document instituting the proceedings in due form and in sufficient time, must both be met in order for a foreign judgment given against that defendant to be recognized. That provision is therefore to be interpreted as meaning that a judgment given in default of appearance may not be recognized where the document instituting the proceedings was not served on the defendant in due form, even though it was served in sufficient time to enable him to arrange for his defence.

2. Article 27(2) of the Convention is to be interpreted as meaning that questions concerning the curing of defective service are governed by the law of the State in which judgment was given, including any relevant international agreements.

REPORT FOR THE HEARING
in Case C-305/88 *

I — Facts and procedure

1. Isabelle Lancray SA, the creditor and plaintiff in the main proceedings, is a public limited liability company governed by French law and having its registered office at Neuilly-sur-Seine which had business relations with Peters und Sickert KG, a limited partnership governed by German law having its registered office at Essen, the debtor and defendant in the main proceedings. Those relations were based on a contract of 2 November 1983 in respect of which the parties agreed to apply French law and to give jurisdiction to the Tribunal de commerce (Commercial Court), Nanterre.

2. On 18 July 1986, the creditor obtained an interim order from the Amtsgericht (Local Court) Essen prohibiting the debtor from selling or delivering to third parties any products of the make 'Isabelle Lancray' in its stock. On 30 July 1986, the creditor brought an action before the Tribunal de commerce, Nanterre, in which it asked that court to confirm the tenor of the interim order.

3. By a letter of 30 July 1986, the Public Prosecutor's Office in Nanterre sent to the President of the Landgericht (Regional Court) Essen the summons, drawn up in French, to appear on 18 November 1986 before the French court, together with a form entitled 'Fiche descriptive des éléments essentiels de l'acte' (description of the essential particulars of the writ) printed in French and English and partly completed in French, and requested that they be served. By a certificate of service dated 19 August 1986 the Amtsgericht Essen stated that service had been effected by delivery of the documents to a secretary in the debtor's offices. No German translation was appended to the documents.

* Language of the case: German.

4. A summons dated 19 September 1986, drawn up in French, to appear at a hearing before the Tribunal de commerce, Nanterre, on 16 December 1986 was sent to the debtor by registered mail.

5. By judgment of 16 October 1986, the Landgericht Essen quashed the interim order of 18 July 1986 and dismissed the creditor's application for an interim order. By a letter of 11 November 1986, the debtor informed the Tribunal de commerce, Nanterre, of this fact and claimed, further, that the documents had not been duly served on the debtor because they were not accompanied by a certified translation of the summons into German. The French court returned that letter, suggesting that the sender submit, if it wished, a document in French.

6. The debtor did not appear at the hearing on 16 December 1986 and, in a judgment in default of appearance after due service ('jugement réputé contradictoire') of 15 January 1987, the Tribunal de commerce, Nanterre, upheld the application. That judgment was served on the debtor by delivery to its managing partner on 9 March 1987.

7. Upon application by the creditor, the Landgericht Essen decided, by order of 6 July 1987, that the judgment of the Tribunal de commerce, Nanterre, of 15 January 1987 was to be recognized in the Federal Republic of Germany.

8. The debtor then claimed that under Article 27(2) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter referred to as 'the Convention') the creditor's application should not have been allowed. The Oberlandesgericht (Higher Regional Court) allowed its appeal and dismissed the creditor's application.

9. In a Rechtsbeschwerde (appeal on a point of law) to the Bundesgerichtshof in accordance with the second paragraph of Article 37 of the Convention, the creditor claimed that the order should be set aside and the debtor's appeal dismissed.

10. Article 27(2) of the version of the Convention applicable, according to the national court, to the dispute in the main proceedings (Official Journal 1978 L 304, p. 36) provides that a judgment may not be recognized, 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.

11. In its legal analysis of the case, the Bundesgerichtshof considers that the summons was served on the debtor in sufficient time to enable it to arrange for its defence, because the debtor had a period of three months in which to acquaint itself with the content of the documents served in French by having them translated. The court considers, however, that the document instituting the proceedings was not served in due form. In that connection, it points out, first, that the summons was served not on the addressee but by delivery to a secretary in the addressee's offices, that is to say by way of substituted service in accordance with Paragraph 183(1) of the Zivilprozeßordnung (Code of Civil Procedure).

12. It then points out that Article 5 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters (*Bundesgesetzblatt* 1977 II, p. 1452; notice of 23 June 1980, *Bundesgesetzblatt* II, p. 907) provides that, except in the case covered by subparagraph (b) of the first paragraph of that article, the document may always be served by delivery to an addressee who accepts it voluntarily. But in the present case, service was effected not by delivery to the addressee who accepted it voluntarily but by way of substituted service. That would have been acceptable as formal service only if the document served had been drawn up in, or translated into, German (Paragraph 3 of the Law of 22 December 1977 implementing the Hague Convention of 15 November 1965, *Bundesgesetzblatt* 1977 I, p. 3105).

13. Nor, finally, was service effected in due form under the Agreement of 6 May 1961 between the Government of the Federal Republic of Germany and the Government of the French Republic on the further simplification of legal transactions and relations pursuant to the Hague Convention relating to Civil Procedure of 1 March 1954 (Notification of 25 July 1961, *Bundesgesetzblatt* II, p. 1040). Under the first paragraph of Article 3 of the Agreement of 6 May 1961, service could have been effected by delivery of the document to the addressee, provided that the addressee accepted it voluntarily. But service was effected by way of substituted service, and accordingly a translation should have been attached.

14. The Bundesgerichtshof also observes that the Oberlandesgericht held that the defective service could not be cured under Paragraph 187 of the Zivilprozeßordnung, stating that although defective service consisting in the absence of a translation may be cured if the addressee has a command of the foreign language, it cannot if, as in the present case, he does not have a command of that language.

15. The Bundesgerichtshof considered that the dispute raised a question relating to the interpretation of the Convention, and decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is recognition of a judgment given in default of appearance to be refused in accordance with Article 27(2) of the pre-accession version of the Brussels Convention where the document instituting the proceedings was not served on the defendant in due form, even though it was served in sufficient time to enable him to arrange for his defence?

(2) In the event that a judgment given in default of appearance is not recognized because, although the defendant was served with the document instituting the proceedings in sufficient time to enable him to arrange for his defence, the service was not duly effected, does Article 27(2) of the pre-accession version of the Brussels Convention preclude recognition of the judgment even where the laws of the State in which recognition is sought permit the defective service to be cured?'

16. The order for reference was received at the Court Registry on 19 October 1988.

17. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities,

written observations have been submitted by the plaintiff in the main proceedings, represented by Heinz-Joachim Freund, Rechtsanwalt; by the defendant in the main proceedings, represented by Dieter Eikelau, Rechtsanwalt; by the Government of the Federal Republic of Germany, represented by C. Böhmer, acting as Agent; by the Government of the French Republic, represented by Régis de Gouttes, acting as Agent; by the Italian Government, represented by Oscar Fiumara, acting as Agent; and by the Commission, represented by Friedrich-Wilhelm Albrecht and G. Cherubini, acting as Agents.

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 submitted to the Court

A — *The first question*

1. The *plaintiff in the main proceedings* maintains that Article 27(2) of the Convention, properly construed, is concerned primarily not with whether service was effected in due form or in sufficient time but with the aim pursued by those requirements, namely that of enabling the defendant to arrange for his defence. According to that interpretation, even a possible procedural irregularity in service is a bar to recognition of the judgment only in so far as it may have prevented the defendant from arranging for his defence.

If the provision is interpreted in terms of its purpose, no account should be taken of any irregularities in service if they have not deprived the defendant in any way of the opportunity to arrange for his defence.

Moreover, the plaintiff explains, the aim of the Convention is to facilitate the international recognition of judgments, and to object to recognition on purely formal grounds would be directly contrary to that aim.

It therefore proposes that the Court should rule that a judgment given in default of appearance is to be recognized where the document instituting the proceedings was not served on the defendant in due form but was served in sufficient time to enable him to arrange for his defence.

2. The *defendant in the main proceedings* considers, first, that the preliminary ruling which the Court of Justice is asked to give is inappropriate to the nature of the dispute. It states that the plaintiff company has already acknowledged that the service on the debtor was inadequate. It also considers that the French court cannot confirm an interim order of a German Amtsgericht lawfully quashed by the Landgericht on appeal. It takes issue, finally, with the question referred to the Court, which, it claims, is framed in abstract terms and totally ignores the fact that the judgment, as it stands, contains nothing which can be enforced.

3. With regard to the first question, the *Government of the Federal Republic of Germany* considers that Article 27(2) of the Convention should be interpreted literally to mean that it prohibits the recognition of a foreign judgment given in default of appearance if the defendant was not duly

served with the document which instituted the proceedings, regardless of whether service was effected in sufficient time to enable him to arrange his defence.

In its view, that provision makes the recognition of foreign judgments conditional upon two requirements: where the judgment is given in default of appearance, the defendant must have been served with the document which instituted the proceedings both in due form and in sufficient time. Both conditions must be fulfilled. Consequently, failure to meet either requirement is sufficient for recognition of a foreign judgment to be refused. Recognition is therefore precluded if service was not effected in due form, regardless of whether the defendant had actual knowledge of the document which instituted the proceedings or had sufficient time to arrange for his defence (see the judgment of the Court in Case 166/80 *Klomps* v *Michel* [1981] ECR 1593, and the report by P. Jenard, Official Journal C 59, 5.3.1979, p. 1, at p. 44).

The German Government explains that if, in the interpretation of Article 27(2), less weight were given to the literal meaning and more to the protective aim of the provision, then the second requirement for recognition — that service must be effected in sufficient time — would acquire decisive importance. In view of the main concern of the Convention, that of facilitating the international recognition of judgments, it would indeed appear at first sight open to doubt whether an application seeking the recognition of a judgment should be allowed to fail merely because of a procedural defect when that defect has not been prejudicial to the defence.

The German Government considers, however, that it would be excessive to conclude from those considerations that it is in principle of little importance whether the service was duly effected, provided that the defendant was informed in sufficient time. Just as service free of defects generally indicates that the procedural safeguards of the State in which the judgment was given and of the Convention have been observed, any irregularity in service reveals that proper account has not been taken of the defendant's interests.

It points out that if a simplistic interpretation in terms of purpose were adopted, only the question whether service was effected in sufficient time would be of any importance; plaintiffs would then be under great temptation to ignore the procedures laid down for service in due form and to deal with service themselves.

The German Government is, therefore, in favour of a literal interpretation of Article 27(2) of the Convention. That does not, in its view, in principle preclude the possibility that in certain exceptional cases, after a close examination of all the relevant considerations in the light of the purpose of the Convention in general and the protective aim of Article 27(2) in particular, it may be justifiable to recognize a foreign judgment despite the fact that service was not effected in due form, where the defendant had actual knowledge of the document which instituted the proceedings in sufficient time to enable him to arrange for his defence. It is not, however, possible to find grounds for such an exception in the present case.

4. The *French Government* also refers to the Court's judgment in Case 166/80 *Klomps* v *Michel*, cited above, and the report by Mr Jenard (cited above) in connection with the first question, and points out, first, that both of the conditions laid down in Article 27(2) of the Convention — that service must be effected in due form and in sufficient

time — must be fulfilled together and that each constitutes an independent ground for refusing recognition.

It then considers whether the document was duly served for the purposes of the Brussels Convention and the Hague Convention. In that connection, it points out that the irregularity referred to by the German court lies in the fact that the document was drawn up in French and served in the Federal Republic of Germany but was not accompanied by a German translation. The fact that the Brussels Convention is silent on this point might be taken to mean that translation is optional, were it not for the third paragraph of Article 5 of the Hague Convention, which allows the central authority of the State addressed to require a translation. A translation is required in Germany. It follows that service of a document drawn up in French, unaccompanied by a translation, is not service in due form. That irregularity, on the face of it, forms a bar to recognition of the French judgment, pursuant to Article 27(2) of the Brussels Convention.

But, the French Government adds, the second paragraph of Article 5 of the Hague Convention provides that such an irregularity may be overridden by voluntary acceptance of the document by the addressee. It considers that that is what happened in the case before the Court, since the document initiating the proceedings before the Tribunal de commerce, Nanterre, which was served by the German judicial authorities in accordance with Article 1 of the Agreement of 6 May 1961 between Germany and France, was accepted by an employee of the debtor company apparently empowered to act on the company's behalf and was confirmed by registered mail with acknowledgment of receipt in sufficient time to enable the defendant to arrange for its defence.

The French Government also maintains that delivery to the addressee must be considered to be validly effected for the purposes of the second paragraph of Article 5 of the Hague Convention when service is effected at the addressee's premises as well as when the document is served personally on the addressee. In the present case, it claims, delivery at the addressee's premises is accepted by the legislation of both States in respect of their own nationals.

The French Government also refers to the Court's judgment in Case 228/81 *Pendy Plastic* v *Pluspunkt* [1982] ECR 2723, at p. 2736, in which it held that both the courts of the State in which the judgment was given and the courts of the State in which enforcement is sought have jurisdiction to determine whether the document initiating the proceedings was properly served. But strict application of that dual jurisdiction, particularly in view of the translation requirement, would in its opinion frustrate the objective of facilitating the enforcement of judgments, which is the corner-stone of European judicial cooperation.

It considers, therefore, that it is necessary to temper the constraints of that dual jurisdiction with the concept of sufficient time mentioned in Article 27(2) of the Convention. In the case in question, the time was sufficient for the addressee to obtain a translation of the document instituting the proceedings before the Tribunal de commerce, Nanterre.

5. In the view of the *Italian Government*, the rule in Article 27(2) of the Convention should be interpreted as meaning that the

review must be carried out in such a way as to ascertain whether the defendant was given a real opportunity to arrange for his defence. Since, however, the Convention is intended to safeguard the rights of a defendant residing in one Contracting State who has been summoned to appear, but has not entered an appearance, before a court in another Contracting State, and Article 20 requires the original court to ensure in particular that that safeguard has been provided in the State in which the proceedings are conducted, which it can do only in accordance with its own procedural rules, Article 27(2) should be interpreted as meaning that the subsequent review at the time of recognition must be carried out essentially in accordance with the principles underlying the procedural system of the court in which recognition is sought.

Consequently, it asserts, if the court in which recognition is sought finds an irregularity in service according to the procedural rules of the original court, then recognition may be refused only in so far as the rules of the court in which recognition is sought do not make it possible to disregard any such invalidity when the actual opportunity afforded to the defendant to arrange for his defence in sufficient time has an effect equivalent to that which the requirement of service in due form is intended to achieve.

The Italian Government considers, therefore, that Article 27(2) of the Convention appears to make it possible to apply a general principle to the effect that the invalidity of a document is immaterial if the document itself has achieved the purpose for which it was intended.

In view of those considerations, the Italian Government proposes that the Court should rule that a judgment given in default of appearance may be recognized even where the defendant was not duly served with the document which instituted the proceedings if that document achieved its purpose inasmuch as it was served on the defendant himself in sufficient time to enable him to arrange for his defence.

6. The *Commission* refers to the case-law of the Court and the report by P. Jenard (cited above), and considers that Article 27(2) of the Convention lays down two distinct grounds for refusing recognition, either one of which is thus sufficient for refusal of recognition. Consequently, it asserts, recognition and enforcement must be refused not only when service was effected in due form but not in sufficient time, but also when the document instituting the proceedings was served in sufficient time but not in due form.

That approach, the Commission points out, might well give rise to objections. It might be said that the Convention should be interpreted so as to facilitate recognition of foreign judgments: Article 27(2) of the Convention should therefore be interpreted restrictively, inasmuch as it constitutes a derogation from the principle of recognition. Moreover, the purpose of that derogation is to ensure that the defendant is in a position to arrange for his defence, so any irregularities in service should be ignored or cured if the defendant has in fact been made aware of the proceedings in sufficient time. Finally, in support of the argument that regularity of service is of only secondary importance, it might be pointed out that the second paragraph of Article 20 of the

Convention makes no explicit reference to that requirement.

The Commission rebuts those possible objections by asserting, first, that Article 27(2) of the Convention makes it a condition, in the defendant's interest, that service must be effected not only in due form, but also in sufficient time. That does not mean, in the Commission's view, that regularity of service is of only secondary importance. On the contrary, the Commission stresses, service in due form is an equally essential requirement for the recognition of a judgment delivered in proceedings in which the defendant did not participate. Furthermore, the requirement that service of the document which instituted the proceedings must have been effected in due form serves to enable a person living in a Contracting State to ascertain that legal proceedings based on a clearly defined claim have been brought against him. In the Commission's view, that requirement takes on particular importance when, in the case of service by way of substituted service, the document must be accompanied by a translation in the language of the State addressed. It must be added that the international conventions relating to service in civil procedure have contributed to the simplification of the procedure for service. The Commission therefore considers that the minimum requirement that the document instituting the proceedings must be served in the manner laid down in the relevant provisions may not be waived.

With regard to the reference to the second paragraph of Article 20 of the Convention, the Commission points out that the third paragraph of that article provides that the provisions of the second paragraph are to be replaced by those of Article 15 of the Hague Convention of 15 November 1965 if the document instituting the proceedings had to be transmitted in accordance with that convention. That article, too, lays down a requirement of service in due form in addition to the requirement that the defendant must be informed in sufficient time.

B — *The second question*

1. The *plaintiff* maintains that where the service of the document which instituted the proceedings was defective, recognition should not be refused if it was possible to cure that defect by applying the laws of the State in which recognition is sought.

The plaintiff therefore proposes that the Court should rule that the national rules of the State concerned relating to the validation of defective service apply.

2. The *German Government* considers that there can be no question of curing a defect in service unless the rules applicable to the service in question provide for such a possibility. In its view, the international conventions, which override the internal law of the contracting States relating to service, must be applied first. Neither the Hague Convention of 15 November 1965 nor the Agreement of 6 May 1961 between Germany and France provides for curing defects in service.

Nor, the German Government adds, is there any basis for assuming the existence of a general principle of procedural law by virtue of which all irregularities in service are deemed to be cured if the document to be

served was actually received by its addressee.

3. The *French Government* stresses that the possibilities available for curing the defect under the law of the State addressed can override the effect of Article 27(2) of the Convention and enable a foreign judgment to be recognized.

4. The *Commission* considers that the courts of both the State in which the judgment was given and the State in which recognition is sought have the power and the duty to verify that service was effected in due form, but that that question should be examined solely in the light of the law to be applied by the court in the State in which the judgment was given.

If the courts of the State in which recognition is sought nevertheless had, under their national law, a discretionary power to recognize a judgment, the Commission considers that there would be a risk, in the event of applications for recognition and enforcement in several contracting States, that the question of recognition might be answered differently under the internal rules of the various contracting States; uniform application of Article 27(2) would no longer be guaranteed. The Convention, the Commission explains, does provide for dual review, but it involves only the interpretation and application of the same applicable provisions, not the different provisions of the internal law of the various States in which recognition is sought.

It considers, therefore, that provisions of the internal law of the State in which recognition is sought which leave questions of curing irregularities in service to the discretion of the courts cannot lead to recognition of the judgment.

M. Díez de Velasco
Judge-Rapporteur