JUDGMENT OF THE COURT (Fifth Chamber)

6 June 2002 *

In Case C-80/00,

REFERENCE to the Court, 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, by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Italian Leather SpA

and

WECO Polstermöbel GmbH & Co.,

on the interpretation of Title III, headed 'Recognition and enforcement', of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — amended text — p. 77), by the Convention

* Language of the case: German.

of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Italian Leather SpA, by J. Kummer, Rechtsanwalt,

— WECO Polstermöbel GmbH & Co., by J. Schütze, Rechtsanwalt,

— the German Government, by R. Wagner, acting as Agent,

— the Greek Government, by S. Khala and K. Grigoriou, acting as Agents,

— the Italian Government, by U. Leanza, acting as Agent, and O. Fiumara, avvocato dello Stato,

— the United Kingdom Government, by G. Amodeo, acting as Agent, and A. Layton QC,

— the Commission of the European Communities, by J.L. Iglesias Buhigues, acting as Agent, and B. Wägenbaur, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Italian Leather SpA, represented by J. Kummer; the Greek Government, represented by K. Grigoriou; the United Kingdom Government, represented by A. Layton; and the Commission, represented by A.-M. Rouchaud, acting as Agent, and B. Wägenbaur, at the hearing on 22 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

1 By order of 10 February 2000, received at the Court on 7 March 2000, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling 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 three questions on the interpretation of Title III, headed 'Recognition and enforcement', of that Convention (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — amended text — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) (hereinafter 'the Brussels Convention').

2 Those questions were raised in proceedings between Italian Leather SpA (hereinafter 'Italian Leather'), a company governed by Italian law established in Bironto (Italy), and WECO Polstermöbel GmbH & Co. (hereinafter 'WECO'), a limited partnership governed by German law established in Leimbach (Germany), concerning the conditions of use of a brand name under a contract for the exclusive distribution of leather-upholstered furniture.

Legal context

The Brussels Convention

3 As stated in the first paragraph of Article 1, the Brussels Convention applies in civil and commercial matters whatever the nature of the court or tribunal.

4 Article 24 of the Brussels Convention states:

'Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'

5 Title III of the Brussels Convention lays down the rules under which judgments given by the courts of a Contracting State are recognised and enforced in the other Contracting States.

6 Article 25 of the Brussels Convention provides:

'For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.'

7 The first paragraph of Article 26 of the Brussels Convention states:

'A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required.'

8 Article 27 of the Brussels Convention is worded as follows:

'A judgment shall not be recognised:

...

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

...'

9 The first paragraph of Article 31 of the Brussels Convention states:

'A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.'

10 The first paragraph of Article 34 of the Brussels Convention provides:

'The court applied to shall give its decision without delay; the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.'

German legislation

11 According to the Bundesgerichtshof, under Paragraph 935 of the Zivilprozessordnung (German Code of Civil Procedure, hereinafter 'the ZPO') an interim measure may be granted if it is feared that a change in the current situation could prevent or substantially impede the assertion by a party of his rights. Accordingly, the court seised is called on essentially to maintain the status quo.

12 The Bundesgerichtshof further points out that, under Paragraph 940 of the ZPO, the court seised may also make an interim order regulating a legal relationship, in so far as that appears to be necessary in order to prevent substantial prejudice or imminent use of force or for other reasons.

13 Under Paragraph 890(1) of the ZPO, decisions of German courts which impose restraining orders may also give rise to an administrative penalty payment or, where such payment cannot be recovered, to imprisonment.

The main proceedings and the questions referred for a preliminary ruling

14 Italian Leather is a company which sells leather-upholstered furniture under the name 'LongLife'. WECO sells furniture of the same type.

15 In 1996 Italian Leather granted WECO, under an 'exclusive contract', the right to distribute its goods for five years within a specified geographical area. That contract contained *inter alia* the following clauses:

'(2) Dealers may use the LongLife brand name only when marketing suites that are covered in LongLife leather.

...

(4) No dealer may use the LongLife brand name for its own advertising without written authorisation from the supplier.'

16 The parties agreed that the courts of Bari (Italy) would have jurisdiction to deal with disputes relating to that contract.

17 In 1998 WECO complained of defective performance of the contract by Italian Leather. It informed Italian Leather that, as a consequence, it would not be a party to any joint sales message at forthcoming exhibitions and that it would present its own WECO mark.

18 Italian Leather brought proceedings for interim relief against WECO before the Landgericht Koblenz (Regional Court, Koblenz, Germany), the court within whose jurisdiction WECO's registered office is situated, to restrain it from marketing products presented as being in easy-care leather under the brand name 'naturia longlife by Maurizio Danieli'.

19 By judgment of 17 November 1998 the Landgericht Koblenz, which had been seised in accordance with Article 24 of the Brussels Convention, dismissed the application because there was no 'ground justifying the grant of interim relief'.

20 The Landgericht Koblenz took the view that to grant Italian Leather's application would be tantamount to ordering WECO to perform the contract. However, Italian Leather had not proved that there was a risk of irreparable damage or of a definitive loss of rights, conditions which had to be met under German law before the relief sought could be granted. Furthermore, WECO had already taken concrete steps to advertise and market its products with leather from other suppliers. Accordingly, it too would suffer considerable damage if the prohibition sought were granted.

21 A few days before the Landgericht Koblenz delivered its judgment of 17 November 1998, Italian Leather had applied to the Tribunale di Bari (Bari District Court) for interim measures. In its order of 28 December 1998, the Tribunale di Bari took a different view on the condition of urgency. It held in this regard that 'the *periculum in mora* (urgency) lies in the plaintiff's economic loss and the possible "extinction" of its rights resulting therefrom, for which there would be no compensation'.

22 Consequently, the Tribunale di Bari prohibited WECO from using the word 'LongLife' for the distribution of its leather furniture products in certain Member States, including Germany.

23 On application by Italian Leather, the Landgericht Koblenz, by order of 18 January 1999 (hereinafter 'the order for enforcement'), endorsed a warrant for execution in the order of the Tribunale di Bari, coupling it with a financial penalty on the basis of Paragraph 890(1) of the ZPO.

24 On an appeal brought by WECO, the Oberlandesgericht (the competent Higher Regional Court) varied the order for enforcement, holding that the order of the Tribunale di Bari was irreconcilable, within the meaning of Article 27(3) of the Brussels Convention, with the judgment of 17 November 1998 by which the Landgericht Koblenz had dismissed Italian Leather's application seeking to prohibit WECO from using the LongLife brand name for the marketing of its leather products.

25 Italian Leather appealed against the decision of the Oberlandesgericht to the Bundesgerichtshof.

26 The Bundesgerichtshof is unsure as to the correct interpretation of Article 27(3) of the Brussels Convention.

27 According to the Bundesgerichtshof, the Court of Justice's case-law on whether the legal consequences of different judgments are mutually exclusive has, until now, only concerned situations in which there were divergences in substantive law. However, the case before the Bundesgerichtshof has the particular feature

that the conflict between the two decisions on interim measures at issue is attributable only to divergences as to procedural requirements.

28 The Bundesgerichtshof states that, if those decisions are irreconcilable, the court of the State in which enforcement is sought should nevertheless have the power to disapply Article 27(3) of the Brussels Convention if it considers that, from the point of view of that State, the divergence is not sufficiently significant. The sole purpose of Article 27(3) is to prevent the rule of law in a Contracting State from being disrupted by advantage being taken of two conflicting judgments. The risk of such disruption in a given case is to be assessed solely from the point of view of the State in which enforcement is sought.

29 The Bundesgerichtshof is also uncertain whether, if it were to uphold the order for enforcement, it may, or must, maintain the financial penalty which the Landgericht Koblenz, on the basis of German law, attached to the order of the Tribunale di Bari in case the latter order was not enforced.

30 Pointing out that the Brussels Convention is designed to further the transnational recognition of judgments, the Bundesgerichtshof interprets the first paragraph of Article 31 and the first paragraph of Article 34 of the Convention as, in general terms, requiring the court of the State where enforcement of a foreign judicial decision is sought to create, so far as possible, the same favourable conditions for its enforcement as apply to a comparable decision of a national court.

31 In this connection, the Bundesgerichtshof observes that under Italian law there is no direct method of enforcement of restraining orders other than payment of damages.

32 Accordingly, the application of coercive measures provided for by German law in order to enforce immediately a restraining order made by an Italian court would have more powerful effects than those envisaged by the law of the State of origin. The Bundesgerichtshof has doubts as to whether the first paragraph of Article 31 and the first paragraph of Article 34 of the Brussels Convention permit or require such a solution.

33 Consequently, the Bundesgerichtshof decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Can judgments be irreconcilable within the meaning of Article 27(3) of the Brussels Convention when the only difference between them lies in the specific requirements for the adoption of a particular type of autonomous provisional measure (within the meaning of Article 24 of the Convention)?

(2) May and must the court of the State of enforcement which has declared a foreign judgment requiring the party against whom enforcement is sought to desist from certain activities to be enforceable in accordance with the first paragraph of Article 34 and the first paragraph of Article 31 of the Convention at the same time order the measures necessary, under the law of the State of enforcement, for enforcement of a restraining order?

(3) If the answer to Question 2 is in the affirmative, must the measures necessary, under the law of the State of enforcement, for enforcement of the restraining order be ordered even if the judgment to be recognised does not itself include comparable measures in accordance with the law of the State of origin, and that law makes no provision at all for the immediate enforceability of such restraining orders?'

Question 1

34 By this question, the national court is essentially asking, first, whether, on a proper construction of Article 27(3) of the Brussels Convention, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought, even though the respective effects of those decisions are attributable to divergences as to the procedural requirements for the grant of such an order under the national law of the State of origin and of the State where recognition is sought. If so, it asks, second, whether a court of the latter State is required to refuse to recognise the foreign decision or whether the Brussels Convention allows it to refuse recognition only if it finds that the coexistence of two conflicting decisions would cause real and appreciable disruption to the rule of law in the State where recognition is sought.

Observations of the parties

35 So far as concerns the first part of the first question, the United Kingdom Government submits in its written observations that the concept of irreconcilability requires the court of the State in which recognition is sought to draw certain distinctions, such as that existing between the procedural requirements for the adoption of a particular type of measure and the effects of the judgment adopting or refusing to grant such a measure, or the distinction between the substantive and procedural requirements upon which grant of the measure sought is conditional.

36 The United Kingdom Government observes with regard to the first distinction that Article 27(3) of the Brussels Convention concerns solely the legal effects of a judgment and not the procedural requirements for its adoption. Examination of those requirements may, however, be necessary in order to determine the legal effects of the judgment concerned and to assess, by way of consequence, to what

extent it is irreconcilable with another judgment. That is particularly the case where the measure sought has been refused. It may then be necessary to refer to the requirements for the adoption of the measure in order to understand the content of the judgment refusing to grant it.

37 As regards the second distinction referred to in paragraph 35 of the present judgment, the court may, in order to appraise the content and effect of each of the competing judgments, examine whether the requirements for the adoption of the measures in question are substantive or procedural. That will be particularly true where the court of the State in which recognition is sought is faced with a judgment refusing to order a particular measure because, in that case, there will be no 'measure' as such to examine.

38 At the hearing, the United Kingdom Government inferred therefrom that, in the main proceedings, it was difficult to regard the negative effects of the judgment of 17 November 1998 of the Landgericht Koblenz as being irreconcilable with the positive effects of the order of the Tribunale di Bari of 28 December 1998. Only if the respective criteria applied by those two courts and the evidence adduced before them were identical could the effects of the decisions made by them be regarded as irreconcilable.

Findings of the Court

39 By way of preliminary point, the Court proceeds on the assumption that, the court competent to adjudicate on the substance being the Tribunale di Bari, the Landgericht Koblenz did not by its judgment of 17 November 1998 exceed the limits, as interpreted by the Court, of the jurisdiction which it derived from Article 24 of the Brussels Convention (see Case C-391/95 *Van Uden* [1998] ECR I-7091, paragraphs 37 to 47, and Case C-99/96 *Mietz* [1999] ECR I-2277, paragraphs 42, 46 and 47).

40 First, it is clear from the Court's case-law that, in order to ascertain whether two judgments are irreconcilable within the meaning of Article 27(3) of the Brussels Convention, it should be examined whether they entail legal consequences that are mutually exclusive (Case 145/86 *Hoffmann* [1988] ECR 645, paragraph 22).

41 Second, it is unimportant whether the judgments at issue have been delivered in proceedings for interim measures or in proceedings on the substance. As Article 27(3) of the Brussels Convention, following the example of Article 25, refers to 'judgments' without further precision, it has general application. Consequently, decisions on interim measures are subject to the rules laid down by the Convention concerning irreconcilability in the same way as the other 'judgments' covered by Article 25.

42 Third, it is equally immaterial that national procedural rules as to interim measures are liable to vary from one Contracting State to another to a greater degree than rules governing proceedings on the substance.

43 The object of the Brussels Convention is not to unify the procedural rules of the Contracting States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments (see Case C-365/88 *Hagen* [1990] ECR I-1845, paragraph 17, and Case C-68/93 *Shevill and Others* [1995] ECR I-415, paragraph 35).

44 Moreover, as follows from paragraph 22 of the judgment in *Hoffmann*, cited above, irreconcilability lies in the effects of judgments. It does not concern the requirements governing admissibility and procedure which determine whether judgment can be given and which may vary from one Contracting State to another.

45 In the light of the foregoing, it is clear that decisions on interim measures such as the decisions here at issue in the main proceedings are irreconcilable.

46 The Tribunale di Bari granted the application made by Italian Leather seeking to prohibit WECO from using the LongLife brand name for the marketing of its leather products after the Landgericht Koblenz had dismissed an identical application made by the same plaintiff against the same defendant.

47 The answer to the first part of the first question must therefore be that, on a proper construction of Article 27(3) of the Brussels Convention, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought.

48 As regards the second part of the first question, concerning the consequences which result where a foreign judgment and a judgment of a court of the State in which recognition is sought are irreconcilable, it should be noted first of all that, as stated in the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, at p. 45), 'there can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments'.

49 Next, it must be remembered that Article 27(3) of the Brussels Convention provides that a judgment is not to be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought.

50 Article 27(3) of the Brussels Convention therefore sets out a ground for refusing to recognise judgments which is mandatory, in contrast to the second paragraph

of Article 28 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9), under which recognition of a judgment may be refused in any case provided for in Articles 54B(3) or 57(4) of that Convention.

51 Finally, it would be contrary to the principle of legal certainty, which the Court has repeatedly held to be one of the objectives of the Brussels Convention (see Case 38/81 *Effer* [1982] ECR 825, paragraph 6, Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-6307, paragraph 23, and Case C-256/00 *Besix* [2002] ECR I-1699, paragraph 24), to interpret Article 27(3) as conferring on the court of the State in which recognition is sought the power to authorise recognition of a foreign judgment when it is irreconcilable with a judgment given in that Contracting State.

52 In view of the foregoing, the answer to the second part of the first question must be that, where a court of the State in which recognition is sought finds that a judgment of a court of another Contracting State is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties, it is required to refuse to recognise the foreign judgment.

Questions 2 and 3

53 In view of the answer given to the first question, there is no need to answer the second and third questions.

Costs

54 The costs incurred by the German, Greek, Italian and United Kingdom Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 10 February 2000, hereby rules:

1. **On a proper construction of Article 27(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October**

1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought.

2. Where a court of the State in which recognition is sought finds that a judgment of a court of another Contracting State is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties, it is required to refuse to recognise the foreign judgment.

Jann Edward La Pergola

Wathelet Timmermans

Delivered in open court in Luxembourg on 6 June 2002.

R. Grass P. Jann

Registrar President of the Fifth Chamber