seeks to ascertain, essentially, whether Article 21 of the Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account must be taken not only of the claims of the respective applicants but also of the grounds of defence raised by a defendant.

25 In that regard it must be observed, first of all, that according to its wording Article 21 of the Convention applies where two actions are between the same parties and involve the same subject-matter (see *Gubisch Maschinenfabrik*, cited above, paragraph 14). Furthermore, the subject-matter of the dispute for the purpose of that provision means the end the action has in view (*The Tatry*, cited above, paragraph 41).

26 It thus appears from the wording of Article 21 of the Convention that it refers only to the applicants' respective claims in each of the sets of proceedings, and not to the defence which may be raised by a defendant.

27 Next, it follows from Case 129/83 *Zelger* v *Salinitri* [1984] ECR 2397, paragraphs 10 to 15, that, in so far as the substantive conditions laid down in paragraph 25 of the present judgment are met, *lis pendens* exists from the moment when two courts of different Contracting States are definitively seised of an action, that is to say, before the defendants have been able to put forward their arguments.

28 Although it is not applicable *ratione temporis* to the case in the main proceedings, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) confirms that interpretation.

29 That regulation specifies, in particular for the purpose of the application of the rules on *lis pendens*, when a court is deemed to be seised. Under Article 30, a court is deemed to be seised either at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or, if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to

take the steps he was required to take to have the document lodged with the court.

30 Finally, the objective and automatic character of the *lis pendens* mechanism should be stressed. As the United Kingdom Government correctly points out, Article 21 of the Convention adopts a simple method to determine, at the outset of proceedings, which of the courts seised will ultimately hear and determine the dispute. The court second seised is required, of its own motion, to stay its proceedings until the jurisdiction of the court first seised is established. Once that has been established, it must decline jurisdiction in favour of the court first seised. The purpose of Article 21 of the Convention would be frustrated if the content and nature of the claims could be modified by arguments necessarily submitted at a later date by the defendant. Apart from delays and expense, such a solution could have the result that a court initially designated as having jurisdiction under that article would subsequently have to decline to hear the case.

31 It follows that, in order to determine whether there is *lis pendens* in relation to two disputes, account cannot be taken of the defence submissions, whatever their nature, and in particular of defence submissions alleging set-off, on which a defendant might subsequently rely when the court is definitively seised in accordance with its national law.

32 In the light of the foregoing, the answer to the first two questions is that Article 21 of the Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant.

The third question

33 By its third question, the national court seeks to ascertain whether the decision of a court of a Contracting State, which, in order to settle a claim, has had to determine the legal nature of the relations between the parties, is binding on the court of another Contracting State subsequently seised of a dispute between the same parties, in which the precise legal nature of the contractual relations between the parties is a matter of dispute.

34 As a preliminary point, it must be recalled that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts established by Article 234 EC, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18).

35 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which a case has been referred to it by the national court, in order to assess whether it has jurisdiction (*PreussenElektra*, cited above, paragraph 39, and *Canal Satélite Digital*, cited above, paragraph 19). 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 or hypothetical questions (see *Bosman*, cited above, paragraph 60, and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 26).

36 It is therefore possible that there will be a refusal to rule on a question referred by a national court for a preliminary ruling where, *inter alia*, the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, for example, *PreussenElektra*, paragraph 39, and *Canal Satélite Digital*, paragraph 19).

37 In order to enable the Court to provide a useful interpretation of Community law, it is appropriate that, before making the reference to the Court, the national court should establish the facts of the case and settle the questions of purely national law (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association* [1981] ECR 735, paragraph 6). By the same token, it is essential for the national court to explain why it considers that a reply to its questions is necessary to enable it to give judgment (see Joined Cases 98/85, 162/85 and 258/85 *Bertini and Others* [1986] ECR 1885, paragraph 6, and Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 19).

38 That case-law may be transposed to orders for preliminary reference provided for by the Protocol (see, to that effect, Case C-220/95 *Van den Boogaard* [1997] ECR

I-1147, paragraph 16; Case C-295/95 *Farrell* [1997] ECR I-1683, paragraph 11; and Case C-159/97 *Castelletti* [1999] ECR I-1597, paragraph 14).

39 In that connection it must be observed that in the case in the main proceedings the Austrian courts are seised of a claim for payment of the price of goods supplied. It is not clear from the order for reference how the exact legal nature of the contract on which Gantner bases its claim would be relevant for the purpose of giving judgment.

40 In those circumstances, the Court does not have sufficient information to indicate how an answer to the third question is necessary.

41 That question is therefore inadmissible.

Costs

42 The costs incurred by the Austrian, Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Oberster Gerichtshof by order of 22 February 2001, hereby rules:

Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, 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, must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant.

Wathelet Timmermans La Pergola

Jann von Bahr

Delivered in open court in Luxembourg on 8 May 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber