OPINION OF ADVOCATE GENERAL JACOBS
delivered on 8 July 1992 *

Mr President,
Members of the Court,

1. This case concerns the extent to which the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of Accession of 9 October 1978 of Denmark, Ireland and the United Kingdom (see OJ 1978 L 304), precludes a court in one Contracting State from recognizing a judgment given in default of appearance by a court in another Contracting State. I shall refer to the 1968 Convention, as amended, as 'the Brussels Convention'.

2. The case arises by way of a reference for a preliminary ruling made by the German Bundesgerichtshof (Federal Court of Justice) under the Protocol of 3 June 1971 on the interpretation by this Court of the Brussels Convention. The question referred is in the following terms:

'Is recognition of a judgment given in default of appearance to be refused under Article 27(2) of the Brussels Convention where it cannot be proved that the defendant was served with the document which instituted the proceedings or he was not duly served with that document, if he was nevertheless aware of the judgment delivered in the proceedings but availed himself of none of the legal remedies against the judgment provided for in the procedure of the State in which the judgment was delivered?'

The background

3. That question has arisen in the course of proceedings instituted by Brandeis Ltd, a company incorporated under English law the registered office of which is in London, against Minalmet GmbH, a company incorporated under German law and which has its place of business in Düsseldorf. Brandeis is seeking to enforce in Germany a judgment in default of appearance given by the Queen's Bench Division of the English High Court ordering Minalmet to pay Brandeis $36, 533.50 plus interest and costs. Minalmet argues that the writ commencing the proceedings against it in the High Court was not duly served on it and that Article 27(2) of the Brussels Convention therefore prevents the High Court's judgment from being recognized in Germany.

4. Article 27 of the Brussels Convention is contained in Title III, which is headed 'Recognition and Enforcement'. The general rule with regard to recognition is laid down in the first paragraph of Article 26, which provides that 'A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.' Article 27 derogates from that general rule by setting out a

* Original language: English.

number of situations in which a court of one Contracting State must refuse to recognize a judgment given by a court in another Contracting State. Thus, in accordance with Article 27(2), a judgment shall 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 or with an equivalent document in sufficient time to enable him to arrange for his defence.'

By virtue of Article 34 of the Brussels Convention, Article 27 also applies to applications in one Contracting State for the enforcement of a judgment given in another Contracting State.

5. In the present proceedings, the referring court takes the view that the document which instituted the proceedings, that is the writ, was not properly served on Minalmet and that the defect in service cannot be cured. However, Brandeis argues that the judgment of the High Court should still be recognized on the basis that a defendant cannot rely on Article 27(2) if he was aware of the judgment against him and failed to avail himself of the remedies available in the State in which it was delivered. It appears that, in this case, the judgment of the High Court was served on Minalmet on 12 January 1990. Under the rules of procedure applicable in the English High Court (see the Rules of the Supreme Court, Order 13, rule 9), Minalmet could then have taken steps to have the judgment set aside or varied, but failed to do so.

The effect of Article 27(2)

6. As the referring court points out, the argument put forward by Brandeis enjoys the support of certain academic writers. The reasoning underlying it may be summarized as follows. The purpose of the Brussels Convention is to implement the provisions of Article 220 of the EEC Treaty, by virtue of which the Member States undertook to secure 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals ...'. The first paragraph of Article 26 of the Convention is intended to contribute to the realization of that objective. Article 27 constitutes an exception to the general rule set out in the first paragraph of Article 26 and as such must be strictly construed. The purpose of Article 27(2) is to safeguard the rights of the defendant. It should not be applied literally if that purpose can be achieved in other ways. Where provision is made for a judgment given in default of appearance to be set aside, it is not necessary to insist on strict compliance with the wording of Article 27(2) in order to protect the rights of the defendant.

7. Brandeis draws attention to the second subparagraph of Article 2(c) of the Convention between the Netherlands and Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, signed at The Hague on 30 August 1962, which expressly requires judgments given in default to be recognized in circumstances such as these.

8. It will be observed, however, that the text of Article 27(2) provides no support for the view that the requirements of that provision do not need to be satisfied where the defendant fails to avail himself of a remedy available in the State in which the default

judgment was given. Moreover, the Jenard Report contains no suggestion that Article 27(2) was intended to be qualified in the manner advocated by Brandeis (see OJ 1979 C 59, p. 1 at pp. 44-45).

9. Where the defendant was not duly served with the document which instituted the proceedings, it is clear that service of the judgment itself cannot affect the position. As both the referring court and the United Kingdom Government rightly point out, the judgment cannot be considered the document which instituted the proceedings or an equivalent document for the purposes of Article 27(2). This is evident from paragraph 9 of the judgment in Case 166/80 *Klomps* v *Michel* [1981] ECR 1593, where the Court explained that:

'... Article 27, point 2, is intended to ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised. It follows that a measure, such as the order for payment [Zahlungsbefehl] in German law, service of which on the defendant enables the plaintiff, where no objection to the order is made, to obtain a decision which is enforceable under the Convention, must be duly served on the defendant in sufficient time to enable him to arrange for his defence and accordingly that such a measure must be understood as being covered by the words "the document which instituted the proceedings" in Article 27, point 2. On the other hand a decision, such as the enforcement order [Vollstreckungsbefehl] in German law, which is issued following service of an order for payment and which is itself enforceable under the Convention, is not covered by those words even although [*sic*] the lodging of an objection against the enforcement order, like the objection to the order for payment, transforms the procedure into adversary proceedings.'

10. A variant of the view put forward by Brandeis in these proceedings was advanced in Case C-305/88 *Lancray* v *Peters und Sickert* [1990] ECR I-2725, where the plaintiff contended that the defendant's rights were adequately protected where he received the document which instituted the proceedings in sufficient time to enable him to arrange for his defence, and that it was not necessary in such circumstances to require it to be established in addition that that document was duly served. That argument was rejected by the Court, which made it clear that both the conditions laid down in Article 27(2) had to be satisfied before a judgment given in default could be recognized. The Court pointed out, at paragraph 20 of the judgment, that the opposite view:

'would render completely inoperative the requirement of due service. If the sole issue were whether the document came to the defendant's attention in sufficient time, plaintiffs would be tempted to ignore the prescribed forms for due service, the requirements of which have in any event been considerably relaxed by international agreements. That would create considerable uncertainty as to whether documents had actually been served, thus thwarting the uniform application of the provisions of the Convention. Finally, a defendant could not know with certainty whether proceedings which might lead to a finding against him had been properly instituted and whether it was therefore necessary to arrange for a defence, a situation which would also be inconsistent with the aims of the Convention.'

11. While it is true that it is one of the purposes of the Brussels Convention to facilitate the recognition of judgments, the Court has made it clear that this cannot be achieved at the expense of the defendant's right to a fair hearing: see Case 49/84 *Debaecker* v *Bouwman* [1985] ECR 1779; *Lancray*, already cited. To interpret Article 27(2) in accordance with the view put forward by Brandeis would be liable to have this result, for, as the referring court points out, the possibility of challenging a judgment given in default which has already become enforceable cannot be considered a satisfactory alternative to entering a defence before the judgment is delivered, since the remedies available afterwards may be more limited or more difficult to exercise. Article 27(2) seems implicitly to recognize this point by seeking to protect the defendant's right to be heard before judgment is given against him.

12. I therefore consider that, in the light of the wording of Article 27(2), the intentions of the authors of that provision and the case-law of the Court, the question referred can only be answered in the affirmative. In other words, a judgment given in default may not be recognized if the document which instituted the proceedings was not duly served on the defendant. It is irrelevant that the defendant was aware of the judgment and has failed to avail himself of the remedies available in the State in which the judgment was delivered.

13. The Convention between the Netherlands and Germany of 30 August 1962 does not affect the conclusion I have reached on the proper interpretation of Article 27(2). As the Commission points out, that Convention has now been superseded by the Brussels Convention pursuant to Article 55 of the latter. If it had any relevance at all in the present context, it might in any event be taken to support the view that, had the authors of the Brussels Convention intended to qualify Article 27(2) in the manner advocated by Brandeis, they would have done so expressly.

Conclusion

14. I am therefore of the opinion that the question referred to the Court in this case should be answered as follows:

Under Article 27(2) of the Brussels Convention, a judgment given in default of appearance in one Contracting State must not be recognized in another Contracting State if the defendant was not duly served with the document which instituted the proceedings, even if he was aware of the judgment concerned but failed to avail himself of any remedies available under the law of the first State which might have led to that judgment being set aside or varied.