

OPINION OF ADVOCATE GENERAL
LÉGER

delivered on 5 December 2002 ¹

1. By order of 22 February 2001, the Oberster Gerichtshof (Supreme Court) (Austria) referred to the Court for a preliminary ruling three questions on the interpretation of Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.² That provision establishes, in essence, that where proceedings involving the same cause of action and with the same subject-matter are brought between the same parties before the courts of different Contracting States the court seised in second place must decline jurisdiction in favour of the court first seised.

I— Legal background

A — *The Convention*

2. According to its preamble, the Convention is intended to facilitate the recognition and enforcement of court judgments, in consonance with Article 293 EC, and to strengthen the legal protection in the European Community of persons established in the Community. The recital thereto states that it is necessary for that purpose to determine the international jurisdiction of the Contracting States.

3. The rules on jurisdiction are contained in Title II of the Convention. Section 8, 'Lis pendens — related actions', seeks to prevent conflicting decisions and thus to ensure the proper administration of justice in the Community.³

1 — Original language: French.

2 — OJ 1978 L 304, p. 36. Convention 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 of the Kingdom of Sweden (OJ 1997 C 15, p. 1). A consolidated version of the Convention, as amended by those four accession conventions, is published in OJ 1998 C 27, p. 1 (hereinafter 'the Convention').

3 — Report concerning the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, known as the 'Jenard Report' (OJ 1979 C 59, p.1).

4. Article 21 on *lis pendens* provides that:

‘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.’

5. Article 22, which is concerned with related actions provides that:

‘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.’

B — *Austrian law*

6. In order to understand the case, it is appropriate to set out the principles of the Austrian law on set-off. As regards the concept of ‘set-off’, suffice it to note that it is a form of extinguishment of obligations. It has the effect of simultaneously extinguishing different obligations between two persons who are debtors of each other, to the extent of the lower debt.

7. According to Austrian law, set-off occurs by the unilateral declaration of one of the parties to the other.⁴ Further types of set-off found in other European national laws, such as legal set-off (by operation of law) and judicial set-off (by order of a court), do not exist. The declaration may be made either extrajudicially or in proceedings. The declaration of set-off has the same effect whether it was made in an

⁴ — Set-off by agreement (two reciprocal declarations) is also possible.

extrajudicial declaration or in proceedings. It is always retroactive — both debts are deemed to be extinguished on the date on which the requirements for set-off are satisfied, not on the date of the declaration of set-off, and the court merely makes a finding that the set-off has occurred.

II — Factual background and procedure in the main proceedings

8. Gantner Electronic GmbH⁵ is an Austrian company which manufactures and sells carrier pigeon clocks. In the context of its business relationship with the Netherlands company Basch Exploitatie Maatschappij BV,⁶ it delivered goods to the latter to be resold in the Netherlands.

9. Taking the view that Basch had failed to pay the purchase price of goods delivered and invoiced up to June 1999, Gantner terminated their business relationship.

10. On 7 September 1999, Basch then brought an action before the Arrondis-

sementsrechtbank (Regional Court) Dordrecht (Netherlands) seeking damages of EUR 2 520 814.26⁷ from Gantner. It asserted that since Gantner had terminated a contractual relationship which had existed for over 40 years, the notice period should have been longer. It emerges from the order for reference⁸ that Basch believed itself entitled to EUR 2 700 428.82⁹, but considered that EUR 170 852.34¹⁰ relating to claims by Gantner which it considered legitimate, should be deducted from that amount. That deduction gives the sum of EUR 2 520 814.26 which it claimed. It accordingly then declared its intention to set off that sum,¹¹ as established in Netherlands and Austrian law.

11. On 22 September 1999,¹² Gantner brought an action before the Landesgericht (Regional Court) Feldkirch (Austria) for an order that Basch pay it the purchase price of goods delivered up to 1999 amounting to EUR 837 460.18.¹³ Gantner did not plead that debt in the proceedings in the Netherlands.

7 — The order for reference gives the amount claimed as NLG 5 555 143.60 (p. 3).

8 — Pages 3 and 4.

9 — The order for reference gives this amount as NLG 5 950 962 (p. 4).

10 — The order for reference gives this amount as NLG 376 509 (p. 4).

11 — Hereinafter 'the extrajudicial set-off'.

12 — Those proceedings were served on Basch on 21 December 1999.

13 — The order for reference states that the sum in question is ATS 11 523 703.30 (p. 4).

5 — Hereinafter 'Gantner'.

6 — Hereinafter 'Basch'.

12. Basch argued that the proceedings should be dismissed. It asserted that the part of Gantner's claim which it considered legitimate (EUR 170 852.34) had been extinguished by extrajudicial set-off and that the balance (EUR 666 607.84) was set off¹⁴ by the remainder of its claim for damages forming the subject-matter of the proceedings in the Netherlands. Basch further applied to the Austrian court to stay the proceedings on the grounds of *lis pendens* in accordance with Article 21, or of related actions in accordance with Article 22 of the Convention.

13. The Austrian court of first instance refused to stay the entire proceedings. It did however suspend the proceedings in relation to the objection of set-off.

14. Basch lodged an appeal against the decision not to suspend the entire proceedings. The appeal court, finding that the defence of payment by extrajudicial set-off could give rise to *lis pendens* between the two sets of proceedings, set aside the decision at first instance.

14 — To distinguish between the two forms of set-off claimed by Basch, the latter set-off shall be referred to hereinafter as an 'objection of set-off' in the sense that the declaration of intention required by Austrian law was made in the course of court proceedings. There is no question here, as I indicated in point 6 of this Opinion, of judicial set-off as exists in other national legal systems.

15. Gantner appealed against that decision to the Oberster Gerichtshof.

III — The preliminary questions

16. The Oberster Gerichtshof took the view that the outcome of the main proceedings depended on the interpretation of Article 21 of the Convention. It therefore stayed the proceedings and referred the following questions to the Court 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 extrajudicial 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 pro-

ceedings initiated by a later action decisive and the defences 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?

the second, on the other hand, in the Austrian proceedings is irrelevant from the perspective of Austrian law¹⁵ — in either situation, if the legal requirements for set-off to operate are satisfied, Gantner's claim would in its view be extinguished on the date on which they were fulfilled.¹⁶ The Austrian court should therefore find, Basch contends, that on the date on which judgment is delivered Gantner's claim does not exist.

- (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?

18. The difficulty emerges from the fact that the part of Basch's claim for damages which is the subject-matter of the objection of set-off is also the subject-matter of the proceedings which the latter has brought in the Netherlands. That raises two issues. First, the Austrian court, in determining whether the objection of set-off is made out, has to examine the same claim as that which is the subject-matter of the action in the Netherlands. Second, when it examines the validity of the other defence of (extra-judicial) set-off, it must address the issue of whether there was a dealership contract, which the Netherlands court will also examine.

IV — The subject-matter of the preliminary questions

17. Given the complexity of the facts of the dispute and of the main proceedings, it is useful to give a brief summary of the position. Basch asserts, in essence, that Gantner's claim has been extinguished as the result of the two instances of set-off between that claim and its claim for damages. The fact that the first set-off was claimed outside any proceedings and

19. The referring court is in doubt as to whether those circumstances give rise to *lis*

¹⁵ — See point 6 of this Opinion. Netherlands law appears to be similar to Austrian with regard to set-off.

¹⁶ — See point 7 of this Opinion.

pendens within the meaning of Article 21 of the Convention.¹⁷

subject-matter of the dispute. It would in consequence be necessary, in the view of that court, to take the objection of set-off into account in determining whether the action against which it is raised has 'the same cause of action' as a different action brought before the courts of another Contracting State (the second preliminary question).

20. The first question raised is to what extent set-off pleaded as a procedural objection can give rise to *lis pendens*. The referring court seems to believe that an objection of set-off should be treated as a claim, enabling it to decline jurisdiction over that objection as it would over any other application, whether originating or in counterclaim (the first preliminary question). It takes the view that, if it cannot equate the objection to a claim (and therefore cannot decline jurisdiction over the objection alone), the question remains whether the fact that it has to examine Basch's claim is such as to widen the

21. If the answer to the first preliminary question is affirmative, it seems evident that the objection of set-off is the same as the proceedings brought in the Netherlands. Both turn on the existence of the part of Basch's claim in damages which was not extinguished by extrajudicial set-off. The Austrian court should therefore decline jurisdiction over that objection.

17 — To my mind the issue raised in this case will only arise before the courts of Contracting States which allow set-off by unilateral declaration. In those States which distinguish between 'legal set-off' and 'judicial set-off', it would appear that only legal set-off can be relied on as a procedural objection, whereas judicial set-off has to be the subject-matter of a counterclaim. So, given the requirements imposed by the law for legal set-off to occur (the debts must be reciprocal, certain, enforceable and liquidated), there will be no legal set-off, and hence no objection of set-off, where one of the debts is the subject-matter of a claim. Should the defendant wish to raise in defence a debt which is not certain or not liquidated it must, apparently, bring a counterclaim. Accordingly, in those circumstances, it is clear that, where the defendant's claim is the subject-matter of proceedings in another Contracting State, only the counterclaim will be affected by *lis pendens* and the national court will only be required to decline jurisdiction over that claim. In Contracting States which do not have judicial set-off, set-off can be pleaded as an objection or as a claim but the national court must, in any event, always give leave for the plea. In my view the national court before which an objection of set-off is raised will decline to admit the plea if the defendant's claim is the subject-matter of proceedings pending before another court. As regards the distinctions between the various families of laws on set-off, see my Opinions in *Dawvaari Production* (Case C-341/93 [1995] ECR I-2053, paragraph 31) and *Commission v CCRE* (Case C-87/01 P, paragraphs 32 and 34), pending before the Court of Justice.

22. Conversely, if one takes the view that the objection cannot be treated as being a claim, but that the objection of set-off must be taken into account in comparing both the actions in issue (a negative reply to the first question and an affirmative reply to the second), they should in my view be regarded as having 'the same cause of action', given the similarity between the objection of set-off and the proceedings in the Netherlands. The Austrian court should therefore decline jurisdiction over the entire proceedings.

23. There remains, lastly, the question whether, in the hypothesis that an objection of set-off should be treated as a claim, the national court should also decline jurisdiction over the defence of extrajudicial set-off. That is the subject of the third preliminary question.

24. The referring court asserts that, in Austrian law, those ‘proceedings’ are not regarded as being the same as those brought in the Netherlands, but as related,¹⁸ and do not give rise to *lis pendens*. It is not convinced, however, that this national solution remains valid in the context of Article 21 of the Convention. It points out that the Court of Justice, in *Gubisch Maschinenfabrik*¹⁹ held that there was *lis pendens* in circumstances where the issue raised as a principal head of claim in one set of proceedings was merely a preliminary question for disposal of the other. In that case, the two actions in issue sought, respectively, enforcement of an international sale of goods contract and a finding that the contract was invalid. The Court held that the question as to whether the contract was binding lay at the heart of both actions²⁰ and that there was a danger of irreconcilable decisions if both sets of

proceedings were not heard by the same court.²¹

25. The referring court states that the circumstances of the present case are not exactly the same as those which gave rise to the judgment in *Gubisch Maschinenfabrik*. Whilst in that case both actions raised the issue of the validity of the contract, here the question as to whether there was a dealership contract is merely preliminary in both sets of proceedings. The referring court therefore asks whether the Court intends to broaden even further the concept of ‘the same cause of action’ with the effect of finding that there is *lis pendens* in a situation such as that of the case before it.

26. That is how, in my view, one should understand the third question the Oberster Gerichtshof has referred to the Court. By that question the referring court enquires, it is true, whether the Netherlands court’s finding as to whether there was a contract is binding on the Austrian court. I believe, however that the referring court is merely seeking to ascertain whether there is *lis pendens* between the defence of extrajudicial set-off and the proceedings pending in the Netherlands.²²

18 — It explains that, in Austrian law, a court’s finding on a preliminary question (such as, in the instant case, whether there was a dealership contract) is not binding on a court which subsequently hears different proceedings but which raise the same issue, still as a preliminary question. This means that, in its view, where both sets of proceedings are pending at the same time, there is no *lis pendens*.

19 — Case 144/86 [1987] ECR 4861, paragraphs 16 to 18. In that judgment the Court opted for a broad definition of that concept, finding that two actions, seeking performance of an international sale contract and a finding that it was invalid, respectively, did have the same cause of action within the meaning of Article 21 of the Convention.

20 — Paragraph 17.

21 — Paragraph 18.

22 — That interpretation of the preliminary question is borne out by the recitals to the order for reference which refer only to the issue of *lis pendens*. Moreover, the only question before the referring court is that of the existence of *lis pendens* between the proceedings brought in Austria and those brought in the Netherlands. All its questions therefore seek to enable it to give a ruling on that issue.

27. It therefore seems to me that the preliminary questions can be formulated as follows:

V — The replies to the preliminary questions

A — *The first question*

(1) Does the concept of 'the same cause of action' in Article 21 of the Convention extend also to an objection of set-off?

28. The referring court enquires whether the concept of 'the same cause of action' within the meaning of Article 21 of the Convention extends to the objection of set-off pleaded by Basch. The question seeks to ascertain whether an objection of set-off can be treated as a claim, so that the court called upon to rule must, in response to such an objection to a claim which is the subject-matter of other proceedings, decline jurisdiction over that objection as it would have to do over a claim.

(2) In ascertaining whether proceedings have 'the same cause of action', are only the pleadings of the plaintiff in the proceedings decisive and, in consequence, is the objection of set-off raised by the defendant irrelevant?

29. The reply to that question should be in the negative.

(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 binding in subsequent proceedings between the same parties relating to the existence of that obligation with the effect that, if the second set of proceedings is brought before the first proceedings are concluded, it would give rise to *lis pendens*?

30. The issue was raised in *Meeth*.²³ On that occasion the Bundesgerichtshof (Federal Court of Justice) (Germany) asked the Court to interpret the first paragraph of Article 17 of the Convention.²⁴ The point

²³ — Case 23/78 [1978] ECR 2133.

²⁴ — That provision states that '[i]f the Parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction'.

at issue was whether the German court appointed by the parties under a clause attributing jurisdiction as the sole court with jurisdiction to hear claims by one of the parties against the other had jurisdiction to hear an objection of set-off raised by the defendant. The clause attributing jurisdiction had the effect of precluding the defendant from pleading set-off as a counterclaim. The referring court enquired whether such a clause could also preclude a plea of set-off as a pure defence. The Court appears to have taken the view that, unless the parties excluded that possibility, the court should take the set-off into account.²⁵ Advocate General Capotorti had gone further in his Opinion in the case and, having clearly distinguished an objection of set-off from a counterclaim, had taken the view that the parties could not exclude the objection of set-off from the jurisdiction of the court before which the proceedings had been brought. He had stated that '[t]o consider that the defence should be brought before a different court from that seised of the main action would entail dissolving the unity of the procedure and would disregard the rights of the defence'.²⁶

31. The Court has clearly held, in *Danvaern Production*,²⁷ that an objection of set-off is not a counterclaim. In that case the Court was called upon, by the Vestre Landsret (Western Regional Court) (Denmark), to determine whether the expression 'counterclaim' used in Article 6(3)

of the Convention²⁸ should be interpreted as covering counterclaims in set-off.²⁹ The Court held that the term 'counterclaim' should be reserved for situations where the defendant seeks the pronouncement of a separate judgment against the plaintiff. If the defendant pleads as a pure defence a claim which he allegedly has against the plaintiff, that claim is not a counterclaim.³⁰

32. It therefore emerges from the case-law of the Court that an objection of set-off must be distinguished from a counterclaim. Admittedly, the aforementioned judgments in *Danvaern Production* and *Meeth* did not concern Article 21 but other provisions of the Convention. However, I believe the same conclusion should apply where the issue is one of ascertaining whether there is *lis pendens*.

25 — *Meeth* (paragraph 8).

26 — Paragraph 4.

27 — Paragraph 18.

28 — That provision states that '[a] person domiciled in a Contracting State may also be sued... on a counterclaim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending'.

29 — Paragraph 10. The difficulty lay in the fact that, in Danish procedural law, the expression 'counterclaim' is used to refer to both a plea in defence seeking dismissal of the plaintiff's claims and to a plea seeking a ruling against the plaintiff under the counterclaim. Danish law does not therefore recognise the distinction which appears to exist in other national legal systems between the terms 'set-off as a defence' and 'counterclaim' (see paragraph 17 of the aforementioned judgment, point 18 of my Opinion in that case and the Opinion of Advocate General Capotorti in *Meeth*, point 3).

30 — Paragraph 18 of the judgment.

33. A single definition of an objection of set-off must be adhered to in interpreting all provisions of the Convention, especially because those provisions are capable of being applied in the same dispute. For example, in the present case it is apparent from *Danvaern Production* that Article 6(3) of the Convention does not apply because the set-off was raised as an objection and not as a counterclaim. The Austrian court cannot therefore in my view decline jurisdiction over the objection of set-off on the basis of that provision. That being so, however, to find that it should none the less decline jurisdiction, under Article 21, because the objection must be treated as a claim, would lead to a contradiction and would be tantamount to defining the objection differently in the course of a single action.

34. I consequently take the view that the objection of set-off should not, for the purposes of Article 21 of the Convention, be treated as a claim.

35. I therefore propose that the Court should reply that the concept of 'the same cause of action' within the meaning of Article 21 of the Convention, does not apply to an objection of set-off.

B — *The second question*

36. The referring court asks, in substance, whether an objection of set-off should be taken into account for the purposes of determining whether the proceedings in response to which it is pleaded have 'the same cause of action' within the meaning of Article 21 of the Convention, as other proceedings brought before a court of a different Contracting State.

37. A preliminary point to note, in my view, leaving aside briefly the issue of set-off, is that the two actions brought in the Netherlands and Austria are not the same within the meaning of Article 21 of the Convention.

38. For there to be *lis pendens* in Community law there must, according to Article 21 of the Convention, be a threefold identity between the two actions — unity of parties, of the cause of action and of the subject-matter. Where one of those elements is not the same, there is no *lis pendens*.

39. In the present case, it is clear to me that the two sets of proceedings do not have the same cause of action. The Court has defined the cause of action, within the meaning of Article 21 of the Convention, as

comprising ‘the facts and the rule of law relied on as the basis of the action’.³¹ Neither the facts nor the rule of law relied on are the same in the two actions.

40. The facts giving rise to Basch’s action in the Netherlands can be summarised, it would appear, as follows: (1) there had been a dealership contract between the two parties for more than 40 years, and (2) Gantner terminated that contract without complying with the notice period which that duration dictated. On the other hand, the facts underlying the action brought by Gantner in Austria are the following: (1) Gantner delivered and invoiced goods to Basch, and (2) the latter has not paid the price of the goods.

41. As regards the rule of law, the action brought in the Netherlands is based, I contend, on the alleged dealership contract, whereas that brought in Austria is based on the sale of goods.³²

42. The issue is whether the fact that an objection of set-off has been pleaded alters that analysis.

43. The Court has already had occasion to rule that the concept of ‘*lis pendens*’ is not the same in all the legal systems of the Contracting States and that it is not possible, by a rapprochement of the various relevant national provisions, to arrive at a common concept of ‘*lis pendens*’.³³ The Court has accordingly held that the concepts referred to in Article 21 of the Convention must be treated as independent.³⁴ I shall therefore endeavour to reply to the question raised on the basis of the text, the underlying logic and the intention of Article 21 of the Convention.

44. First, the text of Article 21 of the Convention establishes that there is *lis pendens* where two sets of ‘*proceedings*’ involving the same cause of action and between the same parties *are brought* in the courts of different Contracting States’.³⁵

45. I consider two factors to be fundamental. First, the reference to ‘*proceedings*’ (*demande* in French) is significant since a number of national legal systems provide that there is *lis pendens* when two ‘actions’

31 — Case C-406/92 *Tatry* [1994] ECR I-5439, paragraph 39.

32 — The legal basis of Gantner’s action in Austria is not clear from reading the order for reference. At the hearing, however, the parties stated that it is not founded on the dealership contract (the existence of which Gantner denies), but on the purchase or delivery of goods.

33 — *Gubisch Maschinenfabrik* (paragraphs 10 and 11), and Case 129/83 *Zelger* [1984] ECR 2397, paragraph 13.

34 — *Gubisch Maschinenfabrik* (paragraph 11).

35 — Emphasis added.

are identical.³⁶ Proceedings are defined as ‘the instrument by which an action is brought before a court’.³⁷ The other language versions of the Convention also refer to the originating application. For example the Convention uses the expression *klagen* in German, *demanda* in Spanish, *domande* in Italian, *vorderingen aanhangig zijn* in Netherlands, *acções* in Portuguese, *kanteita* in Finnish, *talan* in Swedish and *proceedings are brought in the courts* in English.

46. Second, under Article 21 of the Convention, *lis pendens* automatically arises as soon as two identical sets of proceedings are brought. The Court has held that the moment at which proceedings are brought is a matter for the procedural law of the State of the court seised.³⁸ Admittedly, the national laws of the Contracting States establish different formalities for the purpose of deeming proceedings to have been brought (service on the defendant, the date on which the case is lodged with the court).³⁹ Those formalities in all cases precede the filing of the defence. It follows that proceedings are brought, for the purposes of Article 21 of the Convention, before the pleas in defence are submitted. The situation is thus fixed, one way or the other, and the pleas and submissions in

defence, whatever they may be, can do nothing to change it.⁴⁰

47. However, it is above all imperative, in my view, to keep in mind the underlying logic of Article 21 of the Convention. That provision places an obligation on a court seised of proceedings which are the same as others, brought previously before a court in a different Contracting State, to decline jurisdiction in favour of the first court as soon as the jurisdiction of the latter is established. There is therefore an *obligation to decline jurisdiction*.⁴¹

48. It is necessary, therefore, to imagine what will be the consequences of a court declining jurisdiction in that way where only an objection of set-off raised in the second action is the same as the first proceedings brought. Accordingly, in the present case, were it to take the objection of set-off into account, the Austrian court would have a duty to decline jurisdiction, since the proceedings brought in the Netherlands, as we have seen,⁴² are not the same as those brought by Gantner. The

36 — Article 100 of the French Nouveau Code de procédure civil (New Code of Civil Procedure) thus provides that ‘[i]f the same action is pending before two courts of the same level both having equal jurisdiction to hear the action, the court seised in second place must decline jurisdiction in favour of the other if either of the parties so requests...’. In Spanish law, see De la Oliva Santos, A., and Fernández López, M.A., *Derecho procesal civil*, 1993, pp. 65 and 66.

37 — See *Le Petit Larousse*.

38 — *Zelger*, paragraphs 14 to 16.

39 — See the Opinion of Advocate General Mancini in *Zelger*, point 4.

40 — Furthermore, French law, for example, requires an objection of *lis pendens* to be raised as a preliminary matter before any substantial defence or any plea of inadmissibility (Article 74(1) of the French New Code of Civil Procedure). See Cadet, L., *Droit judiciaire privé*, Litec, Paris, 1998 (paragraph 628). In Spanish law, the new law on civil procedure likewise requires *lis pendens* to be pleaded before the filing of the defence (*Ley 1/2000 de Enjuiciamiento Civil* of 7 January 2000, Article 39).

41 — Conversely, Article 22 of the Convention provides that the court seised in second place can stay its proceedings where it considers that the action brought before it is related to another action brought before a foreign court.

42 — Points 37 and 38 of this Opinion.

Austrian proceedings would be dismissed and no court would rule on Gantner's claim. That outcome would therefore lead to a real denial of justice.⁴³

conflicting decisions resulting from those proceedings.⁴⁵

49. Further, as the Austrian Government has pointed out,⁴⁴ set-off is as a rule only pleaded in the alternative. In other words, the defendant only relies on its claim in the hypothesis that the plaintiff is found to have a valid claim. Where the court finds that the debt adduced by the plaintiff never existed or that it has otherwise already been extinguished, it will not examine the claim pleaded in set-off. Any *lis pendens* arising as a result of the objection of set-off is therefore only ever 'in the alternative'. That being so, I believe it is here again inappropriate for the court to decline jurisdiction in that to do so would deprive the plaintiff of a decision on its claim since, at the time of the decision to decline jurisdiction, it is not even certain that the court will be called upon to examine the defendant's claim.

51. It is true that, if the procedural law of the court before which the objection is raised gives the force of *res judicata* to the finding on the defendant's claim, there is reason to fear a resulting risk of irreconcilable decisions and refusal of recognition. However, the Convention establishes a further mechanism in addition to *lis pendens* to avoid such a situation. Thus, Article 22(3) of the Convention affords the national court the opportunity to stay its proceedings where the two actions, although not identical, 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'.

50. Lastly, such an outcome is not, in my opinion, contrary to the aims of Article 21 of the Convention. That provision seeks to prevent parallel proceedings relating to the same action from taking place before courts in different Contracting States and to avoid

52. I take the view, consequently, that if the national court seised in second place considers that the decision it has to make may be irreconcilable with that to be made in another Contracting State, it can stay its proceedings under Article 22 of the Convention. That solution would enable it to

43 — Commenting on Article 22 of the Convention, the Jenard Report stresses the importance of avoiding negative conflicts of jurisdiction.

44 — See its written submissions (pp. 1 and 5).

45 — *Gubisch Maschinenfabrik* (paragraph 8).

preserve the coherence of the concept of '*lis pendens*' and to protect the rights of the second plaintiff whilst at the same time avoiding irreconcilable decisions.

C — *The third question*

53. Furthermore, it appears that some national legal systems which, in common with Austrian law, provide for set-off by unilateral declaration, allow a court to stay proceedings as regards the objection of set-off (as occurred in the main proceedings) and even, in certain circumstances, to deliver its judgment on the plaintiff's claim subject to the decision on set-off.⁴⁶ That 'provisional' decision can even be enforced. The courts involved can therefore avail themselves of that option and stay proceedings on the grounds of related actions under Article 22 of the Convention, solely in relation to the objection of set-off raised by the defendant. The proceedings on the originating application could therefore proceed normally.

54. In view of the foregoing, I therefore propose that the Court reply that, in order to ascertain whether proceedings have 'the same cause of action', it should treat as decisive only the arguments submitted by the plaintiff and, in consequence, should not take into account the objection of set-off raised by the defendant.

55. The national court asks whether the finding made, in an action for damages arising from the unlawful termination of a dealership contract, on whether such a contract existed, is binding in subsequent proceedings on a different claim albeit based on the unlawful termination of the same contract.

56. As we have seen,⁴⁷ by this question the national court is seeking to ascertain whether there is *lis pendens* between the defence of extrajudicial set-off and the proceedings brought in the Netherlands. As indicated, that issue is only relevant to determination of the main proceedings if one takes the view that an objection of set-off should be treated as a claim over which the court can decline jurisdiction. Since I believe that it cannot be treated as such and that the court cannot decline jurisdiction over an objection of set-off, that question thus becomes devoid of purpose.

46 — See, in particular, Paragraphs 145(3) and 302 of the German Procedural Code, and Paragraph 391(1) of the Austrian Procedural Code).

47 — Paragraphs 23 to 26 of this Opinion.

VI — Conclusion

57. In the light of all the foregoing considerations, I propose that the Court reply as follows to the questions referred by the Oberster Gerichtshof:

- (1) The concept of ‘the same cause of action’ within the meaning of Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not apply to an objection of set-off.

- (2) In order to ascertain whether proceedings have ‘the same cause of action’ a court must only take into account the arguments submitted by the plaintiff and, in consequence, the objection of set-off raised by the defendant is irrelevant.