

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 17 JUNE 1982¹

*Mr President,
Members of the Court,*

Pendy Plastic Products [hereinafter referred to as "Pendy"], the appellant on a point of law in the main proceedings, which has its registered office in Helmond in the Netherlands, brought an action before the court in 's-Hertogenbosch in the spring of 1970 against Pluspunkt Handelsgesellschaft [hereinafter referred to as "Pluspunkt"], which has its registered office in Neuss in the Federal Republic of Germany. Apparently, the action was initiated in the following manner: the writ and the summons to attend a hearing on 27 April 1979 were transmitted on 26 March 1979 to the Netherlands Officier van Justitie at the court in 's-Hertogenbosch, which is permissible under Netherlands law for the purpose of service abroad. Furthermore, aforementioned documents were to be served through official channels on the defendant at 36 Kaarster Straße, Neuss, that is to say the address which the plaintiff, later the appellant on a point of law, knew at the time.

However, it proved impossible to effect service because in April 1979 the defendant had transferred its business premises to another address in Neuss, of which the plaintiff claims to have learnt from the Chamber of Commerce for the Central Lower Rhine towards the end of April 1979. The Amtsgericht [local court] Neuss, whose assistance had been requested, issued a certificate on 17 May 1979 — perhaps a little too hastily and without carrying out sufficient inquiries — indicating that it had not been possible to effect service in accordance with Article 6 (2) of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extra-judicial Documents in Civil

or Commercial Matters [hereinafter referred to as "the Hague Convention"].

On 8 June 1979 the court in 's-Hertogenbosch delivered an interlocutory judgment on account of the defendant's failure to enter an appearance. It enjoined the plaintiff to prove that the defendant had had an opportunity to receive the summons in sufficient time or that all necessary steps had been taken to enable it to arrange for its defence. At the same time, it adjourned the proceedings until 20 July 1979.

The plaintiff complied with that order by submitting to the court the answers which it had received from the Residents Registration Office, Neuss, and the Commercial Register, Neuss, according to which the defendant's address was, in so far as any details were given, "36 Kaarster Straße, Neuss". Accordingly, in the opinion of the court in 's-Hertogenbosch, the plaintiff had demonstrated to the court's satisfaction that it had taken all the necessary steps to locate the person on whom the documents were to be served. Their transmission to the Netherlands Officier van Justitie, as evidenced by the document issued on 26 March 1979, was thus regarded as sufficient. The Netherlands court then gave judgment in default on 14 September 1979 ordering the defendant to pay a certain sum, plus interest and the costs of the proceedings. That judgment was declared provisionally enforceable and served on the defendant by the Amtsgericht Neuss on 10 December 1979. That, it seems, is when the defendant heard for the first time that proceedings had been instituted against it. It apparently lodged an appeal against that judgment but we know nothing of the outcome.

¹ — Translated from the German.

In order to enforce that judgment the plaintiff subsequently applied to the Landgericht [Regional Court] Düsseldorf pursuant to Article 31 et seq. of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [hereinafter referred to as "the Brussels Convention"] for the issue of an enforcement order. The application was dismissed on 24 July 1980, essentially in reliance on the principle of the right to a proper hearing and on the ground that the defendant had had no knowledge of the proceedings instituted against it.

because the defendant had not received any notice of the proceedings. In that respect, the steps taken by the plaintiff to discover the defendant's address were wholly inappropriate — as the plaintiff, which is a business undertaking, might have realized — since it should not have confined itself to approaching the Residents Registration Office, which does not record the addresses of commercial premises, and the Commercial Register, which does not list the addresses of undertakings, but should at least have applied to the Chamber of Commerce for information.

The appeal lodged against that decision was also dismissed. In its judgment of 6 January 1981 the Oberlandesgericht [Higher Regional Court] Düsseldorf held that, according to the second paragraph of Article 34 in conjunction with Article 27 (2) of the Brussels Convention, it was for the court of the State in which enforcement was sought to establish whether service had been effected properly. In that regard it was clear that service had not been effected in accordance with the Hague Convention; it had merely been attempted, and since the Convention contained no other provisions which were relevant in those circumstances the proceedings had culminated in the issue of a certificate attesting that it had been impossible to effect service. Nor had the documents been served in compliance with the Netherlands provisions on service by public notice, since there had been no notification in a newspaper, as required by those provisions. Instead, the documents had merely been transmitted to the Officier van Justitie, which is sufficient under Netherlands law for the purpose of service abroad. In any event, Article 27 (2) of the Brussels Convention provided that the principle of the right to a proper hearing must be observed. That principle had however been contravened

Pendy then appealed on a point of law to the Bundesgerichtshof [Federal Court of Justice]. It contended that, since service through official channels had proved impossible, as was apparent from the certificate issued by the Amtsgericht Neuss, the Netherlands court had been right to accept service by public notice. The only thing which mattered in those circumstances was that the Netherlands court had complied with Article 20 of the Brussels Convention in conjunction with Article 15 of the Hague Convention. Accordingly, it was no longer permissible for the court in which enforcement was sought to question whether the documents had been properly served under Netherlands law.

The Bundesgerichtshof, which proceeds on the assumption that the Hague Convention applies in the Federal Republic of Germany and in the Netherlands, is uncertain about the nature of the power of examination vested in the court in which enforcement is sought by Article 27 (2) of the Brussels Convention. The Bundesgerichtshof's doubts stem from Article 20 of the Brussels Convention and Article 15 of the Hague Convention. It inclines to the

view that the court in which enforcement is sought is entitled to examine the judgment if the court of the State in which it was given conducted an investigation under Article 20 of the Brussels Convention and Article 15 of the Hague Convention and disregarded essential matters. In the opinion of the Bundesgerichtshof, however, it may also be argued that where the court of the State in which the judgment was given endeavoured to ascertain in accordance with Article 20 of the Brussels Convention whether the defendant had an opportunity to arrange for his defence, the third paragraph of Article 34 of that Convention requires that its findings should be accepted without further inquiry by the court of the State in which enforcement is sought.

Accordingly, by decision of 8 July 1981 the Bundesgerichtshof stayed the proceedings and referred to the Court of Justice, under Article 3 of the Protocol on the interpretation by the Court of Justice of the Brussels Convention, the following question for a preliminary ruling:

“May recognition of a judgment be refused in accordance with Article 27 (2) of the Brussels Convention where the defendant did not enter an appearance in the proceedings in the adjudicating State and he was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence, even where the court of the State in which the judgment was given established, in accordance with the third paragraph of Article 20 of the Convention in conjunction with Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial documents in Civil or Commercial Matters, that the defendant had an opportunity to receive the writ in sufficient time to enable him to arrange for his defence?”

The Governments of the Federal Republic of Germany, the United Kingdom and the Italian Republic and the Commission of the European Communities have suggested that the question should be answered in the affirmative. In my opinion, there can be no other answer.

1. However, I should first like to remind the Court of the contents of the provisions which are relevant to these proceedings.

The second paragraph of Article 20 of the Brussels Convention provides that, where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance:

“The Court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.”

However, in the circumstances of this case, the aforesaid provision is, according to the third paragraph of Article 20, to be replaced by Article 15 of the Hague Convention, which provides that:

“Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that —

- (a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic

actions upon persons who are within its territory, or

- (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled —

- (a) the document was transmitted by one of the methods provided for in this Convention,
- (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed."

The Netherlands has made such a declaration. It was published in the Bundesgesetzblatt (1980, Part II, p. 912) and provides as follows:

"Notwithstanding the provisions of the first paragraph of Article 15 of the Convention, the Netherlands court may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled —

- (a) the document was transmitted by one of the methods provided for in the Convention,
- (b) a period of time of not less than six months, laid down by the court in the particular case, has elapsed since the date of the transmission of the document,
- (c) no certificate of service or delivery has been received, even though every reasonable effort has been made to obtain it through the competent authorities."

It is also significant that, according to Article 34 of the Brussels Convention, an application to the court of the country in which enforcement is sought for the issue of an enforcement order may be refused only for one of the reasons specified in Articles 27 and 28. Article 27 provides, in so far as it is relevant, that:

"A judgment shall not be recognized:

- 1. if such recognition is contrary to public policy in the State in which recognition is sought;
- 2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence."

2. In order to solve the problem raised by the Bundesgerichtshof, reference may be made in particular to Case 166/80¹, which also involved Article 27 (2). That occurred in connection with the enforcement in the Netherlands of a German order, equivalent to a judgment

¹ — Judgment of 16 June 1981 in Case 166/80 *Klomp v Michel* [1981] ECR I593.

by default, which had been granted after the German court had established that the document instituting the proceedings had been duly served on the defendant at his address in Germany.

In this regard, it was stated in the preliminary ruling that the purpose of Article 27 (2) of the Brussels Convention is to prevent the recognition and enforcement of judgments if the guarantees provided by the law of the State in which the judgment was given and by the Brussels Convention are not sufficient to ensure that the defendant had an opportunity to arrange for his defence. Under that provision the court of the State in which enforcement is sought must determine whether two requirements were satisfied: the first relates to the proper service of the document and the test is to be carried out by reference both to the law of the State in which the judgment was given and to the Convention, which is binding on that State: the second concerns the time required by the defendant to prepare his defence and necessitates findings of fact. A decision given in the original State in connection with the first of the aforementioned requirements does not release the court of the State in which enforcement is sought from the duty to ascertain whether the second requirement was complied with. The court in which enforcement is sought must establish in each case whether there are exceptional circumstances leading to the conclusion that service was sufficient to enable the defendant to arrange for his defence; for this purpose all the circumstances of the case, including the manner in which service was effected, must be taken into consideration.

Accordingly, it is clear that the fundamental purpose of Article 27 (2) is to ensure that the defendant has an opportunity to prepare a proper defence or, in other words, that the principle of the right to a proper hearing is observed

(see in that connection Geimer, *Anerkennung gerichtlicher Entscheidungen nach dem EWG-Übereinkommen vom 27. September 1968*, *Recht der Internationalen Wirtschaft* 1976, p. 139 et seq.; Droz, *Compétence judiciaire et effets des jugements dans le marché commun*, 1972, No 500). Furthermore, in my opinion it is possible to deduce from that judgment a principle that the court in which enforcement is sought must act independently in assessing that matter and is not bound by the findings of the adjudicating court.

3. (a) It must of course be recognized that the provisions of Title II of the Brussels Convention, and indeed those of Article 15 of the Hague Convention, serve to protect the interests of the defendant.

However, it is clear from the rules as a whole, in the light of the declaration made by the Netherlands pursuant to Article 15, that no adequate guarantee is provided of the defendant's actually being notified of the document instituting the proceedings and having an opportunity to arrange for his defence accordingly. As the Jenard Report on the Brussels Convention (*Official Journal C* 59, 5. 3. 1979, p. 39) stated Netherlands law is characterized *inter alia* by the fact that the formalities connected with judicial documents intended for a person living abroad, are localized in the territory of the State of the forum, which means in effect that the documents are considered to have been duly served if they have been transmitted to the Procureur Generaal or Officier van Justitie at the competent Netherlands court or forwarded to the Ministry for Foreign Affairs. That was apparently the position even after the entry into force of the Hague Convention, as may be inferred from the German Government's memorandum thereon (*Drucksache des Deutschen Bundestages*, 8/217 II A 1 b),

which was referred to by the Commission.

That alone suffices to show that it is reasonable to assume that the examination by the court of the State in which the judgment was given of the question whether the defendant had an opportunity to arrange for his defence is not final and that a second, independent examination in the State in which enforcement is sought must be performed in order to determine whether the defendant genuinely had an opportunity to arrange for his defence before the judgment by default was given.

(b) I have already pointed out that Article 27 (2) of the Brussels convention reflects the basic concern to ensure observance of the principle of the right to a proper hearing. In order to clarify the meaning of that principle reference was made in the course of the proceedings to the Court's judgment in Case 125/79¹, and to the fact that the principle is often regarded as a matter of public policy. In any event, that was emphasized in relation to English law and it also holds true for French law, according to the French Court of Cassation (judgment of 4 October 1967, cited by Droz, *op. cit.*, p. 317). It may therefore be stated without further inquiry that provisions having such a content are not to be interpreted restrictively, that is to say they must not be construed as curtailing the powers of the courts which are responsible for their application.

(c) It was also argued — quite rightly — that according to an internationally recognized principle, the courts' decision-making powers are unfettered and may not be assumed to be restricted as regards the determination and appraisal of the facts unless such a restriction has been expressly laid down.

Such a provision is indeed contained in the third paragraph of Article 34 of the Brussels Convention in relation to the review of the substance of a foreign judgment and in the second paragraph of Article 28, which provides as follows:

"In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be *bound by the findings of fact* on which the court of the State in which the judgment was given based its jurisdiction."

Article 5 of the Convention of 30 August 1962 between Germany and the Netherlands contained a provision to the same effect.

However, as far as the inquiry to be conducted under Article 27 (2) of the Brussels Convention is concerned, no restrictions whatsoever are imposed either by that or by any other provision of the Convention. In particular, it does not contain any proviso in relation to Article 20. Nor may it be said with certainty that the conclusion must perforce be drawn from the last-mentioned article — as would be necessary in view of the principle under discussion — that its purpose is to restrict the scope of the inquiry to be conducted by the court in which enforcement is sought.

4. Finally, it is also significant that Article 46 of the Brussels Convention requires, in the case of a judgment given in default, the party seeking recognition or applying for enforcement of the judgment to produce the document establishing that the party in default was served with the document instituting the proceedings. This, in particular the absence of any restriction, undoubtedly suggests that the court of the State in which enforcement is sought must examine the manner in which service was effected and cannot therefore simply

¹ — Judgment of 21 May 1980 in Case 125/79 *Denilvaux v. Couvreur Freres* [1980] ECR 1553.

proceed on the assumption that the tests which were to be conducted by the court in which the judgment by default was given were sufficient.

Moreover, the opinion which I have expressed is also held by various academic lawyers.

I would refer to the above-mentioned article by Geimer, in which it is emphasized that the questions of public policy which must be considered include the question whether in the foreign proceedings any fundamental procedural requirements which may not be waived in the second State were infringed, and that in conducting such an inquiry the court of the second State is not bound by the findings of fact made by the first court.

Moreover, a number of interesting statements are contained in "Internationaler Rechtsverkehr in Zivil- und Handelssachen, Erläuterungen zu dem Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung

gerichtlicher Entscheidungen in Zivil- und Handelssachen," by Bülow-Böckstiegel. There it is pointed out (in Note III 4 (a) to Article 27) that, precisely because certain forms of service, such as service by public notice, are fictitious, it is required — as a necessary corrective — that service should be effected in sufficient time and that the defendant should have an opportunity to arrange for his defence. It is also stated that, because of the disruptive impact of judgments by default, Article 27 (2) contains an exception, concerning the proper service of documents, to the rule that the judgment may not be reviewed as to its substance. Moreover, even where the adjudicating court has already determined, pursuant to the second paragraph of Article 20 of the Brussels Convention or Article 15 of the Hague Convention, that service was effected in sufficient time, the court in which recognition is sought may, according to Bülow-Böckstiegel, re-examine the question and may arrive at quite different findings (Note III 4 (b) to Article 27).

5. Accordingly, I propose that the court should answer the question submitted by the Bundesgerichtshof as follows:

"Article 27 (2) of the Brussels Convention is to be interpreted as meaning that even where the court of the State in which the judgment was given established, pursuant to the third paragraph of Article 20 of the Brussels Convention in conjunction with Article 15 of the Hague Convention, that the defendant had an opportunity to receive the writ in sufficient time to enable him to arrange for his defence, the court of the State in which enforcement is sought must, where the defendant failed to enter an appearance in the proceedings in the State in which the judgment was given, ascertain independently whether the defendant was duly served with the document instituting the proceedings in sufficient time to enable him to arrange for his defence; if it comes to the conclusion that that was not the case it must refuse to recognize the judgment."