JUDGMENT OF THE COURT (Third Chamber)
14 October 2004 *

In Case C-39/02,

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, brought by the Højesteret (Denmark), by decision of 8 February 2002, received at the Court on 13 February 2002, for a preliminary ruling in the proceedings pending before that court between:

Mærsk Olie & Gas A/S

and

Firma M. de Haan en W. de Boer,

THE COURT (Third Chamber),

composed of: A. Rosas, acting as President of the Third Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

* Language of the case: Danish.

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 1 April 2004,

after considering the observations submitted on behalf of:

— Mærsk Olie & Gas A/S, by S. Johansen, advokat,

— Firma M. de Haan and W. de Boer, by J.-E. Svensson, advokat,

— the Netherlands Government, by H.G. Sevenster et J. van Bakel, acting as Agents,

— the United Kingdom Government, by P. Ormond, acting as Agent, assisted by A. Layton, Barrister,

— the Commission of the European Communities, by N.B. Rasmussen and A.-M. Rouchaud, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2004,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 21, 25 and 27 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (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) ('the Brussels Convention').

2 This reference has been made in the course of a dispute between the company Mærsk Olie & Gas A/S ('Mærsk') and the partnership of Mr M. de Haan and Mr W. de Boer ('the shipowners') concerning an action for damages in respect of damage allegedly caused to underwater pipelines in the North Sea by a trawler belonging to the shipowners.

The legal framework

The 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships

3 Article 1(1) of the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships of 10 October 1957 (International Transport

Treaties, suppl. 1-10, January 1986, p. 81) ('the 1957 Convention') provides that the owner of a sea-going ship may limit his liability to a specified amount in respect of one of the claims there listed, unless the occurrence giving rise to the claim resulted from the actual fault of the owner. The claims listed include, under Article 1(1)(b), damage to any property caused by the act, neglect or default of any person on board the ship in connection with the navigation thereof.

4 Under Article 3(1) of the 1957 Convention the amount to which liability may be limited is calculated according to the ship's tonnage and will vary depending on the nature of the damage caused. Thus, in the case where the harmful event has resulted in damage only to property, the amount to which the shipowner may limit his liability corresponds to 1 000 francs Poincaré for each tonne of the ship's tonnage.

5 In the case where the aggregate of the claims resulting from the same harmful event exceeds the limits of liability as thus defined, Article 2(2) and (3) of the 1957 Convention provides that a fund, corresponding to that limit, may be constituted for the purpose of being available only for the payment of claims in respect of which limitation of liability may be invoked. Article 3(2) provides that this fund is to be distributed 'among the claimants ... in proportion to the amounts of their established claims'.

6 Article 1(7) of the 1957 Convention provides: 'The act of invoking limitation of liability shall not constitute an admission of liability'.

7 Article 4 of the 1957 Convention provides as follows:

'... the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the State in which the fund is constituted.'

8 According to the case-file, the Kingdom of the Netherlands was bound by the 1957 Convention at the time of the events in issue in the main proceedings.

The Brussels Convention

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

10 Article 2 of the Brussels Convention lays down the general rule that jurisdiction is vested in the courts of the State in which the defendant is domiciled. Article 5 of the Convention, however, provides that, 'in matters relating to tort, delict or quasi-delict', the defendant may be sued 'in the courts for the place where the harmful event occurred'.

11 Article 6a of the Brussels Convention adds:

'Where by virtue of this Convention a court of a Contracting State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that State, shall also have jurisdiction over claims for limitation of such liability.'

12 The Brussels Convention also seeks to prevent conflicting decisions being delivered. Thus, Article 21, 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.

A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.'

13 Article 22 of the Brussels Convention 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.'

14 With regard to recognition, Article 25 of the Convention states as follows:

'For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.'

15 The first paragraph of Article 26 of the Brussels Convention provides:

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

16 Article 27, however, provides as follows:

'A judgment shall not be recognised:

...

2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

...'.

17 Article IV of the Protocol annexed to the Brussels Convention states:

'Judicial and extrajudicial documents ... which have to be served on persons in another Contracting State shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the Contracting States.

...'.

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

18 In May 1985 Mærsk laid oil and gas pipelines in the North Sea. In the course of June 1985 a trawler belonging to the shipowners was fishing in the area in which those pipelines had been laid. Mærsk established that the pipelines had been damaged.

19 By letter of 3 July 1985 Mærsk informed the shipowners that it held them responsible for that damage, the repair work in respect of which it was estimated would cost USD 1 700 019 and GBP 51 961.58.

20 On 23 April 1987 the shipowners lodged with the Arrondissementsrechtbank (District Court) Groningen (Netherlands), the place in which their vessel was registered, an application for limitation of their liability. That court made an order on 27 May 1987 provisionally fixing that limitation at NLG 52 417.40 and enjoining the shipowners to lodge that sum together with NLG 10 000 to cover the legal costs. The shipowers' legal respresentatives informed Mærsk of that decision by telex of 5 June 1987.

21 On 20 June 1987 Mærsk brought an action for damages against the shipowners before the Vestre Landsret (Western Regional Court) (Denmark).

22 On 24 June 1987 Mærsk appealed to the Gerechtshof (Court of Appeal) Leeuwarden (Netherlands) against the decision of the Arrondissementsrechtbank Groningen on the ground that the latter court did not have jurisdiction. On 6 January 1988 the Gerechtshof upheld the decision delivered at first instance, referring to, inter alia, Articles 2 and 6a of the Brussels Convention. Mærsk did not lodge an appeal to have the decision of the Gerechtshof quashed.

23 By registered letter of 1 February 1988 the administrator notified Mærsk's lawyer of the order of the Arrondissementsrechtbank establishing the liability limitation fund and, by letter of 25 April 1988, requested Mærsk to submit its claim.

24 Mærsk did not accede to that request, choosing instead to pursue its action before the Danish court. In the absence of any claims submitted by injured parties, the sum lodged with the Arrondissementsrechtbank in the Netherlands was returned to the shipowners in December 1988.

25 By decision of 27 April 1988 the Vestre Landsret held that the rulings of the Netherlands courts of 27 May 1987 and of 6 January 1988 had to be treated as being judgments within the terms of Article 25 of the Brussels Convention in view of the fact that Mærsk had had the opportunity to defend its position during the corresponding proceedings.

26 As it took the view that the proceedings brought in the Netherlands and in Denmark were between the same parties, had the same subject-matter and related to the same cause of action, and that this finding could not be invalidated by the fact that Mærsk had not defended its interests in the proceedings relating to the limitation of liability, the Vestre Landsret ruled that the conditions governing a finding of *lis pendens* pursuant to Article 21 of the Brussels Convention had been satisfied.

27 In view of the fact that proceedings had been brought earlier in the Netherlands (23 April 1987) than in Denmark, and in view of the finding of the Arrondissementsrechtbank Groningen, upheld on appeal, that it had jurisdiction to deliver its decision, the Vestre Landsret, acting pursuant to the second paragraph of Article 21 of the Brussels Convention, declined jurisdiction in favour of the Netherlands court.

28 Mærsk appealed against that decision to the Højesteret (Danish Supreme Court).

29 As it took the view that the case raised questions on the interpretation of Articles 21, 25 and 27 of the Brussels Convention, the Højesteret decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does a procedure to establish a liability limitation fund pursuant to an application by a shipowner under the Brussels Convention of 10 October 1957 constitute proceedings within the meaning of Article 21 of the 1968 Brussels Convention where it is evident from the application, where the relevant names are stated, who might be affected thereby as a potential injured party?

2. Is an order to establish a liability limitation fund under the Netherlands procedural rules in force in 1986 a judgment within the meaning of Article 25 of the 1968 Brussels Convention?

3. Can a limitation fund which was established on 27 May 1987 by a Netherlands court pursuant to Netherlands procedural rules then in force without prior service on an affected claimant now be denied recognition in another Member State in relation to the claimant concerned pursuant to Article 27(2) of the 1968 Brussels Convention?

4. If Question 3 is answered in the affirmative, is the claimant concerned deprived of its right to rely on Article 27(2) by virtue of the fact that in the Member State which established the limitation fund it raised the matter of jurisdiction before a higher court without having previously objected to default of service?'

The first question

30 By its first question, the Højesteret is essentially asking whether an application brought before a court of a Contracting State by a shipowner seeking to have a liability limitation fund established, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner constitute proceedings that have the same subject-matter, involve the same cause of action and are between the same parties, within the terms of Article 21 of the Brussels Convention.

31 It should be borne in mind at the outset that Article 21 of the Brussels Convention, together with Article 22 on related actions, is contained in Section 8 of Title II of that Convention, which 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, so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3) of the Convention, that is to say, the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought (see Case 144/86 *Gubisch Maschinenfabrik* [1987] ECR 4861, paragraph 8, and Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 41).

32 It follows that, in order to achieve 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 (Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317, paragraph 16, and *Gasser*, cited above, paragraph 41).

33 It is, in the present case, common ground that proceedings relating to the establishment of a liability limitation fund, such as those brought before the Netherlands court, are intended to allow a shipowner who could be declared liable under one of the heads of claim listed in Article 1(1) of the 1957 Convention to limit his liability to an amount calculated in accordance with Article 3 of that Convention, such that claimants cannot recover from the shipowner, in respect of the same harmful event, amounts other than those to which they would be entitled under such proceedings.

34 An application of this kind for the establishment of a liability limitation fund undoubtedly constitutes proceedings for the purposes of Article 21 of the Brussels Convention. It is, however, also necessary to examine whether it involves the same subject-matter and cause of action as an action for damages brought by the victim against the shipowner before a court of another Contracting State and whether those sets of proceedings have been brought between the same parties. Those three cumulative conditions must be satisfied before there can be a situation of *lis pendens* within the terms of Article 21 of the Brussels Convention.

35 The applications under consideration clearly do not have the same subject-matter. Whereas an action for damages seeks to have the defendant declared liable, an application to limit liability is designed to ensure, in the event that the person is declared liable, that such liability will be limited to an amount calculated in accordance with the 1957 Convention, it being borne in mind that, under Article 1 (7) of that Convention, 'the act of invoking limitation of liability shall not constitute an admission of liability'.

36 The fact that, in proceedings for the establishment of a liability limitation fund, the claims are verified by an administrator or may also be challenged by the debtor is not such as to cast doubt on that analysis. As the Court has already ruled, in order to determine whether two sets of proceedings have the same subject-matter under

Article 21 of the Brussels Convention, account should be taken, as is evident from the wording of that article, only of the applicants' respective claims in each of the sets of proceedings, and not of the defence which may be raised by a defendant (Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, paragraph 26).

37 Nor do the applications under consideration involve the same cause of action, within the terms of Article 21 of the Convention.

38 As the 'cause of action' comprises the facts and the legal rule invoked as the basis for the application (see Case C-406/92 *The Tatry* [1994] ECR I-5439, paragraph 39), the unavoidable conclusion is that, even if it be assumed that the facts underlying the two sets of proceedings are identical, the legal rule which forms the basis of each of those applications is different, as has been pointed out by Mærsk, the Commission and the Advocate General at point 41 of his Opinion. The action for damages is based on the law governing non-contractual liability, whereas the application for the establishment of a liability limitation fund is based on the 1957 Convention and on the Netherlands legislation which gives effect to it.

39 Accordingly, without it being necessary to examine the third condition that the proceedings must be between the same parties, the conclusion must be drawn that, in the absence of identical subject-matter and an identical cause of action, there is no situation of *lis pendens* within the terms of Article 21 of the Brussels Convention between a set of proceedings seeking the establishment of a fund to limit the liability of a shipowner, such as the application made in the main proceedings before a court in the Netherlands, and an action for damages brought before the court making the reference for a preliminary ruling.

40 That conclusion does not, in principle, preclude application of Article 22 of the Brussels Convention, as has been pointed out by the United Kingdom Government and by the Advocate General at point 45 of his Opinion. Applications such as those in issue in the main proceedings are sufficiently closely connected to be capable of being regarded as 'related' within the meaning of the third paragraph of Article 22, with the result that the court second seised may stay proceedings.

41 There are, however, no grounds in the present case for examining the conditions governing application of Article 22 of the Brussels Convention or, in particular, for determining which would, in that event, have been the court first seised, as it is clear from the order making the reference that the proceedings before the Arrondissementsrechtbank Groningen have been definitively terminated and that, in the absence of any claims having been submitted by persons injured, the sum lodged with the Arrondissementsrechtbank was returned to the shipowners in December 1988. In those circumstances, there are no longer any 'related actions' within the meaning of Article 22 of the Convention.

42 In the light of the foregoing, the answer to the first question must be that an application to a court of a Contracting State by a shipowner for the establishment of a liability limitation fund, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner do not create a situation of *lis pendens* within the terms of Article 21 of the Brussels Convention.

The second question

43 By its second question, the Højesteret asks whether a decision ordering the establishment of a liability limitation fund, such as that in issue in the main proceedings, is a judgment within the meaning of Article 25 of the Brussels Convention.

44 In this connection, it should be borne in mind that, under Article 25, a 'judgment' for the purposes of the Brussels Convention, means 'any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called'.

45 As the Court has already ruled (see Case C-414/92 *Solo Kleinmotoren* [1994] ECR I-2237, paragraph 17), in order to be a 'judgment' for the purposes of the Convention the decision in question must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties.

46 As is pointed out in the Report on the Brussels Convention (OJ 1979 C 59, p. 71, point 184), Article 25 of that Convention is not limited to decisions which terminate a dispute in whole or in part, but also applies to provisional or interlocutory decisions.

47 Consequently, a decision such as the order made on 27 May 1987 by the Arrondissementsrechtbank Groningen, which provisionally fixed the amount to which the liability of a shipowner would be limited, comes within the scope of Article 25 of the Brussels Convention.

48 Mærsk nevertheless submits that this order cannot be a judgment within the meaning of Article 25 as it was made at the conclusion of non-contested proceedings.

49 That objection cannot be accepted.

50 While it is true that, according to settled case-law, the Convention is concerned essentially with judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin, and under various procedures, of an inquiry in contested proceedings (Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 13), it must be stated clearly that, even if it was taken at the conclusion of an initial phase of the proceedings in which both parties were not heard, the order of the Netherlands court could have been the subject of submissions by both parties before the issue of its recognition or its enforcement pursuant to the Convention came to be addressed (see also, along these lines, Case C-474/93 *Hengst Import* [1995] ECR I-2113, paragraph 14).

51 It is thus evident from the case-file that such an order does not have any effect in law prior to being notified to claimants, who may then assert their rights before the court which has made the order by challenging both the right of the debtor to benefit from a limitation of liability and the amount of that limitation. Claimants may, in addition, lodge an appeal against that order challenging the jurisdiction of the court which adopted it — as indeed happened in the main proceedings in the present case.

52 In the light of the foregoing, the answer to the second question must be that a decision ordering the establishment of a liability limitation fund, such as that in the main proceedings in the present case, is a judgment within the terms of Article 25 of the Brussels Convention.

The third and fourth questions

53 By its third and fourth questions, which it is appropriate to examine together, the Højesteret asks whether a decision establishing a liability limitation fund, in the absence of prior service on the claimant concerned, may be refused recognition in another Contracting State pursuant to Article 27(2) of the Brussels Convention, even in the case where the claimant has appealed against that decision in order to challenge the jurisdiction of the court which delivered it but without having previously objected to default of service of the document instituting the proceedings.

54 It should be borne in mind in this regard that Article 27 of the Convention sets out the conditions governing recognition, in one Contracting State, of judgments delivered in another Contracting State. Article 27(2) states that recognition of a judgment is to be refused 'where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence'.

55 According to settled case-law, the purpose of Article 27(2) of the Convention is to ensure that a judgment will not be recognised or enforced under the Convention if the defendant has not had an opportunity to put his defence before the court which gave the judgment (Case 166/80 *Klomps* [1981] ECR 1593, paragraph 9, Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 38, and *Hengst Import*, cited above, paragraph 17).

56 It follows that non-recognition of a judgment for the reasons set out in Article 27(2) of the Brussels Convention is possible only where the defendant was in default of appearance in the original proceedings. That provision cannot therefore be relied on where the defendant appeared, at least if he was notified of the elements of the claim and had the opportunity to arrange for his defence (*Sonntag*, cited above, paragraph 39).

57 In the present case, Mærsk did not at any time make an appearance in the proceedings for the establishment of a liability limitation fund. Although it appealed against the order of 27 May 1987, that appeal, which, as the Advocate General has stated at point 60 of his Opinion, related only to the jurisdiction of the court which issued the order, cannot be treated as equivalent to an appearance by a defendant in proceedings for limiting the liability of shipowners to a specific maximum amount. The defendant must therefore be considered in default of appearance within the terms of Article 27(2) of the Convention.

58 That being so, in order that the decision establishing a liability limitation fund could be recognised in accordance with the Brussels Convention, the document instituting the proceedings must have been duly served on Mærsk and in sufficient time to enable it to arrange for its defence.

59 Account must be taken in this regard of the special features of the procedure for the establishment of a liability limitation fund, as governed by Netherlands law, under which an order provisionally determining the maximum amount of liability is at first provisionally adopted by the court at the conclusion of a unilateral procedure, which is then followed by reasoned submissions by both parties, as has been pointed out in paragraph 50 of the present judgment. Such an order must be treated as a document that is equivalent to a document instituting proceedings within the meaning of Article 27(2) of the Convention.

60 According to the case-file, the administrator appointed by the Arrondissementsrechtbank Groningen informed Mærsk by registered letter of 1 February 1988 of the content of the order of 27 May 1987 and, according to the information provided by the Netherlands Government, such notification is due and proper under Netherlands law and under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed in The Hague on 15 November 1965, which was, at the time of the facts in the main proceedings in

the present case, binding on the Kingdom of the Netherlands and the Kingdom of Denmark.

61 It is for the court in which enforcement is sought to determine whether notification was effected in the due and proper form and in sufficient time to enable the defendant to arrange its defence effectively, account being taken of all the circumstances of the case (*Klomps*, cited above, paragraph 20, and Case 49/84 *Debaecker and Plouvier* [1985] ECR 1779, paragraph 31).

62 In the light of the foregoing, the reply to the third and fourth questions must be that a decision to establish a liability limitation fund, in the absence of prior service on the claimant concerned, and even where the latter has appealed against that decision in order to challenge the jurisdiction of the court which delivered it, cannot be refused recognition in another Contracting State pursuant to Article 27(2) of the Brussels Convention, on condition that it was duly served on or notified to the defendant in good time.

Costs

63 As these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. The costs involved in submitting observations to the Court, other than those of the parties to the main proceedings, are not recoverable.

On those grounds, the Court (Third Chamber), hereby rules:

1. **An application to a court of a Contracting State by a shipowner for the establishment of a liability limitation fund, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner do not create a situation of *lis pendens* within the terms of 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.**

2. **A decision ordering the establishment of a liability limitation fund, such as that in the main proceedings in the present case, is a judgment within the terms of Article 25 of that Convention.**

3. **A decision to establish a liability limitation fund, in the absence of prior service on the claimant concerned, and even where the latter has appealed against that decision in order to challenge the jurisdiction of the court which delivered it, cannot be refused recognition in another Contracting State pursuant to Article 27(2) of that Convention, on condition that it was duly served on or notified to the defendant in good time.**

Signatures.