

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 17 March 2005¹

I — Introduction

1. The present case, a preliminary reference from the Oberlandesgericht München (Higher Regional Court of Appeal, Munich), concerns the concept of due service within the meaning of Article 27(2) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.²

3. By Articles 26(1) and (2) of the convention, 'A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Title, apply for a decision that the judgment be recognised ...'

II — Legal framework

4. Article 27(2) of the Brussels Convention provides that a judgment shall not be recognised '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.'

A — The Brussels Convention

2. The provisions of the Brussels Convention relating to the recognition and enforcement within a contracting state of judgments rendered in another contracting state can be found in Title III of the convention (Articles 25 to 49).

5. Article IV of the Protocol annexed to the Brussels Convention provides,

'Judicial and extrajudicial documents drawn up in one Contracting State which have to be served on persons in another Contracting State shall be transmitted in accordance with

¹ — Original language: English.

² — OJ 1998 C 27, p. 1.

the procedures laid down in the conventions and agreements concluded between the Contracting States.

appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Brussels Convention.

Unless the State in which service is to take place objects by declaration to the Secretary-General of the Council of the European Communities, such documents may also be sent by the appropriate public officers of the State in which the document has been drawn up directly to the appropriate public officers of the State in which the addressee is to be found. In this case the officer of the State of origin shall send a copy of the document to the officer of the State applied to who is competent to forward it to the addressee. The document shall be forwarded in the manner specified by the law of the State applied to. The forwarding shall be recorded by a certificate sent directly to the officer of the State of origin.'

6. Article 65 of the Brussels Convention provides that the protocol annexed to the Convention shall form an integral part thereof.

7. A final provision of relevance is Article 20 of the Brussels Convention, which forms part of Title II on Jurisdiction (Section 7, 'Examination as to jurisdiction and admissibility'). This Article provides,

'Where a defendant domiciled in one contracting state is sued in a court of another contracting state and does not enter an

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 or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

The provisions of the foregoing paragraph shall be replaced by those of Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, if the document instituting the proceedings or notice thereof had to be transmitted abroad in accordance with that Convention.'

B — *The Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters* ('*The Hague Convention*')³

8. The Hague Convention on service of documents abroad, signed on 15 November

3 — Cmnd 3986; TS 50 (1969).

1965, counts among its contracting states all the Brussels Convention states with the exception of Austria. The convention applies to all civil or commercial cases where there is occasion to transmit a judicial or extrajudicial document or service abroad.⁴ It provides for a principal method of transmission whereby the authority or official competent under the law of the requesting State transmits the document to a 'Central Authority' of the State addressed. Thus Articles 5(1) and 5(2) provide that:

Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

'The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either —

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.'

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

9. The convention provides for several alternative methods of transmission, such as through consular or diplomatic channels, postal channels, or through judicial officers, officials or other competent persons of the State of destination.⁵ The convention also entitles a State to object to the use of some of these alternative methods of transmission.⁶

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

5 — The Hague Convention, Articles 8-10

6 — Upon ratification of the convention, the German Government declared that the methods of service referred to in Article 10 were not possible within German territory, namely, the sending of judicial documents by postal channels directly to persons abroad; the service of judicial documents directly by judicial officers or other competent persons of the State of origin through judicial officers or other competent persons of the State of destination; and the service of judicial documents by any person interested in a judicial proceeding directly through the judicial officers or other competent persons of the State of destination

4 — Article 1(1) of the Hague Convention.

10. Further, with the aim of reconciliation of the respective interests and rights of the plaintiff and defendant, Articles 15 and 16 of the convention are intended to protect the defendant at the stage of the proceedings and when a judgment has been given in default. Article 15, to which Article 20(3) of the Brussels Convention refers, provides,

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-

‘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 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,

(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

(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.

(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.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.’

11. In addition, in cases where a writ of summons or an equivalent document must be transmitted abroad for the purpose of service, Article 16 of the convention requires

contracting states to modify their rules on time-limits for appeal or setting aside of a judgment to deal with the possibility of a defendant only becoming aware of the proceedings after the judgment has been handed down.

irrespective of whether it has in fact reached its addressee abroad.⁷

III — Factual background

C — National law

12. Under French law, documents destined for persons domiciled abroad are served on the French *parquet* (department of the public prosecutor) by way of a formal method of service termed *signification* (Articles 683 and 684 of the new Civil Code of Procedure), although other methods of service provided for in treaties are also possible.

13. *Signification* is effected by the lodging by a court bailiff of two copies of the document with the French public prosecutor, who stamps the original and sends the copies of the document to the Ministry of Justice for distribution (Article 685). The bailiff must send a certified copy of the document to the addressee by registered post on the same day or, at the latest, the first working day thereafter (Article 686). This method of service is termed *remise au parquet*, and constitutes a so-called *signification interne fictive* (an internal fictional service), as service is deemed to have taken place when the court bailiff has lodged the copies of the document with the French public prosecutor,

14. By judgment of 8 September 2000, the Court of Appeal of Amiens found Rockinger Spezialfabrik für Anhängerkupplungen GmbH & Co., established in Munich (Germany) ('Rockinger'), liable to pay to Scania Finance France ('Scania'), established in Angers (France), the sum of FRF 615 566.72. At the request of Scania, the Landgericht München (Regional Court, Munich) granted *exequatur* (registration) of this judgment, which was duly notified to Rockinger on 15 April 2002.

15. In May 2002, Rockinger appealed before the Oberlandesgericht München for annulment of the registration on the ground that the originating summons in the French procedure had not been transmitted to it by regular service and constituted a judgment given in default of appearance by Rockinger. Service had been effected by means of the French method of *remise au parquet*, as described in paragraph 13 above. Although a German officer of justice had

⁷ — The Commission has, in its submissions, noted that notification by means of 'remise au parquet' is also provided for in Belgian, Netherlands and Luxembourg law.

transmitted the summons to Rockinger, Rockinger had refused to accept the document on the ground that the document had not been translated into German. Rockinger had subsequently received the summons by post, also without a translation.

proceedings by Scania, Rockinger, the German, French and Austrian Governments, as well as by the Commission.

IV — Analysis

16. The Oberlandesgericht München decided to refer two questions to the Court of Justice by way of preliminary reference dated 31 October 2003.

First, should Article 27(2) of the Brussels Convention and Article IV(1) of the protocol to this convention be read to imply that the service of a document on a defendant domiciled in a contracting state other than the state of origin can only be effected pursuant to conventions or agreements concluded between states party to the convention?

Second, if not, should Article 12 EC be interpreted to mean that a national regulation such as the French rule of *remise au parquet* is contrary to Community law?

17. In accordance with Article 23 of the Statute of the Court of Justice, written observations were lodged in the present

A — Admissibility

18. Rockinger argues that the reference for a preliminary ruling in the present case serves no useful purpose and is unnecessary for a number of reasons. In particular, it argues that French law does not allow for the coexistence of the methods of service under Article 683 of the French Civil Code of Procedure, on the one hand, and those of the Hague Convention, on the other. In Rockinger's view, French law gives priority to the methods set out in the Hague Convention. As, in its contention, the applicant in the main proceedings did not comply with the provisions of the Hague Convention on service, the request for execution should be rejected by the German court on this ground alone.

19. I am not convinced by these arguments. As is well established, in a preliminary reference procedure it is not for the Court to assess the facts of the main proceedings or to examine a national court's reasons for making a reference.⁸ The task of applying national law must fall to the national court. As a result, the case should be declared admissible.

⁸ — See, for example, Case 35/76 *Simmenthal v Ministero delle Finanze* [1976] ECR 1871

B — *On the first question*

20. By its first question, the Oberlandesgericht asks whether Article 27(2) of the Brussels Convention and Article IV(1) of its protocol mean that the service of a document on a defendant domiciled abroad can only be effected pursuant to conventions or agreements concluded between states party to the convention.

21. As set out above, Article 27(2) provides that a judgment must not be recognised in another contracting state 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. The present question concerns the proper interpretation of 'due service' under this provision, as specified by Article IV of the protocol to the convention.

22. As a preliminary matter, I note that neither Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁹ nor Regulation (EC) No 1348/2000

on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters¹⁰ applies in the present case, as the relevant facts in the main proceedings occurred prior to the entry into force of these regulations.

23. In answering the Oberlandesgericht's first question, the first point of reference must be the language of the articles in cause. As Article 27(2) contains no definition of the concept of 'due service', the wording of Article IV(1) of the protocol to the convention is of evident importance in this respect: 'documents ... *shall* be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the contracting states ...'.¹¹ Literally interpreted, this suggests that the national court's first question should be answered in the affirmative. On a natural reading, it seems difficult to see how this provision should be interpreted as permitting service of documents by transmission abroad by other methods than those allowed for by conventions or agreements concluded between states party to the convention.

10 — OJ 2000 L 160, p. 37.

11 — My underlining. See also, the Dutch and French versions of this article ('De gerechtelijke en buitengerechtelijke stukken, opgemaakt op het grondgebied van een verdragsluitende staat, die medegedeeld of betekend moeten worden aan personen die zich op het grondgebied van een andere verdragsluitende staat bevinden, worden toegezonden op de wijze al is bepaald in tussen de verdragsluitende staten gesloten verdragen of overeenkomsten'; 'Les actes judiciaires et extrajudiciaires dressés sur le territoire d'un État contractant et qui doivent être notifiés ou signifiés à des personnes se trouvant sur le territoire d'un autre État contractant sont transmis selon les modes prévus par les conventions ou accords conclus entre les États contractants').

9 — OJ 2001 L 12, p. 1.

24. Moreover, this approach fits, in my view, with the general scheme of the convention and accords with the underlying aims of its authors.

25. The aim of Article 27(2) is clearly to safeguard the right to defence by seeking to ensure that, in cases where a judgment is entered in default of appearance, a defendant has had a chance to defend himself in the state of origin of that judgment. As such, it stands as an important exception to the general spirit of Title III of the Brussels Convention, which title, in the words of the Jenard report, 'seeks to facilitate as far as possible the free movement of judgments.'¹² Thus, the Court has held in *Klomps v Michel* that Article 27(2) of the Brussels convention is 'intended to ensure that a judgment is not recognised or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seized.'¹³

26. In order to ensure this right of defence, the court seized must be satisfied that two conditions have been fulfilled: first, that the defendant has been 'duly' served and, second, that service must have been effected in sufficient time to enable the defendant to

arrange for his defence.¹⁴ As I have already stated, this case concerns the proper interpretation of the first of these conditions.

27. Article 27(2) mirrors, for recognition of judgments, the equivalent provision within Title II of the convention concerning jurisdiction, namely Article 20. This article has a similar aim to that of Article 27(2), that is, 'to ensure that in cases of failure to enter an appearance the court giving judgment does so only if it has jurisdiction, and so to safeguard the defendant as fully as possible in the original proceedings.'¹⁵ The balance between this aim and that of the free movement of judgments is, for cases in which the document instituting proceedings or notice thereof must be transmitted abroad, captured in Article 20(3), which incorporates the test set out in Article 15 of the Hague Convention, set out above.

28. The rationale for the existence of these safeguards at both jurisdictional level, on the one hand, and recognition and enforcement level, on the other, was confirmed by the Court in *Lancray v Peters und Sickert*. The Court emphasised that the Brussels Convention had not attempted to provide a comprehensive definition of the concept of 'due service', but that the application of this concept was determined by the law to be applied by the court of origin of the judgment, including the relevant international conventions:

12 — Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the 'Jenard report'), p. 42.

13 — Case 166/80 *Klomps v Michel* [1981] ECR 1593, paragraph 8.

14 — *Klomps v Michel*, cited in footnote 13, paragraph 15.

15 — Jenard report, cited in footnote 12, p. 39.

'Although they do not seek to harmonise the different systems of service abroad of legal documents which are in force in the Member States, the provisions of the Brussels Convention are designed to ensure that the defendant's rights are effectively protected. For that reason, jurisdiction to determine whether the document instituting the proceedings was properly served was conferred both on the court of the State in which judgment was given and on the court of the State in which enforcement is sought. The Brussels Convention does not determine which law is to be applied to that question. Since the rules governing the service of the document instituting the proceedings form part of the procedure before the court of the State in which judgment was given, the question whether service was duly effected can only be answered by reference to the law to be applied by that court, including any relevant international conventions.'¹⁶

29. Article IV of the protocol to the Brussels Convention constitutes a qualification of the principle that the question of 'due service' is to be determined by the law of the court of origin, in that it contains a partial specification of the acceptable methods of transmission in cases where judicial or extrajudicial documents must be served on persons in another contracting state. This article provides for two such methods of transmission: the first, as discussed above, in accordance with the procedures laid down in the conventions and agreements concluded between the contracting states (Article IV (1)); and the second, in the absence of an official objection by the state in which

service is to take place, directly between the appropriate public officers of the state of origin of the document and the state in which the addressee is to be found (Article IV(2)). The words 'may also' in Article IV(2) make clear that these two possibilities of transmission are exhaustive.

30. In my view, therefore, the scheme and function of Article IV would thus be cast into doubt if Article IV were to be read in a non-exhaustive manner, i.e., as permitting other methods of service not mentioned therein.¹⁷

31. I should add that this is not to say that Article IV of the protocol to the Brussels Convention allows only methods of service explicitly set out in detail in conventions or agreements concluded between contracting states to the Brussels Convention. It is to my mind clear that the article allows any method of service permitted by such conventions or agreements, even if the mechanics of a method are not explicitly set out in detail therein.¹⁸ This would extend, for example, to 'alternative' methods of service allowed for by Articles 8-10 of the Hague Convention.

¹⁶ — Case C-305/88 *Lancray v Peters und Sickert* [1990] ECR I-2725, paragraphs 28 and 29. See also, Case 228/81 *Pendy Plastic Products v Pluspunkt Handelsgesellschaft* [1982] ECR 2723, at paragraph 13.

¹⁷ — See also, *Philips v Symes* [2002] 1 WLR 853, for a judgment of an English court holding that service must be effected according to the methods provided for by Article IV where a plaintiff relies on service of proceedings from one contracting state on a defendant in another contracting state.

¹⁸ — See also, *Thierry Noirhomme v David Walklater* [1992] 1 Lloyd's Rep, for a judgment of an English court holding that Article IV permits all methods of transmission of documents abroad referred to in transmission conventions, not merely those methods specified by the conventions themselves.

32. It is for the Oberlandesgericht to assess whether either of the possibilities provided for in Article IV of the protocol to the convention apply in the present case. In particular, it is not for this Court to assess whether the French system of service by *remise au parquet* satisfies the requirements of the Hague Convention, or indeed the requirements of any other convention that may be applicable. The jurisdiction of the Court in this regard is explicitly limited, by the Protocol on the interpretation of the Brussels Convention, to interpretation of the convention itself, the protocol annexed to the convention, and the protocol on the interpretation of the convention.¹⁹

33. The answer to the first question should be, therefore, that, Article 27(2) of the Brussels Convention and Article IV of its protocol mean that judicial or extrajudicial documents drawn up in one contracting state to be served on a defendant domiciled in another contracting state must either be transmitted (1) in accordance with conventions or agreements concluded between states party to the convention, as set out in Article IV(1) of the protocol to the convention; or (2) in the absence of an official objection by the state in which service is to take place, directly between the appropriate public officers of the state of origin of the document and the state in which the addressee is to be found, as set out in Article IV(2) of the protocol to the convention.

C — On the second question

34. By its second question, the Oberlandesgericht asks whether, in the event of a negative response to the first question, should Article 12 EC be interpreted to mean that a national regulation such as the French rule of *remise au parquet* is contrary to Community law?

35. In view of my answer to the first question, it is unnecessary to respond on this point. I would observe, however, that any civil or commercial proceeding involving parties domiciled in different jurisdictions inherently raises potential conflicts between the plaintiff's and the defendant's interests; in general, for example, each has an interest in the proceeding taking place in his own jurisdiction. The rules laid down in the Brussels Convention seek by their very nature to strike a balance between these interests. In cases where the relevant convention provision makes clear the balance intended by its authors — as in the present proceeding — it would subvert the provision's purpose, and the convention's objectives of promoting uniformity and legal certainty,²⁰ if, whenever this balance could have negative consequences for one party in a particular case, the provision were dis-applied.

19 — Protocol on the interpretation of the 1968 Convention by the Court of Justice (consolidated version), OJ 1998 C 27, p. 28.

20 — See, for example, Case C-432/93 *SISRO v Ampersand Software BG* [1995] ECR I-2269.

V — Conclusion

36. I am therefore of the opinion that the Court should give the following answer to the questions referred by the Oberlandesgericht:

37. Article 27(2) of the Brussels Convention and Article IV of its protocol mean that judicial or extrajudicial documents drawn up in one contracting state to be served on a defendant domiciled in another contracting state must be transmitted:

- in accordance with conventions or agreements concluded between states party to the convention, as set out in Article IV(1) of the protocol to the convention;
or
- in the absence of an official objection by the state in which service is to take place, directly between the appropriate public officers of the state of origin of the document and the state in which the addressee is to be found, as set out in Article IV(2) of the protocol to the convention.