JUDGMENT OF THE COURT (Sixth Chamber)
9 October 1997 *

In Case C-163/95,

REFERENCE to the Court pursuant to 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 House of Lords for a preliminary ruling in the proceedings pending before that court between

Elsbeth Freifrau von Horn

and

Kevin Cinnamond

on the interpretation of Article 21 of the said 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 the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1), and of Article 29 of the Convention of 26 May 1989,

* Language of the case: English.

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, G. F. Mancini (Rapporteur), P. J. G. Kapteyn, J. L. Murray and G. Hirsch, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Freifrau von Horn, by Messrs Forsyte, Saunders and Kerman, Solicitors,

— Mr Cinnamond, by Nicholas Forwood QC and Peter Brunner, Barrister, instructed by David Henshall, Solicitor,

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and David Lloyd Jones, Barrister,

— the Commission of the European Communities, by Nicholas Khan, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Cinnamond, the United Kingdom Government and the Commission at the hearing on 24 April 1996,

after hearing the Opinion of the Advocate General at the sitting on 14 May 1996

gives the following

Judgment

1 By order of 25 May 1995, received at the Court on 29 May 1995, the House of Lords 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 (OJ 1978 L 304, p. 36, hereinafter 'the Brussels Convention') two questions on the interpretation of Article 21 of that Convention, 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 the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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 San Sebastian Convention'), and of Article 29 of the San Sebastian Convention.

2 Those questions were raised in proceedings between Freifrau von Horn, domiciled in Portugal, and Mr Cinnamond, domiciled in the United Kingdom, concerning the payment of a sum of money which she claims from him as constituting payment for the sale to a Gibraltar company of shares in a property company.

3 On 27 August 1991 Mr Cinnamond brought proceedings against Freifrau von Horn in the Tribunal de Círculo (Circuit Court), Portimão, Portugal, for a declaration that he did not owe the sum of £600 000 or the equivalent in escudos. In those proceedings Freifrau von Horn counterclaimed for a declaration that Mr Cinnamond owed her £600 000 and an order for payment.

4 On 9 November 1992 Freifrau von Horn issued a writ in the High Court of Justice, served on Mr Cinnamond on 18 November 1992, for payment of £600 000 as the balance due for the shares or, in the alternative, for damages. On 27 November 1992 Mr Cinnamond issued a summons for a declaration that that court lacked jurisdiction. On 5 March 1993 the proceedings were stayed. On 21 April 1993 a judge of the High Court allowed Freifrau von Horn's appeal against the stay. Mr Cinnamond appealed against the judge's decision to the Court of Appeal, which dismissed his appeal by judgment of 25 February 1994. On 19 July 1994 the House of Lords granted Mr Cinnamond leave to appeal.

5 Since it considered that the dispute raised questions of the interpretation of the Brussels and San Sebastian Conventions, the House of Lords stayed proceedings and referred the following questions to the Court:

'In a case where:

(a) there are pending proceedings in two different Contracting States involving the same cause of action and between the same parties;

(b) the first such proceedings in time were initiated in Contracting State A before the Brussels Convention and/or any applicable accession convention came into force in that State;

(c) the second such proceedings are initiated in Contracting State B in accordance with Article 2 of the Brussels Convention after the Brussels Convention and/or any applicable accession convention has come into force in both State A and State B;

and having regard to Article 29(1) of the San Sebastian Convention and the corresponding articles in any other applicable accession convention and Article 21 of the Brussels Convention (as amended):

(1) Does the Brussels Convention (as amended) and/or any applicable accession convention lay down any, and if so what, rules as to whether the proceedings in State B may or must be stayed, or jurisdiction declined, on the ground of pending proceedings in State A

and in particular

(2) Is the Court second seised required or permitted, for the purpose of deciding whether or not to decline jurisdiction in respect of, or to stay, the proceedings before it, to conduct any and, if so, what examination of the basis upon which the court first seised assumed jurisdiction?'

6 In answering those questions, which should be taken together, it must be noted that under Article 21 of the Brussels Convention, as amended by Article 8 of the San Sebastian Convention,

'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 stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

7 Article 29 of the San Sebastian Convention reads as follows:

'1. The 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention, the 1982 Convention and this Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention, as amended by the 1978 Convention, the 1982 Convention and this Convention, if jurisdiction was founded upon rules which accorded with the provisions of Title II of the 1968 Convention, as amended, or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.'

8 In accordance with Article 32(2) thereof, the San Sebastian Convention entered into force between Portugal and the United Kingdom on the first day of the third month following the deposit of the last instrument of ratification, namely 1 July 1992.

9 The rule which governs the temporal application of Article 21 of the Brussels Convention is therefore that laid down in Article 29(1) of the San Sebastian Convention. However, that provision does not allow it to be determined with certainty whether the *lis pendens* provisions of Article 21 of the Brussels Convention apply where the first proceedings were brought in a Contracting State before the date of entry into force of the San Sebastian Convention and the second proceedings were brought in another Contracting State after that date, or whether both sets of

proceedings must have been brought after the entry into force of the San Sebastian Convention.

10 First, while Article 21 is included in Title II of the Brussels Convention among the provisions which determine jurisdiction of the court seised, it requires that court to stay the proceedings before it and, as the case may be, decline jurisdiction because of the existence of proceedings before a court of another Contracting State. In contrast to other procedural rules, it thus necessarily implies the taking into account of other proceedings, which may have been brought before or after the entry into force of the Convention.

11 While Article 29(1) of the San Sebastian Convention states that the Brussels Convention is to apply to legal proceedings instituted after its entry into force, it does not specify whether, in the case, referred to in Article 21 of the Brussels Convention, where several actions are pending before the courts of different Contracting States, it is necessary that all the proceedings should have been instituted after the date of entry into force or whether it is enough that the proceedings pending before the court last seised were so instituted.

12 Most of the language versions of Article 21 of the Brussels Convention admittedly refer to the institution of the proceedings and thus appear to suggest that Article 29(1) of the San Sebastian Convention is to be interpreted as providing that Article 21 is to apply only if all the proceedings were commenced after the entry into force of the Convention. However, the German ('werden ... anhängig gemacht') and Dutch ('aanhangig zijn') versions refer to the situation where the proceedings are pending, so that they permit the interpretation that by reason of Article 29(1) the rule in Article 21 applies where that situation is shown to exist before the court second seised after the entry into force of the San Sebastian Convention.

13 Second, the two interpretations mentioned in paragraph 9 above are both capable of leading to consequences which are unsatisfactory and contrary to the aims of

the Brussels Convention as set out in its preamble, which are, in particular, to facilitate reciprocal recognition and enforcement of judgments of courts and tribunals and to strengthen the legal protection of persons established in the Community. With respect more particularly to Article 21, the Court has repeatedly observed that that provision, together with Article 22 on related actions, is contained in Section 8 of Title II of the Brussels Convention, a section which 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 arise therefrom. Those rules are therefore designed to preclude, in so far as possible and from the outset, a situation such as that referred to in Article 27(3), namely the non-recognition of a judgment on account of its irreconcilability with a judgment given between the same parties in the State addressed (see Case 144/86 *Gubisch Maschinenfabrik* v *Palumbo* [1987] ECR 4861, paragraph 8, and Case C-351/89 *Overseas Union Insurance and Others* v *New Hampshire Insurance* [1991] ECR I-3317, paragraph 16).

14 The view that Article 21 applies where the second proceedings have been brought after the date of entry into force of the San Sebastian Convention, even if the first action was commenced before that date, could make it impossible for the parties to the proceedings to obtain a judgment enforceable in the Contracting State in which the second proceedings take place. The court second seised would have to stay the proceedings and, as the case may be, decline jurisdiction by reason of the existence of proceedings before a court of another Contracting State, even though recognition and enforcement of the judgment given in those proceedings might prove impossible in the State addressed. That would be the case in particular, under Article 29(2) of the San Sebastian Convention, if the jurisdiction of the court of the Contracting State of origin was founded on rules which did not accord with Title II of the Brussels Convention or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

15 The contrary view, namely that Article 21 applies only if the two sets of proceedings were instituted after the entry into force of the San Sebastian Convention, on the other hand, would lead to their continuing, in the two Contracting States, and possibly resulting in two different judgments being delivered. If those decisions

were irreconcilable, neither of them could be recognized in the other State, in accordance with Article 27(3) of the Brussels Convention.

16 In those circumstances, it may be seen that it is essential to interpret Article 29(1) of the San Sebastian Convention in the light of the structure and aims of that Convention and the Brussels Convention.

17 That provision should therefore be construed in such a way as to make it possible for the legal protection of persons established in the Community to be strengthened and recognition and enforcement of judicial decisions to be facilitated, in particular by reducing the danger of irreconcilable judgments being delivered, that being a ground for refusing recognition and enforcement under Article 27(3) and the second paragraph of Article 34 of the Brussels Convention (see Case C-220/88 *Dumez France and Tracoba* v *Hessische Landesbank and Others* [1990] ECR I-49, paragraph 18, and *Overseas Union Insurance*, paragraph 15).

18 In accordance with Article 29(2) of the San Sebastian Convention, judgments delivered in a Contracting State after the date of entry into force of that Convention in proceedings brought before that date must be recognized and enforced in accordance with Title III of the Brussels Convention if jurisdiction was founded on rules which accorded with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

19 In such a case, therefore, the court second seised should, in accordance with Article 21, stay the proceedings of its own motion until the jurisdiction of the court first seised is established and, where the jurisdiction of the court first seised is established, decline jurisdiction in favour of that court. The production of parallel, potentially conflicting judgments which might prevent recognition and enforcement will thereby be avoided.

20 If, on the other hand, the jurisdiction of the court first seised is founded on rules which do not accord with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted, its judgment could not be recognized in the Contracting State of the court second seised.

21 In such a case, the court second seised should disapply Article 21 and continue with the proceedings before it. In that way a judgment can be given in the Contracting State of the court second seised, in which the judgment of the court first seised cannot be recognized or enforced. Moreover, the judgment of the court second seised can be recognized and enforced in the Contracting State of the court first seised, provided always that it is not incompatible with a judgment given between the same parties in that State.

22 Further, if the court first seised has not yet ruled on whether it has jurisdiction, it is for the court second seised to apply Article 21 of the Brussels Convention provisionally and stay its proceedings. However, those proceedings may later be resumed if the court first seised declines jurisdiction or the rule on which it has founded its jurisdiction does not accord with the rules of Title II of the Brussels Convention or with a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

23 That interpretation does admittedly mean that a court of a Contracting State will review the jurisdiction of a court of another Contracting State outside the cases expressly listed in Article 28 and the second paragraph of Article 34 of the Brussels Convention, even though, as the Court held in *Overseas Union Insurance*, paragraph 24, apart from those limited exceptions, the Convention does not authorize such a review. However, an exception to that principle appears justified in the situation referred to by the national court.

24 First, by virtue of the transitional provision contained in Article 29(2) of the San Sebastian Convention, application of the rules of that convention which concern the recognition and enforcement of judgments specifically depends on the basis of the jurisdiction of the court first seised.

25 Second, the court second seised must restrict itself to determining whether the jurisdiction of the court first seised accords with the rules of the Brussels Convention, or a convention concluded between the two States concerned, which are common to both courts and may be interpreted with equal authority by the courts of both Contracting States (see *Overseas Union Insurance*, cited above, paragraph 23). In the particular case where the jurisdiction of the court first seised derives, in accordance with Article 4 of the Brussels Convention, from the law of the State of that court, which would thus undeniably be better placed to rule on the question of its own jurisdiction, the court second seised should restrict itself to ascertaining whether the conditions for the application of that provision are satisfied, namely that the plaintiff is domiciled in a Contracting State and the defendant is not domiciled in such a State. In no case, therefore, may the court second seised assess the jurisdiction of the court first seised in the light of the law of the State of that court.

26 Lastly, it must be emphasized that the above rules apply only on a transitional basis to resolve the difficulties deriving from the entry into force of the Brussels Convention and only for so long as proceedings brought before that entry into force are still pending in a Contracting State. Consequently, the principle referred to in paragraph 23 above suffers no lasting injury.

27 The answer to the national court's questions must therefore be that Article 29(1) of the San Sebastian Convention must be interpreted as meaning that where proceedings involving the same cause of action and between the same parties are pending in two different Contracting States, the first proceedings having been brought before the date of entry into force of the Brussels Convention between those States and the second proceedings after that date, the court second seised must apply Article 21 of the Brussels Convention if the court first seised has assumed jurisdic-

tion on the basis of a rule which accords with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the two States concerned when the proceedings were instituted, and must do so provisionally if the court first seised has not yet ruled on whether it has jurisdiction. On the other hand, the court second seised must not apply Article 21 of the Brussels Convention if the court first seised has assumed jurisdiction on the basis of a rule which does not accord with the provisions of Title II of that Convention or with the provisions of a convention which was in force between those two States when the proceedings were instituted.

Costs

28 The costs incurred by the United Kingdom Government and by 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the House of Lords by order of 25 May 1995, hereby rules:

Article 29(1) of the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on Jurisdiction

and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that where proceedings involving the same cause of action and between the same parties are pending in two different Contracting States, the first proceedings having been brought before the date of entry into force of the Brussels Convention between those States and the second proceedings after that date, the court second seised must apply Article 21 of the latter Convention if the court first seised has assumed jurisdiction on the basis of a rule which accords with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the two States concerned when the proceedings were instituted, and must do so provisionally if the court first seised has not yet ruled on whether it has jurisdiction. On the other hand, the court second seised must not apply Article 21 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters if the court first seised has assumed jurisdiction on the basis of a rule which does not accord with the provisions of Title II of that Convention or with the provisions of a convention which was in force between those two States when the proceedings were instituted.

Ragnemalm Mancini Kapteyn

Murray Hirsch

Delivered in open court in Luxembourg on 9 October 1997.

R. Grass

Registrar

H. Ragnemalm

President of the Sixth Chamber