OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 7 March 1991 *

Mr President,
Members of the Court,

1. Under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ('the Convention') the Court of Appeal in the United Kingdom has referred for a preliminary ruling a number of questions concerning the interpretation of some of the Convention's provisions, notably Article 21 which deals with the question of *lis pendens.*

2. The questions were raised in a dispute between three reinsurance companies (Overseas Union Insurance Limited, 'OUI'; Deutsche Ruck UK Reinsurance Limited, 'Deutsche Ruck'; Pine Top Insurance Company Limited, 'Pine Top') and the insurers New Hampshire Insurance Company ('New Hampshire') concerning the effects of a reinsurance policy.

OUI is a company incorporated in Singapore and registered in England as an overseas company. Deutsche Ruck and Pine Top are companies incorporated in England with their registered offices in London. New Hampshire is a company incorporated in the State of New Hampshire (U. S. A.) and has its head office in that State. New Hampshire carries on business not only in the United States but also in France and in England. It is registered in England as an overseas company. In France it is registered as a foreign company and it has several offices there. It conducts its business in France through the agency of American International Underwriters SARL, a company incorporated in France.

3. The facts of the case and the course of the procedure were described in the order making the reference as follows. In September 1979 New Hampshire issued a policy of insurance to Nouvelles Galeries Réunies, a company incorporated in France, to cover risks for that company incurred under the five year warranty it gives on sales of electrical appliances. In December 1980 New Hampshire reinsured a proportion of that risk with OUI, Deutsche Ruck and Pine Top. In July 1986 the re-insurers ceased paying claims after raising a large number of queries concerning the operation and management of the insurance account.

On 4 June 1987 New Hampshire issued proceedings against Deutsche Ruck and Pine Top in the Tribunal de Commerce in Paris seeking performance under the re-insurance policy. On 9 February 1988 it brought similar proceedings in that court

* Original language: Dutch.

against OUI. In the French proceedings Deutsche Ruck, Pine Top and OUI have contested the jurisdiction of the French court.

In a letter dated towards the end of March 1988 OUI, Deutsche Ruck and Pine Top claimed that they were no longer bound by the reinsurance agreement because of non-disclosure and/or misrepresentation or breach of duty in both the placing and operation of the agreement on the part of New Hampshire. On 6 April 1988 they brought an action in the Commercial Court of the Queen's Bench Division seeking a declaration from the English court that they are no longer bound by the reinsurance policy. New Hampshire applied to the Court for a stay of the proceedings. That was granted by the Commercial Court, which decided pursuant to Article 21, second paragraph, of the Convention to stay the English proceedings pending the decision of the French court on the objection concerning its jurisdiction. OUI, Deutsche Ruck and Pine Top appealed against that order to the Court of Appeal. It is in the course of those proceedings that the Court of Appeal has referred to the Court of Justice for a preliminary ruling a number of questions concerning the interpretation of the Convention. [1]

1 — In view of the date on which the dispute was brought before the English courts (6 April 1988), these questions should be considered in the light of the Convention as amended by the Convention of Accession of 1978 (OJ 1978 L 304, p. 1) which came into force in the United Kingdom on 1 January 1987 (OJ 1986 C 285, p. 1). The version of the Convention as amended by the Convention of Accession of 1982 (OJ 1982 L 388, p. 1) did not come into force in the United Kingdom until 1 October 1989 (OJ 1989 C 249, p. 1). As regards the interpretation of the articles of the Convention discussed subsequently there is no difference because those articles were not amended

First question

4. The first question concerns the *applicability* of Article 21 of the Convention. The Court of Appeal seeks to know whether Article 21 applies regardless of the domicile of the parties.

Article 21 of the Convention provides as follows:

'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 decline jurisdiction in favour of that court.

A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.'

5. This Court has already delivered two judgments concerning Article 21 of the Convention.

In *Gubisch* [2] the Court explained what was to be understood by the words 'proceedings involving the same cause of action'. It was held that the concept of *lis pendens* for the purposes of that article covered the case in which one party had brought proceedings before an Italian court for a contract to be set aside, or in the alternative for the party's discharge therefrom, when an action for enforcement of the same contract was pending before a German court. Between

2 — Judgment of 8 December 1987 in Case 144/86 *Gubisch* [1987] ECR 4861.

the parties in the main dispute there is no dispute as regards that point. In the order making the reference the Court of Appeal states that it is common ground that the proceedings before the French and English courts involve the same cause of action within the meaning of Article 21 of the Convention as explained by the Court of Justice in *Gubisch*.

In *Zelger*[3] the Court explained the meaning of the words 'the court first seised'. The Court held that those words were to be interpreted as meaning:

'[the court] before which the requirements for proceedings to become definitively pending are first fulfilled, such requirements to be determined in accordance with the national law of each of the courts concerned'.

In the order making the reference the Court of Appeal stated that it was common ground between the parties that the French court was the court first seised.

6. In the first question the Court of Appeal asks whether the applicability of Article 21 of the Convention depends on the domicile of the parties and if so, of which one of them. The question was raised as a result of one of the arguments put forward by OUI, Deutsche Ruck and Pine Top before the Court of Appeal: they maintain that Article 21 of the Convention does not apply in this case as New Hampshire is not domiciled in a Contracting State, and in particular is not domiciled in France.

Whether a company such as New Hampshire is in fact domiciled outside the Contracting States is a question which was not referred to this Court. Nevertheless, I will discuss that point briefly, since it was the origin, because of Article 4 of the Convention, to which I will refer later, of the dispute as regards the applicability of Article 21.

The first paragraph of Article 53 of the Convention provides as follows:

'For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law.'

The Court of Appeal states in the order making the reference that the national rules enabling the seat of a legal person to be determined for the purposes of Article 53 of the Convention are to be found in Section 42 of the Civil Justice and Judgments Act 1982. The section provides that a corporation has its seat in a Contracting State if and only if:

— it was incorporated or formed under the law of that State and has its registered office or some other official address there; or

3 — Judgment of 7 June 1984 in Case 129/83 *Zelger* [1984] ECR 2397.

— its central management and control is exercised in that State.

Consequently, the Court of Appeal is of the opinion that under the rules of private international law applicable by it New Hampshire does not have its seat in another Contracting State within the meaning of Article 53 of the Convention. However, the Court of Appeal adds that the question whether under French law New Hampshire is to be regarded as domiciled in France is a matter of dispute between the parties.

7. I now come back to the argument relied on by OUI, Deutsche Ruck and Pine Top as explained by them in their observations to this Court. They submit that Article 21 of the Convention applies solely if the defendant is domiciled in the territory of a Contracting State and not when, as the Court of Appeal assumed, he is not domiciled there. Whereas in the first case Article 2 and the provisions referred to in Article 3 of the Convention itself indicate which court has jurisdiction, jurisdiction in the second case is determined according to Article 4 of the Convention in each Contracting State by the law of that State. In that case English law provides that the principle of *forum conveniens* applies, according to which the English court itself may deal with the case if it is to be considered, in the circumstances of the case, as the most appropriate forum.

New Hampshire, the United Kingdom, the German Government and the Commission take the view in their observations that Article 21 of the Convention does apply in the present procedural situation, that is to say, assuming as the Court of Appeal does that New Hampshire is not domiciled in a Contracting State. I agree with them for the reasons I shall set out.

8. Article 21 of the Convention governs cases where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States. According to that article the court last seised (which I shall call the second court) must decline jurisdiction in favour of the court first seised (which I shall call the first court), unless it chooses to stay its proceedings where the jurisdiction of the first court is contested.

As regards the principle of *lis pendens* Article 21 of the Convention makes no distinction based on the provisions applied pursuant to the Convention to determine the jurisdiction of a court. More particularly, it makes no special provision, as the representative of the reinsurers suggested at the hearing, for cases in which Article 4 of the Convention applies. Consequently, Article 21 must be read as meaning that its provisions apply both when the jurisdiction of the court is determined pursuant to Articles 2 and 3 of the Convention by the provisions of the Convention itself (that is to say, when the defendant is domiciled in the territory of a Contracting State) and when jurisdiction is governed in accordance with Article 4 of the Convention by the legislation of the relevant Contracting State

(that is to say, when the defendant is not domiciled in the territory of the Contracting State). Thus the *wording* of Article 21 of the Convention indicates that that article applies irrespective of the domicile of the parties.

9. That interpretation is in accordance with the *purpose* of the provision. In *Gubisch* the Court of Justice described that purpose as follows (paragraph 8 of the decision):

'Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention; that section is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.'

That purpose is best served if Article 21 of the Convention is interpreted as broadly as possible in order to enable it to be applied in principle (granted that there may be an exception in the case of exclusive jurisdiction: see paragraph 13, below) in all cases of proceedings pending before the courts of different Contracting States which are capable of leading to irreconcilable decisions and thus, as I have said, regardless of whether those courts have jurisdiction pursuant to the provisions of Articles 2 and 3 or pursuant to those of Article 4 of the Convention.

Consequently, I see no reason connected with the purpose of Article 21 of the Convention, either, to exclude its application in cases where Article 4 applies. I therefore conclude on the basis of both the wording and the purpose of Article 21 of the Convention that it applies regardless of the domicile of the parties.[4]

Second and third questions

10. The second and third questions concern the *interpretation* of the *second* paragraph of Article 21 of the Convention.

In the second question the Court of Appeal assumes that Article 21 of the Convention is applicable, that the jurisdiction of the first court is contested and that the second court, under the option given to it by the second paragraph of Article 21, has not declined jurisdiction in favour of the first court. The Court of Appeal wishes to know if in those circumstances the second court is obliged to stay its proceedings or whether it may consider the case directly itself.

The third question applies if the second is answered to the effect that the second court is not bound to stay the proceedings, but *may* deal with the case itself. In the third question the Court of Appeal wishes to

4 — See also: G. Droz, *Compétence judiciaire et effets des jugements dans le marché commun*, 1972, p. 189, P. Gothot and D. Holleaux, *La Convention de Bruxelles du 27 Septembre 1968*, 1985 p. 123; P. Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments*, 1987, p. 1221; J. Kropholler, *Europäisches Zivilprozeßrecht*, 1987, p. 215.

know whether *in that case* the second court is required or permitted, in order to decide whether to stay its proceedings or decide the case itself, to examine whether the first court has jurisdiction, and, if so, in what circumstances and to what extent such an examination may or must be conducted.

11. Those questions arose as a result of an alternative argument relied on by OUI, Deutsche Ruck and Pine Top to the effect that the second paragraph of Article 21 of the Convention applies only where the first court has been *properly* seised, a fact which the second court must accordingly ascertain. If the English court did in fact examine the jurisdiction of the French court in their case, they maintain that it would be apparent that the French court is not entitled under the Convention to assume jurisdiction as regards Deutsche Ruck and Pine Top since they have their seat in England and ought therefore to have been sued there, and that as regards OUI, which is registered in England as an overseas company, the French court cannot derive jurisdiction from either the Convention or French law. New Hampshire contends, according to the order making reference, that the French courts do have jurisdiction on the ground that under French law it must be regarded as being domiciled in France for the purposes of the second paragraph of Article 4 of the Convention (or possibly the second paragraph of Article 8), and that such jurisdiction may in fact also be founded on Article 5(1) of the Convention.

12. The question whether the French courts have jurisdiction has not been put to this Court. The Court of Justice has been asked to give a preliminary ruling solely on the question whether the second court may or must examine the jurisdiction of the first.

The representative of OUI, Deutsche Ruck and Pine Top submitted at the hearing that the second court may in some cases proceed to hear itself a case pending before it without awaiting a declaration by the first court that it has no jurisdiction. That argument is based on the view held by some writers[5] that Article 21 of the Convention does not apply where the second court has exclusive jurisdiction on one of the grounds set out in Article 16 of the Convention. That is said to indicate that the second court must in all cases consider whether the first court was *properly* seised.

13. Whether Article 16 of the Convention, like other articles (for instance Article 17) which confer exclusive jurisdiction, constitutes an exception to the rule laid down in Article 21 of the Convention is a question which I need not consider here. It has not been referred by the Court of Appeal. In any case, neither of the parties has suggested that this is a case of exclusive jurisdiction.

Whatever the answer to that question may be, it seems to me to be going too far to draw from the (possible) existence of an exception where there is exclusive jurisdiction the conclusion that the second court may or must in other cases, too, examine whether the first court has jurisdiction.

5 — G. Droz, op. cit., pp. 192-194; P. Kaye, op. cit., pp. 1221-1223.

There is a radical difference between the two hypotheses. Where there is exclusive jurisdiction the second court examines solely the question of its own (exclusive) jurisdiction. That is not so in cases such as the present where there is no ground for exclusive jurisdiction. In such a case the second court, if one takes the view put forward by the reinsurers, would be led to examine the jurisdiction of the first court *in place of the latter* in order to assume jurisdiction itself if it takes the view that the first court has no jurisdiction. Given the difference between the two hypotheses, the *possible* existence of an exception to Article 21 of the Convention where there is exclusive jurisdiction is not relevant to the case in hand.

14. Now, as regards the questions actually referred, I agree with New Hampshire, the United Kingdom, the German Government and the Commission that the interpretation of the second paragraph of Article 21 of the Convention advocated by OUI, Deutsche Ruck and Pine Top (see paragraph 11, above) must be rejected. That is clear from the purpose of the provision, as just described.

The second paragraph of Article 21 of the Convention contains an exception to the general principle that jurisdiction must be declined in favour of the first court. The purpose of that exception was described in the Jenard Report as follows: [6]

'This rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction. The risk of unnecessary disclaimers of jurisdiction is thereby avoided.'

In view of that statement of its purpose I consider that if the second court does not wish to decline jurisdiction in favour of the first court when the jurisdiction of the first court is contested, it must confine itself to staying the proceedings before it without embarking on an examination of the matter itself. Staying the proceedings is entirely sufficient, indeed, to satisfy the aim of avoiding unnecessary disclaimers of jurisdiction as far as possible (that is to say, avoiding the possibility that whenever the first court declares that it has no jurisdiction, the second may no longer validly be seised). It is therefore unnecessary for the second court to proceed to make the examination and decide the case on that basis. Indeed, if it does so, conflicting decisions might arise, if the first court, too, declared that it had jurisdiction and ruled on the case, a result which the Convention seeks to avoid as far as possible (paragraph 9, above).

15. Consequently, the second court must in circumstances such as those of the present case stay its proceedings, if it has not declined jurisdiction in favour of the first court. [7] That also applies if the second court is of the opinion that the first court has no jurisdiction. In any case, whether the first court has jurisdiction or not is a matter not

6 — Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1, at p. 41).

7 — See to the same effect: P. Gothot and D. Holleaux, op. cit., p. 126; P. Kaye, op. cit., p. 1219.

for the second court — leaving aside the case of exclusive jurisdiction — but for the first alone to decide. Any other conclusion would constitute an unjustified interference by the second court in the legal autonomy of the first.

That conclusion also accords best with the wording of the second paragraph of Article 21 of the Convention, which merely states that suspending the proceedings is an alternative to declining jurisdiction in favour of the first court, and does not provide for the possibility that the second court also chooses to proceed with the case.

Fourth question

16. The fourth question concerns the ambit of the provisions of Title II, Section 3, of the Convention with regard to reinsurance contracts. Since that question is asked only if the answer to the other questions indicates that the second court must or may examine the jurisdiction of the first court, I think that on the basis of the answers I have suggested up to now, this question needs no further consideration.

Conclusion

17. I suggest that the questions referred for a preliminary ruling should be answered as follows:

'(1) Article 21 of the Convention applies irrespective of the domicile of the parties who have brought proceedings involving the same course of action in the courts of different Contracting States.

(2) Where Article 21 of the Convention applies, and the jurisdiction of the court first seised is contested, the court second seised is obliged merely to stay its proceedings if it does not decline jurisdiction in favour of the court first seised pursuant to the second paragraph of that article.'