

1. A foreign judgment which has been recognized by virtue of Article 26 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given.
 2. A foreign judgment whose enforcement has been ordered in a Contracting State pursuant to Article 31 of the Convention and which remains enforceable in the State in which it was given must not continue to be enforced in the State where enforcement is sought when, under the law of the latter State, it ceases to be enforceable for reasons which lie outside the scope of the Convention.
- The Convention does not preclude the court of the State in which enforcement is sought from drawing the necessary inferences from a national decree of divorce when considering the enforcement of the foreign order made in regard
- to maintenance obligations between spouses.
 3. A foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable within the meaning of Article 27 (3) of the Convention with a national judgment pronouncing the divorce of the spouses.
 4. Article 36 of the Convention must be interpreted as meaning that a party who has not appealed against the enforcement order referred to in that provision is thereafter precluded, at the stage of the execution of the judgment, from relying on a valid ground which he could have pleaded in such an appeal, and that that rule must be applied of their own motion by the courts of the State in which enforcement is sought. However, that rule does not apply when it has the result of obliging the national court to make the effects of a national judgment which lies outside the scope of the Convention conditional on its recognition in the State in which the foreign judgment whose enforcement is at issue was given.

REPORT FOR THE HEARING

delivered in Case 145/86 *

I — Facts and procedure

The parties to the main proceedings are German nationals who married in the Federal Republic of Germany in 1950. In 1978, the husband moved out of the family home and settled in the Netherlands. On application by the wife, who continued to

live in Germany, the husband was ordered by judgment of the Amtsgericht (Local Court) Heidelberg of 21 August 1979 to pay maintenance to his wife every month under Paragraph 1361 of the Bürgerliches Gesetzbuch (German Civil Code), 'Unterhalt bei Getrenntleben' (maintenance where the spouses are separated).

* Language of the Case: Dutch.

On application by the husband, the Arrondissementsrechtbank (District Court), Maastricht, by judgment of 1 May 1980 given in default of appearance and in application of German law, granted a decree of divorce. On 19 August 1980 that judgment was entered in the Civil Register in The Hague whereupon in the Netherlands the marriage was dissolved.

A decree of divorce does not come within the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention' (see Article 1 (1) thereof). In the Federal Republic of Germany, under Paragraph 7 of the Familienrechtsänderungsgesetz (Family Law Amendment Law), recognition of that judgment requires a decision of the competent Landesjustizverwaltung (Regional Administration of Justice) and then has retroactive effect to 19 August 1980.

In this instance, no such decision had been taken at the time which the Hoge Raad regards as material for the purposes of these proceedings.

On 29 July 1981, on application by the wife, the Arrondissementsrechtbank, Almelo, granted an order for the enforcement of the judgment of the Amtsgericht, Heidelberg in accordance with Article 34 of the Convention. That order for enforcement was notified to the husband in April 1982. He did not appeal against it in the Netherlands but in September 1982 brought an action before the Amtsgericht, Heidelberg for a declaration that the abovementioned maintenance order was no longer enforceable as from 19 August 1980, the date on which the decree of divorce became absolute in the Netherlands. By judgment of 25 January 1983, the Amtsgericht, Heidelberg dismissed the husband's action on the ground that the decree of

divorce had not at that date been recognized in the Federal Republic of Germany.

On 28 February 1983 the wife detained an attachment of the husband's earnings paid by his Netherlands employer. The husband applied to the Arrondissementsrechtbank, Almelo for the discharge or at least the suspension of attachment of earnings order. He succeeded at first instance but his application was dismissed on appeal to the Gerechtshof (Regional Court of Appeal), Arnhem. He appealed in cassation against that judgment before the Hoge Raad.

The Hoge Raad entertained doubts as to the effects of the Netherlands decree of divorce on the German maintenance order, which presupposed the continuing validity of the marriage. By a judgment of 6 June 1986, it decided to refer the following questions to the Court under the Protocol of 3 June 1971 on the Interpretation of the Convention:

- (1) Does the obligation imposed on the Contracting States to recognize a judgment given in another Contracting State (Article 26 of the Brussels Convention) mean that such a judgment must be given the same effect in the other Contracting States as it has under the law of the State in which it was given and does this mean that it is therefore enforceable in the same cases as in that State?
- (2) If Question 1 is answered in the affirmative:

Must Articles 26 and 31 of the Brussels Convention, read together, be interpreted as meaning that the obligation to recognize a judgment given in a Contracting State requires that, because the judgment remains enforceable under the law of the State in which it was given, it also be enforceable in the same cases in the other Contracting State?

- (3) If Question 2 is answered in the affirmative:

In a case such as this, is it possible to plead that the German maintenance order is irreconcilable with the subsequent Netherlands divorce decree or to plead public policy? (Article 27 (1) and (3))?

- (4) Does (the scheme of) the Brussels Convention require acceptance of the rule that, if the party against whom enforcement is sought of a judgment given in another Contracting State fails to plead, in the appeal against the order for enforcement of the judgment, matters of which he was aware before the end of the period referred to in the first paragraph of Article 36 of the Brussels Convention and which preclude (further) enforcement of that judgment, he may no longer plead those matters in subsequent execution proceedings in which he is appealing against (continued) enforcement?

- (5) If Question 4 is answered in the affirmative:

Does (the scheme of) the Brussels Convention require it to be assumed that the court of the State in which an enforcement order is issued must apply of its own motion the rule referred to in the fourth question in subsequent execution proceedings, even if its own law makes no provision for the application of such a rule?

The order making the reference was lodged at the Court Registry on 13 June 1986.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were lodged on 12 September

1986 by the appellant in cassation, Mr Hoffmann, represented by E. Korthals Altes of the Hague Bar, and by the respondent in cassation, Mrs Krieg, represented by H. G. Bronkhorst of the Hague Bar, on 2 September 1986 by the Government of the Federal Republic of Germany, represented by C. Böhmer, on 19 September 1986 by the United Kingdom of Great Britain and Northern Ireland, represented by J. H. Hay, and on 10 September 1986 by the Commission of the European Communities, represented by L. Gyselen, a member of its Legal Department, assisted by S. Pieri, an Italian civil servant on secondment to the Commission.

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

II — Written observations

1. Questions 1 and 2

The Commission suggests an affirmative answer to the first two questions. A judgment given in one Contracting State may and must be enforced in another Contracting State in the same way as it would in the State in which it was given. The Commission relies on the wording of Article 31 of the Convention ('A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State...') and on the Jenard Report (Official Journal 1979, C 59, pp. 43 and 48). It would not be a question of treating the judgment given in another State as a judgment given in the State in which enforcement is sought but of giving it the

same effect in the State of enforcement as it would have in the State in which it was given.

The Commission finds an additional argument in the fact that subparagraph (1) of the second paragraph of Article 1 of the Convention excludes from its scope decisions concerning the status of natural persons. There would be a risk of the sovereign powers of the Contracting States to determine unilaterally (in the absence of a special agreement) the issue of the recognition of a foreign decree of divorce being undermined if a Netherlands court before which enforcement was sought of a German maintenance order could act as if the Netherlands decree of divorce were already recognized in the Federal Republic of Germany.

The United Kingdom Government, while considering that an answer to the first three questions is unnecessary in view of its suggested answer to the last two questions, also supports an affirmative answer to the first two questions for the purposes of this case. This would merely confirm the general scheme of the Convention. However, that general scheme may be subject to exceptions and limitations in individual cases.

The Government of the Federal Republic of Germany also proposes an affirmative answer to the first two questions. It explains that in its view the question raised by this case is whether the order authorizing enforcement can be set aside or amended. It must be possible to do so where the conditions set out in Articles 31 and 34 of the Convention cease to be fulfilled after the order was made. Nevertheless it is in the first place for the courts of the State in which the judgment to be enforced was given to ascertain whether the right on the basis of which enforcement is sought continues to exist. In this instance, a

German court cannot examine whether the right in question ceased to exist following the decree of divorce granted by the Netherlands court until that decree has been recognized in Germany.

Another possibility would be for the judgment debtor, in the interests of procedural simplicity, to raise objections in the State in which enforcement is sought to the right recognized in the foreign decision. That possibility, to which reference is made in the Jenard Report (Official Journal 1979, C 59, at p. 51), is nevertheless limited in view of the intention of Article 34. The courts of the State of enforcement cannot determine that the right on the basis of which enforcement is sought has ceased to exist if, as in this instance, the courts of the State in which the judgment originates would not be able to make such a determination. The jurisdiction of a court in the State of enforcement to rule on a substantive issue cannot go beyond that of the courts in the State in which the judgment was given.

The German Government proposes that the following answer be given to the first two questions:

- '(1) The obligation imposed on the Contracting States by the first paragraph of Article 26 of the Convention to recognize a judgment given in another Contracting State means that such a judgment must be given the same effect as it has under the law of the State in which it was given. That means that it is also enforceable in the same cases as in that State where an order for its enforcement has been issued under Article 31 of the Brussels Convention.
- (2) Articles 26 and 31 of the Convention, read together, must be interpreted as

meaning that a judgment in respect of which an order for enforcement has been issued is enforceable in a Contracting State, provided at least that its enforceability is not clearly capable of being set aside in the State in which the judgment was given'.

2. Question 3

The respondent in the main proceedings argues that the issue in this case is not one of recognition but one of enforcement. Relying on the Jenard Report (cited above, at p. 43), Mrs Krieg advocates an affirmative answer to the first two questions:

'The provisions of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters have the effect of conferring on judgments falling within the scope of the Convention, by virtue of the recognition provided for by Article 26, the same legal force as they enjoy in the State in which they were given.'

The appellant in the main proceedings considers it doubtful whether the first question, on which academic writers disagree, is capable of being answered in general terms. In this case it is unnecessary to answer the question, which deals with recognition, because Question 2, which deals with enforcement — the real point at issue — must in any event be answered in the negative. It is inconceivable that the court before which enforcement is sought should be bound to deny all legal effect in its own country to a judgment which it or another court in the same country has given on the ground that that judgment is not recognized in the country in which the decision to be enforced was given.

According to the Commission, this is not a case in which it is possible to apply Article 27 (1) or (3) of the Convention (a judgment shall not be recognized if 'recognition is contrary to public policy in the State in which recognition is sought' or 'if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought'). As regards public policy, the Commission emphasizes in the first place that that exception can only apply in exceptional cases. Judgments dealing purely with property rights (as in this case) will rarely be capable of raising issues of public policy.

Once the divorce is recognized in Germany with retroactive effect, the matter can no doubt be resolved by the repayment of any sums which should not have been paid, in accordance with national law. Furthermore, it is not recognition as such which is at issue here but merely the partial enforcement at intervals of a periodic payment obligation.

Finally, the Commission considers that applying Article 27 (1) of the Convention would in effect broaden the scope of the Convention as if the Netherlands decree of divorce had been automatically recognized in Germany, contrary to subparagraph (1) of the second paragraph of Article 1 of the Convention.

As regards Article 27 (3) of the Convention, the Commission first observes that, in order for there to be two irreconcilable judgments in a dispute between the same parties, it is not necessary for the same cause of action to be involved (Jenard Report, cited above, at p. 45).

In this instance, the two judgments in question are complementary rather than irreconcilable; the German judgment deals with a legal rule (the duty to pay maintenance until the marriage is dissolved), whereas the Netherlands judgment turns on the time from which that rule actually becomes applicable. In so far as the two judgments are irreconcilable, that is not because of the judgments themselves but because of the way in which two different national legal systems define the presence or absence of a legal fact (the dissolution of the marriage). The dispute in the main proceedings turns rather on the possible duration of the effects which the German judgment may have in the Netherlands than on whether the two judgments may have any effects at all in the Netherlands. Since the issue is not the grant of an order authorizing enforcement of the judgment but what are the practical effects of such an order in time, it is not governed by the Convention but by the national law of the court before which execution is sought (judgment of the Court of 2 July 1985 in Case 148/84 *Deutsche Genossenschaftsbank v Brasserie du Pêcheur* [1985] ECR 1981).

The German Government states that the applicability of Article 27 (3) does not depend on the chronological order of the irreconcilable decisions. In this instance, however, it considers that the two decisions are not irreconcilable because they relate to different causes of action; one is an order for maintenance between separated spouses, the other a decree of divorce together with an order for maintenance after the dissolution of the marriage.

The German Government proposes the following answer:

'A decision awarding maintenance during the marriage which is given in one Contracting State is not irreconcilable, within the meaning of Article 27 (3) of the

Brussels Convention, with a subsequent divorce decree given in another Contracting State and providing for the payment of maintenance after the dissolution of the marriage.'

The respondent in the main proceedings states first that in principle Article 27 (3) of the Convention is also applicable to judgments not governed by the Convention (such as a divorce decree).

The case of irreconcilable judgments fell within the exception on grounds of public policy in most national legal systems before the adoption of the Convention. Despite the restriction of the public policy exception intended by the Convention, the Contracting States meant to retain the power (which should not be interpreted too restrictively) to refuse enforcement in the event of irreconcilability. According to Mrs Krieg, the attempt might be made to show that there are two irreconcilable judgments in this case, since the Netherlands judgment pronounces the divorce of the parties whereas the German judgment presupposes that they are married.

Nevertheless the respondent comes to the opposite conclusion on the basis that a husband is in any event under a duty to pay maintenance to his wife according to his means whether he is married or divorced.

The reply suggested by the respondent is as follows:

'The recognition provided for by Article 26 of the Convention may be refused only under the terms of Articles 27 and 28 thereof. In particular, this means that where a court has made an order for the payment of maintenance, which is based on a duty

on the part of one party to provide maintenance to the other party which also exists in principle under the law of the State in which enforcement is sought, its order must be recognized even where the same parties have been pronounced divorced in that State.'

In the United Kingdom's view, however, there is no doubt that the two judgments are irreconcilable. Although the conflict of judgments involves an element of public policy, the relevant provision is Article 27 (3) of the Convention being a particular provision adopted in order to ensure uniformity (Jenard Report, cited above, at p. 45). That provision is applicable whatever the chronological order of the irreconcilable judgments.

The United Kingdom proposes the following answer:

'Article 27 (3) of the Convention applies to conflicting judgments irrespective of which came first in time.'

The appellant in the main proceedings also considers that the two judgments are irreconcilable. In his view it may also be argued not that the judgments themselves are irreconcilable but that the recognition and enforcement of the German judgment would be incompatible with the Netherlands judgment. In any event, after the decree of divorce has become absolute, recognition of the German judgment would be contrary to public policy in the Netherlands because it would be tantamount to denying any legal effect to a Netherlands judgment.

3. Questions 4 and 5

The Commission repeats its distinction (argued in connection with Question 3 and based on the judgment in *Deutsche Genossenschaftsbank*, cited above) between the order for enforcement on the one hand and

execution and the procedures for it on the other. That latter stage, which is at issue in this instance, is a matter for national law and is not governed by the Convention. The expiry of the period laid down by Article 36 of the Convention (which applies only to the order for enforcement) does not therefore deprive the judgment debtor of the right to bring an action at a later stage against the execution of the judgment. Since the answer to Question 4 must accordingly be in the negative, it is unnecessary to give an answer to Question 5.

The appellant in the main proceedings also concludes that a negative answer should be given to those two questions by following the same line of reasoning as the Commission with regard to the distinction between the order for enforcement and execution itself. In addition to the aforementioned judgment in *Deutsche Genossenschaftsbank*, he relies on the judgment of 27 November 1984 in Case 258/83 *Brennero v Wendel* [1984] ECR 3971. Further, he argues that a rule such as that set out in Question 4 would in any event be untenable in the case of irreconcilable judgments or judgments contrary to public policy.

The United Kingdom comes to the opposite conclusion and proposes an affirmative answer to both questions. The argument that the German judgment was unenforceable in the Netherlands because of the divorce granted by a Netherlands court is one which the husband could have put forward within the period of one month laid down by Article 36 of the Convention after the order for enforcement was notified to him in April 1982. It would not be consistent with the spirit and objective of the Convention to allow an objection to the enforceability of a foreign judgment to be raised in an appeal against a particular measure of enforcement. That would be tantamount to permitting an appeal out of time against the enforcement order itself.

The time-limit laid down by the Convention must be applied by the court of its motion.

The respondent in the main proceedings also proposes an affirmative answer to Questions 4 and 5. The rules laid down by the Convention constitute a single whole and must be applied uniformly in the Contracting States, which may not derogate from them (judgment of 30 November 1976 in Case 42/76 *De Wolf v Cox* [1976] ECR 1759). The Convention has direct effect and its provisions must be applied by the court of their own motion.

The respondent proposes that Questions 4 and 5 be answered as follows:

'The time-limit for an appeal against recognition or enforcement laid down by Article 36 of the Convention is mandatory in the

sense that those issues may no longer be raised in proceedings against enforcement instituted after its expiry.

The time-limit in Article 36 of the Convention is mandatory and must be applied of the court's own motion even if the legal system of the Contracting State in which enforcement or recognition is sought does not itself provide for the possibility of the courts applying the provision in question of their own motion.'

In view of the answers which it has given to the first three questions, the German Government takes the view that Questions 4 and 5 do not call for an answer.

G. C. Rodríguez Iglesias
Judge-Rapporteur