JUDGMENT OF THE COURT
30 NOVEMBER 1976 [1]

Jozef de Wolf
v Harry Cox B.V.
(preliminary ruling requested by the Hoge Raad of the Netherlands)

Case 42/76

Summary

Convention of 27 September 1968 — Judgment obtained in a Member State — Enforcement in another Contracting State possible by virtue of Article 31 of the Convention — Application concerning the same subject-matter and between the same parties brought before a court of that State — Prohibition — Costs of procedure (Convention of 27 September 1968, Art. 31)

The provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 prevent a party who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement under Article 31 of the Convention may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State. The fact that there may be occasions on which, according to the national law applicable, the procedure set out in Articles 31 et seq. of the Convention may be found to be more expensive than bringing fresh proceedings on the substance of the case does not invalidate these considerations.

In Case 42/76

Reference to the Court under Articles 2 and 3 of the Protocol of 3 June 1971 (OJ L 204 of 2 August 1975, p. 28) concerning 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 (JO L 299 of 31 December 1972, p. 32) by the Hoge Raad of the Netherlands for a preliminary ruling in the appeal before that court lodged by the Attorney General to the Hoge Raad against a judgment of the Kantonrechter of Boxmeer delivered in proceedings between

1 — Language of the Case: Dutch.

JOZEF DE WOLF, Turnhout (Belgium)

and

HARRY COX B.V., Boxmeer (The Netherlands)

on the interpretation of the said Convention, and in particular of Article 31 thereof.

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference to the Court and the written observations submitted under provisions of Article 5 of the Protocol concerning 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 in conjunction with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. By judgment in default of the juge de paix of the First Canton of Turnhout of 28 May 1974, the Harry Cox B.V. undertaking (hereinafter referred to as 'Cox') was ordered to pay De Wolf FL 23·30 on an invoice of 24 April 1973 and the costs of service of formal notice to pay by authorized process server, 500 Belgian francs damages by way of penalty, legal interest on the abovementioned sums, and, finally, 913 Belgian francs in respect of the costs of the action.

Because Cox failed to comply with this judgment, De Wolf lodged an application before the Kantonrechter of Boxmeer for an order that Cox pay the abovementioned amounts.

By judgment of 8 July 1975, the Kantonrechter gave judgment in favour

of this application, taking into consideration the following provisions of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention'):

First paragraph of Article 26

A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.

Article 31

A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of an interested party, the order for its enforcement has been issued there.

In particular, the Kantonrechter held that:

— it appears from those provisions that the abovementioned Belgian judgment must be recognized in the Netherlands 'without any special procedure being required', within the meaning of the said Article 26;

— however, by virtue of the relevant Netherlands legislation, an application for the issue of an order for enforcement must be made under the procedure laid down by that legislation.
That procedure, in the present case, would cost more (at least Fl 340) than lodging a second application concerning the same subject-matter. Therefore it is in the interests of the parties that the second course be followed.

The Attorney-General to the Hoge Raad brought an appeal against the judgment of the Kantonrechter of Boxmeer before the Hoge Raad on the ground that the said judgment infringes Article 31 of the Convention, if not the Convention as a whole. In fact, by virtue of the Convention, the application ought to have been declared inadmissible because the only means available to De Wolf in order to obtain satisfaction consisted in submitting an application for the issue of an order for the enforcement of the Belgian judgment.

2. A — On 7 May 1976, the Hoge Raad decided to submit the following question to the Court:

Does Article 31 of the Convention ..., by itself or in conjunction with other provisions of that Convention, prevent a plaintiff who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement within the meaning of Article 31 of the Convention may issue in another Contracting State, from making an application to a court in that other State, in accordance with Article 26 of the Convention, for a judgment against the other party on the same terms as the judgment delivered in the first State, instead of applying for the issue of such an order for enforcement in that other State, assuming, of course, that under the provisions of the Convention that court has jurisdiction to hear the application?

In the statement of reasons for this decision, it is stated that the relevance of the question referred 'becomes particularly apparent in cases of small personal claims. In the Netherlands, these claims may be brought before the Kantonrechter without the assistance of an advocate when they do not exceed the sum of Fl 1 500, and no appeal is possible when they do not exceed the sum of Fl 500. These factors do not apply where the procedure for the issue of an order for enforcement for which the Convention provides must be followed.'

B — The order making the reference was entered in the Court Register on 14 May 1976.

In accordance with the provisions of Article 5 (1) of the Protocol concerning the interpretation by the Court of Justice of the Convention in conjunction with those of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Government of the Federal Republic of Germany and by the Commission of the European Communities.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

1. The *Government of the Federal Republic of Germany* states, *inter alia,* the following:

A — The principal purpose of Articles 31 *et seq.* of the Convention is to ensure that the decisions of the courts of other Contracting States may be declared enfordeable by means of a simpole and effective procedure and in the manner most favourable to the person seeking enforcement.

It follows from the first paragraph of Article 33 of the Convention which provides that 'the procedure for making the application', that is to say the application for the issue of an order for enforcement (Article 31), 'shall be governed by the law of the State in which enforcement is sought', that the Convention has left it to national law to settle the questions which it has not dealt with itself. This explains why the procedure for enforcement of a foreign judgment has not been rendered equally simple by all the Contracting States, particularly as regards the costs. Thus, for example the German law in implementation of the Convention enables the applicant to bring proceedings without the assistance of an advocate, whereas that requirement is imposed under the laws of at least most of the other Contracting States. It may be asked whether the maintenance of such burdensome provisions is entirely compatible with Article 220 of the Treaty and with the spirit of the Convention particularly where, as in the present case, the result is that the simplified procedure for which the Convention makes provision is more expensive than a normal procedure by way of a main action.

B — Apart from these considerations, the arguments for and against an affirmative answer to the question of the Hoge Raad are, it is argued, as follows:

(a) The proposition that the procedure for which Article 31 of the Convention makes provision is exclusive can be based on the following considerations in particular:

1. If this proposition were accepted, foreign orders for enforcement would be uniformly enforced throughout the field of application of the Convention. Thus the latter would be applicable to all aspects of proceedings to enforce a foreign judgment, for example it would be applicable as regards the protection that the Convention gives to a debtor against a definitive enforcement of a foreign judgment before the latter has itself become *res judicata.* The Convention would also apply as regards the limits that it sets on the enforcement of foreign judgments imposing fines, and would apply in so far as it enables foreign orders for enforcement to be partially enforced, lays down a common set of reasons for which recognition of a foreign judgment may be refused and, finally, enables the debtor to appeal against the decision to issue the order for the enforcement of the foreign judgment.
2. The procedure for enforcement is simplified and accelerated, for creditors do not have to enquire whether any legal remedy exists other

than the procedure laid down by the Convention.

3. Contrary to other comparable international instruments, the Convention does not contain any provisions expressly enabling the creditor to sue any such other legal remedy.
4. In any case it is the duty of each Contracting State to ensure that the procedure under Article 31 is always the most simple, the least burdensome and the most effective.

(b) In support of the proposition that the Convention does not prevent the creditor from bringing a new action under national law, as has happened in this case, the following arguments, amongst others, may be advanced:

1. The application of national law is only prohibited in so far as that prohibition results from the text of the Convention. Yet the Convention only requires the Contracting States to make the procedure for the enforcement of foreign judgments laid down by Article 31 *et seq.* available to the parties; it does not require that they must exclude other possibilities of obtaining the enforcement of debts for which there exists a foreign order for enforcement.
   This interpretation is indirectly confirmed by the first sentence of the second paragraph of Article 26 of the Convention which provides that any interested party 'may' use the procedure laid down by the Convention in order to obtain recognition of the foreign judgment. Therefore it is permissible for the national legislature to offer the said party other legal remedies leading to the same result.
2. In general, an international convention should not necessarily be interpreted as meaning that the interested parties are bound to base their claims on that convention alone and not on any other legal basis, even a more favourable one. To hold otherwise would only be acceptable if the harmonization intended by the authors of the convention had absolute priority. Such is not the case here, for the principal objective of the convention is 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals' (Article 220 of the EEC Treaty). Therefore, where there exists a national procedure which costs less than the procedure under Article 31, the Contracting States have no interest in imposing the latter on the interested parties. To leave national law free to complete the rules of the Convention in accordance with the spirit of the latter in certain circumstances not envisaged by its authors makes it possible to achieve flexibility of application which, in the interests of the interested parties, ought not to be excluded *a priori.*
3. It is no objection to the argument put forward here that it is in any event only possible to bring a second main action in so far as the Convention accepts, as a general rule, the jurisdiction of the court before which the action is brought, that the proposition leads to 'fortuitous' results. For enforcement normally takes place at the place where the unsuccessful party is to be found and therefore Article 2 of the Convention applies to most cases. That article provides that in principle 'persons domiciled in a Contracting State shall ... be sued in the courts of that State'.
   Moreover, in any event, Article 21 of the Convention prevents a new main action from being brought before the procedure commenced in the first State has closed with a judgment which has the force of *res judicata.* The debtor is thus sufficiently protected.
   Finally, even within the context of a second main action, there is nothing to prevent the general rules of the Convention and the provisions thereof relating to the recognition of foreign decisions from being applied.

C — In reality, the answer to be given to the Hoge Raad depends on whether Article 220 of the Treaty and the Convention looked at as a whole require the Member States to organize the procedure under Article 31 of the Convention so that it is the simplest, the most effective and the least burdensome. If there is no such obligation, then the conflict between the arguments respectively put forward in favour of the proposition that the said procedure is of an exclusive nature and in favour of the pluralist proposition results in a decision in favour of the latter. That proposition does not seriously jeopardize the uniformity of the procedure for enforcement of foreign judgments within the Community for it is only in rare cases that it is possible to bring a new main action. Moreover the proposition is in accordance with the fundamental objectives of the Convention. In particular, allowing the procedure laid down by Netherlands law and chosen by De Wolf has advantages for interested parties in other Contracting States in disputes involving very small sums.

Therefore the answer to the question of the Hoge Raad should be as follows:

The fact that under Article 31 of the [Convention] an order for the enforcement of a decision emanating from one Contracting State may be requested in another Contracting State does not prevent a new action concerning the same subject-matter as the action brought in the first Contracting State from being brought between the same parties in the other State, if the new action, based on the judgment emanating from the first State, which must be recognized (Article 26), tends to give effect to the individual right claimed more simply or more easily. Moreover in so far as the new action is admissible under Article 2 *et seq.* and Article 21 of the Convention, the national law of the other Contracting State determines the legal criteria according to which that new action may be brought in that State on the basis of the judgment of the foreign court, as an exception and despite the existence of that judgment.

2. The *Commission* puts forward *inter alia* the following considerations:

It is an underlying principle of the Convention that it applies directly, and this is the view taken by its principal commentators. It seems therefore that it was only because of the difficulties inherent in its translation that the word 'directly' ('d'office') was deleted from the text of Article 1 at the request of the German delegation.

This principle also governs the interpretation of Article 31. One cannot draw the contrary conclusion from the fact that according to the Dutch version of that provision 'A judgment ... *may be* enforceable ...'. These words only mean that, as is indeed obvious, the interested party is free to have a judgment previously obtained enforced or not to do so. Moreover the provisions concerning the procedure for enforcement laid down in the second part of Article 31 and in the provisions which follow it do not appear to be optional: enforcement of the judgments is subject to the condition that the order for enforcement has been issued (Article 31). Article 32 *et seq.* lay down the procedure which must be followed in order to obtain this order, etc.

The rules established by the Convention constitute a coherent system which would not be effective if some of its provisions were not applied. The Commission supplies an analysis of this system and stresses in particular that the means of recognition and enforcement are subject, *inter alia,* to compliance with the rules of the Convention concerning jurisdiction (first paragraph of Article 28 and Article 34).

In the present case, the plaintiff has made an improper use of Article 26 of

the Convention, by using recognition 'not as a means of enforcing a judgment without going throught the courts, but as a stage in the procedure for the enforcement of a judgment delivered abroad'.

It is true that the Convention does not prohibit a new judgment from being obtained, but even contains rules concerning *lis pendens* and related actions (Articles 21 to 23). However as regards obtaining the enforcement of a judgment obtained in another Contracting State, Article 31 *et seq.* are of exclusive application.

For these reasons the Commission is of the opinion that the answer which must be given to the question of the Hoge Raad is as follows:

Article 31 *et seq.* of the [Convention] prohibit an applicant who has obtained a judgment in his favour in a Contracting State, being a decision in respect of which an order for enforcement within the meaning of Article 31 of the Convention may issue in another Contracting State, from making an application to a court in that other State, in accordance with Article 26 of the Convention, for a judgment against the other party in the same terms as the judgment delivered in the first State, instead of applying for the issue of an order for enforcement in that other State.

During the oral procedure, which took place on 14 October 1976, the Commission of the European Communities, represented by H. Bronkhorst, a member of its Legal Service, developed as follows the arguments which it put forward in the written procedure:

The proposition that the Convention would be ineffective if the procedure which it lays down were not to be considered as exclusive is supported by Article 36 of the Convention which provides that the party against whom enforcement is sought may appeal against the decision authorizing enforcement. This rule would be purposeless if procedures other than that laid down by the Convention were accepted.

The contrary view, put forward by the German Government, conflicts with the following considerations:

— It seems to give the EEC Treaty, and in particular Article 220 thereof, a higher status than the Convention, whereas in reality these two instruments are of equal legal status.
— The argument based on the saving in costs which might result from accepting other procedures is not relevant. As regards more particularly the Netherlands law adopted in implementation of the Convention, that law provides that the debtor shall bear the costs of the procedure, including the costs of the advocate. Moreover Article 44 of the Convention provides 'An applicant who has been granted legal aid in the State in which the judgment was given shall automatically also qualify for legal aid in the procedures provided for in Articles 32 to 35'.

The Kantonrechter of Boxmeer was in breach of Article 26 of the Convention because, contrary to the requirement laid down in that provision, he did not 'recognize' the judgment of the juge de paix at Turnhout, but himself gave judgment in a case which had already been decided.

The Advocate-General delivered his opinion at the hearing on 9 November 1976.

Law

1 By judgment of 7 May 1976, received at the Court Registry on the following 14 May, the Hoge Raad of the Netherlands has referred to the Court a question on the interpretation, in particular, of Article 31 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, hereinafter referred to as 'the Convention'.

2 It appears from the file that the plaintiff in the main action, resident in Belgium, having obtained a judgment from the juge de paix of Turnhout (Belgium) ordering the defendant in the main action, having its head office in the Netherlands, to pay an invoice, lodged an application before the Kantonrechter (juge de paix) of Boxmeer (The Netherlands) against the same defendant and in respect of the same matter.

3 The Kantonrechter, having heard the defendant, held that the application was admissible and gave judgment on the substance of the case in the same terms as the Belgian court.

4 In so doing, the Dutch court took the view, *inter alia,* on the one hand, that it was required to recognize the Belgian judgment under Article 26 of the Convention but that, on the other, under the legislation of the Netherlands, the procedure chosen by the applicant was less expensive for the parties than the procedure under Articles 31 et seq. of the Convention would have been. Under the latter procedure an application for an order for the enforcement of the judgment delivered by the Belgian court would have been brought before the President of the Arrondissementrechtbank which had jurisdiction.

5 The Attorney-General of the Hoge Raad brought an appeal against the judgment of the Kantonrechter before the Hoge Raad on the ground that the Kantonrechter ought to have declared the application inadmissible, because the procedure under Article 31 of the Convention is the only means available to the applicant for the purpose of enforcing the judgment of the Belgian court.

6 The Hoge Raad is asking the Court, in substance, to rule whether the Convention prevents a plaintiff who has obtained a judgment in his favour in

a Contracting State, being a judgment for which an order for enforcement under Article 31 of the Convention may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State.

7 The first paragraph of Article 26 of the Convention provides: 'A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required'.

8 Although Articles 27 and 28 lay down certain exceptions to this duty of recognition, Article 29 nevertheless provides that 'under no circumstances may a foreign judgment be reviewed as to its substance'.

9 When an application for a review as to substance is declared admissible, the court before which the application is heard is required to decide whether it is well founded, a situation which could lead that court to conflict with a previous foreign judgment and, therefore, to fail in its duty to recognize the latter.

10/11 To accept the admissibility of an application concerning the same subject-matter and brought between the same parties as an application upon which judgment has already been delivered by a court in another Contracting State would therefore be incompatible with the meaning of the provisions quoted. It also results from Article 21 of the Convention, which covers cases in which proceedings 'involving the same cause of action and between the same parties are brought in the courts of different Contracting States' and requires that a court other than the first seised shall decline jurisdiction in favour of that court, that proceedings such as those brought before the Kantonrechter of Boxmeer are incompatible with the objectives of the Convention.

12 That provision is evidence of the concern to prevent the courts of two Contracting States from giving judgment in the same case.

13 Finally, to accept the duplication of main actions such as has occurred in the present case might result in a creditor's possessing two orders for enforcement on the basis of the same debt.

14 The fact that there may be occasions on which, according to the national law applicable, the procedure set out in Articles 31 et seq. of the Convention may be found to be more expensive than bringing fresh proceedings on the substance of the case does not invalidate these considerations.

15 In this respect, it must be observed that the Convention, which, in the words of the preamble thereto, is intended 'to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals', ought to induce the Contracting States to ensure that the costs of the procedure described in the Convention are fixed so as to accord with that concern for simplification.

16 The question raised by the Hoge Raad of the Netherlands should therefore be answered in the affirmative.

Costs

17 The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

18 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Hoge Raad of the Netherlands, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Hoge Raad of the Netherlands by judgment of 7 May 1976, hereby rules:

The provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 prevent a party who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement under Article 31 of the Convention

may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State.

Kutscher Donner Pescatore

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 30 November 1976.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 9 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

The dispute between Joseph de Wolf, a customs agent at Turnhout (Belgium) and the Harry Cox undertaking, whose registered office is at Boxmeer (the Netherlands) was a very small one. It concerned the recovery of a bill for Fl 8·30, which, the agent claimed, was owed to him by the Netherlands undertaking. But that does not matter. This tiny case is at the origin of a reference for a preliminary ruling made by the Hoge Raad of the Netherlands on the interpretation of the provisions of the Convention of Brussels of 27 September 1968 on the recognition and enforcement of judgments; in examining them you will decide an important point of Community law.

Mr de Wolf began by suing his debtor before the juge de paix of the First Canton of Turnhout, the court of his own domicile. That court, considering itself to have jurisdiction, gave judgment by default ordering the defendant to pay the said bill, damages assessed by way of penalty at FB 500 together with the costs of service of formal notice to pay, fixed at 15 guilders, and to pay legal interest and costs, assessed at a total of FB 913.

It may be supposed that notice of this judgment was served on the defendant, but the latter did not react. A comparison of its date, the date on which notice thereof was served on the defendant and the time-limit for bringing an appeal should enable it to be stated that it had the force of *res judicata* and had become enforceable in Belgium.

However, whether it was possible to enforce it is another matter. It is necessary to beware of confusing the effects of a judgment and the practical

1 — Translated from the French.