JUDGMENT OF THE COURT (Third Chamber)
13 July 1995 *

In Case C-474/93,

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 Arrondissementsrechtbank te Zwolle (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Hengst Import BV

and

Anna Maria Campese

on the interpretation of Article 27(2) 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),

THE COURT (Third Chamber),

composed of: C. Gulmann, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur) and D. A. O. Edward, Judges,

* Language of the case: Dutch.

Advocate General: F. G. Jacobs,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Hengst Import BV, by H. F. Hoogeveen, of the Zwolle Bar,

— Mrs Campese, by A. A. Renken, of the Zwolle Bar,

— the Italian Government, by Professor U. Leanza, Head of the Department for Legal Affairs of the Ministry of Foreign Affairs, assisted by O. Fiumara, Avvocato dello Stato, acting as Agent,

— the Commission of the European Communities, by P. van Nuffel, of the Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 4 May 1995,

gives the following

Judgment

1 By order of 15 December 1993, received at the Court on 20 December 1993, the Arrondissementsrechtbank te Zwolle (Zwolle District Court) 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 a preliminary question on the interpretation of Article 27(2) 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; hereinafter 'the Convention').

2 That question was raised in proceedings between Mrs Campese, domiciled in Italy, and Hengst Import BV ('Hengst'), whose registered office is in the Netherlands, concerning partly unpaid bills relating to shoe deliveries in 1987 and 1988.

3 Using the *procedimento d'ingiunzione*, a summary procedure for recovery of debts, Mrs Campese applied to the President of the Tribunale di Trani (Trani District Court, Italy) on 28 March 1989 for a *decreto ingiuntivo* (order for payment) requiring Hengst to pay her the sum of LIT 11 214 875 with statutory interest and costs.

4 The *procedimento d'ingiunzione* is a summary procedure which allows a creditor by *ex parte* application to obtain an enforceable court order against the debtor.

5 The creditor applies to the court, with all supporting written evidence, for an order against the debtor for payment of the sum claimed or delivery of the goods within a period of — generally — 20 days (Article 641 of the Italian Code of Civil Procedure, hereinafter 'CPC'). The second paragraph of Article 643 provides that copies of the order and the application are to be served on the defendant. The third paragraph of Article 643 provides that that joint service marks the start of the proceedings. After service, the defendant may oppose the order until the end of the period set under Article 641 of the CPC for voluntary compliance.

6 In principle, the order is not enforceable without more: authorization of the court, given on the application of the plaintiff after expiry of the period for opposing the order, is necessary to make it enforceable. On application by the creditor, however, the order may be made enforceable on an interim basis where the debt is based on a bill of exchange, a banker's draft, a cheque, a certificate of stock-market liquidation (in cases where a stockbroker has become insolvent) or an instrument made before a notary or other authorized public officer (Article 642(1) of the CPC). The court may also make the order enforceable on an interim basis if delay would give rise to a risk of serious harm (Article 642(2) of the CPC).

7 If the debtor opposes the order within the prescribed period, the ordinary *inter partes* civil procedure is followed (Article 645 of the CPC). Otherwise the court declares the order enforceable on application by the creditor. It must however first order fresh service where it is probable that the debtor was not aware of the order (Article 647 of the CPC).

8 In this case, the President of the Tribunale di Trani made an order for payment on 1 April 1989. On 23 May 1989, that order, together with the application, was served on Hengst in the Netherlands by the Office of the Public Prosecutor at the Arrondissementsrechtbank te Zwolle in accordance with the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters.

9 On 31 July 1989, noting that the *decreto ingiuntivo* had been duly served on the defendant and that the period of 20 days had expired without Hengst's opposing it, the President of the Tribunale di Trani declared the order enforceable. That decision was recorded on 27 September 1989 in the form of a declaration by the clerk of the Tribunale di Trani, inscribed on the *decreto ingiuntivo*.

10 By order of 20 November 1990, the President of the Arrondissementsrechtbank te Zwolle authorized enforcement of the *decreto ingiuntivo* in accordance with Article 31 of the Brussels Convention, which provides: '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, the order for its enforcement has been issued there.' On 6 December 1990, Mrs Campese served that order on Hengst.

11 Hengst opposed the order before the Arrondissementsrechtbank te Zwolle on the basis of Article 27(2) of the Convention which provides that a judgment is not to 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. According to Hengst, service of the copy of the order together with that of the application cannot be considered to be a document which instituted the proceedings or an equivalent document within the meaning of that provision. The order for payment made by the Tribunale di Trani cannot therefore be recognized and enforced on the basis of the Convention.

12 Unsure of the interpretation to be given to the Convention, the Arrondissementsrechtbank referred the following question to the Court for a preliminary ruling:

'Must a *decreto ingiuntivo* within the meaning of Book IV of the Italian Code of Civil Procedure (Articles 633 to 656), together with the application instituting the proceedings or on its own, be regarded as "the document which instituted the proceedings or ... an equivalent document" within the meaning of Article 27(2) or Article 46(2) or the second paragraph of Article 20 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters?'

13 It must be noted first that only Article 27(2) of the Convention is to be interpreted, since Articles 20 and 46(2) of the Convention, also referred to in the question, are irrelevant to the main proceedings. Article 20 is addressed to the courts of the State in which the judgment was given and not to those of the State in which enforcement is sought. With regard to Article 46, the main proceedings do not appear to be concerned with the question whether, as required by that provision in the case of judgments in default, Mrs Campese, in the course of the procedure for

recognition and enforcement, produced a document proving that the document which instituted the proceedings had been duly served in the original action.

14 It should also be noted that the order at issue is undoubtedly a judgment capable of recognition and enforcement under Title III of the Convention since there could have been an *inter partes* hearing in the State where it was made before recognition and enforcement were sought in the Netherlands (see Case 125/79 *Denilauler* v *Couchet Frères* [1980] ECR 1553, paragraph 13).

15 By virtue of Article 645 of the CPC, Hengst could have opposed the order before the Tribunale di Trani within 20 days of service of the *decreto ingiuntivo*, which would have converted the matter into ordinary contentious proceedings.

16 In order to construe the term 'document which instituted the proceedings or ... equivalent document' used in Article 27(2) of the Convention, it must first be noted that the provisions of the Convention as a whole, both in Title II on jurisdiction and in Title III on recognition and enforcement, manifest an intention to ensure that, within the scope of the objectives of the Convention, proceedings culminating in judicial decisions are conducted in such a way that the rights of the defence are observed (*Denilauler*, paragraph 13).

17 That requirement is particularly crucial where the defendant fails to respond. Article 27(2) is specifically intended to ensure that a judgment given in default can be recognized or enforced under the Convention only if the defendant had the opportunity to put his defence before the court which gave the judgment (Case 166/80 *Klomps* v *Michel* [1981] ECR 1593, paragraph 9, and Case C-123/91 *Minalmet* v *Brandeis* [1992] ECR I-5661, paragraph 18). To that end, the provision requires that the document which instituted the proceedings or an equivalent document be duly and timeously served on the defendant.

18 It is clear from *Minalmet*, paragraphs 19 and 20, that in order to enable the defendant to arrange for his defence, service of the document which instituted the proceedings or an equivalent document within the meaning of Article 27(2) of the Convention must be effected before an enforceable judgment is given in the State of origin.

19 It follows that the term 'document which instituted the proceedings or ... equivalent document' within the meaning of Article 27(2) of the Convention means the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin.

20 Since their joint service starts time running for the defendant to oppose the order and since the plaintiff cannot obtain an enforceable order before the expiry of the time-limit, the *decreto ingiuntivo* and the plaintiff's application constitute a document which instituted the proceedings or an equivalent document within the meaning of Article 27(2) of the Convention.

21 It must be stressed that in this case the document which instituted the proceedings is constituted by the combination of the order to pay and the application. The *decreto ingiuntivo* is just a form which to be comprehensible must be read with the application. Conversely, service of the application alone would not enable the defendant to decide whether to defend the action since, without the *decreto ingiuntivo*, he would not know whether the court had granted or refused the application. Moreover, the requirement for joint service of the *decreto ingiuntivo* and the application is confirmed by Article 643 of the CPC, according to which it marks the start of the proceedings.

22 In its written observations to the Court, the Commission puts forward an argument against the recognition and enforcement of the judgment of the Tribunale di Trani which was not raised before the national courts. According to the final paragraph of Article 633 of the CPC, 'the order may not be made if service on the defendant pursuant to Article 643 must be effected outside Italy or the territories

under Italian sovereignty.' Noting that in this case service was effected in the Netherlands, the Commission submits that the order cannot be a document which instituted the proceedings within the meaning of Article 27(2) of the Convention. Hence, the Netherlands court could refuse to recognize the order of the Tribunale di Trani on the ground of lack of proper service of the document which instituted the proceedings.

23 That argument cannot be upheld.

24 First, the sole aim of Article 27(2) is to ensure that a document which instituted the proceedings or an equivalent document was duly served on the defendant in sufficient time to enable him to arrange for his defence. It does not entitle the court of the State in which recognition is sought to refuse recognition and enforcement of a judgment because of a possible breach of provisions of the law of the State in which it was given other than those governing proper service.

25 Secondly, disregard by the court in which the judgment was given of the final paragraph of Article 633 of the CPC is neither one of the grounds for refusing recognition laid down elsewhere in Article 27 nor one of the situations exhaustively listed in Article 28 of the Convention, in which the court of the State in which recognition is sought is authorized to review the jurisdiction of the court of the State in which the judgment was given.

26 The reply to the national court should accordingly be that the *decreto ingiuntivo* within the meaning of Book IV of the Italian Code of Civil Procedure (Articles 633 to 656), together with the application instituting the proceedings, must be regarded as 'the document which instituted proceedings or ... an equivalent document' within the meaning of Article 27(2) of the Convention.

Costs

27 The costs incurred by the Italian Government and the Commission of the European Communities, 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 (Third Chamber),

in answer to the question referred to it by the Arrondissementsrechtbank te Zwolle by judgment of 15 December 1993, hereby rules:

The *decreto ingiuntivo* within the meaning of Book IV of the Italian Code of Civil Procedure (Articles 633 to 656), together with the application instituting the proceedings, must be regarded as 'the document which instituted proceedings or ... an equivalent document' within the meaning of Article 27(2) 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.

Gulmann Moitinho de Almeida Edward

Delivered in open court in Luxembourg on 13 July 1995.

R. Grass
Registrar

C. Gulmann
President of the Third Chamber