In Case 228/81

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 Bundesgerichthof [Federal Court of Justice] of the Federal Republic of Germany for a preliminary ruling in the appeal on a point of law lodged with that court by

PENDY PLASTIC PRODUCTS BV, whose registered office is in Helmond (The Netherlands),

plaintiff in proceedings for the enforcement of a foreign judgment and appellant on a point of law,

against a decision of the Oberlandesgericht [Higher Court] Düsseldorf rejecting its application for the issue of an order for the enforcement of a judgment by default delivered by the Netherlands court in 's-Hertogenbosch against

PLUSPUNKT HANDELSGESELLSCHAFT MBH, whose registered office is in Neuss (Federal Republic of Germany),

defendant in proceedings for the enforcement of a foreign judgment and respondent in the appeal on a point of law,

on the interpretation of Article 27 (2) of the Brussels Convention and the provisions of the third paragraph of Article 20 of the Brussels Convention in conjunction with those of Article 15 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed at The Hague on 15 November 1965 (Tractatenblad 1966, No 91),

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: G. Reischl
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

By a judgment given in default on 14 September 1979 the Netherlands court in 's-Hertogenbosch ordered Pluspunkt Handelsgesellschaft mbH (hereinafter referred to as "Pluspunkt"), whose registered office is in Neuss in the Federal Republic of Germany, to pay to Pendy Plastic Products BV (hereinafter referred to as "Pendy"), whose registered office is in Helmond in the Netherlands, the sum of HFL 29 979.25, plus interest at the legally prescribed rate as from 6 December 1978, and the costs of the proceedings up to the date of that judgment, amounting to HFL 1 042.15.

Pendy, wishing to obtain enforcement of that judgment in the Federal Republic of Germany, applied to the Landgericht [Regional Court] Düsseldorf for an enforcement order; its application was rejected and the decision rejecting it was upheld on appeal by the Oberlandesgericht [Higher Regional Court] Düsseldorf, which considered that a precondition for the issue of an order for the enforcement of the Netherlands judgment by default was observance of the procedural rules laid down in Article 27 (2) and the second paragraph of Article 34 of the Brussels Convention, namely service on the defendant of the document which instituted the proceedings.

It appears from the case-file that the document instituting the proceedings which culminated in the Netherlands judgment by default was transmitted on 26 March 1979 to the Netherlands Procureur Generaal for the purpose of service.

The document instituting the proceedings and the summons to appear at the hearing were to be served on the defendant at 36 Kaarster Straße, Neuss.

Since it was not possible to locate the defendant at the address given, the Amtsgericht [Local Court] Neuss issued a certificate on 17 May 1979 indicating that it had not been possible to serve the document in question, in accordance with Article 6 (2) of The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

The defendant Pluspunkt did not enter an appearance and the Netherlands court in 's-Hertogenbosch, by interlocutory judgment of 8 June 1979 delivered pursuant to the second and third paragraphs of Article 20 of the Brussels Convention in conjunction with Article 15 of The Hague Convention, enjoined Pendy to prove that the defendant had had an opportunity to receive the summons in sufficient time or that all reasonable steps had been taken in that respect to enable it to make arrangements for its defence. It postponed the hearing until 20 July 1979.

On that date, the plaintiff lodged an extract from the commercial register and a communication from the Amtsgericht [Local Court] Neuss, to the effect that the files in its possession showed the defendant's address as 36 Kaarster Straße.

On the basis of that information, the Netherlands court in s'-Hertogenbosch

considered that transmission of the document which instituted the proceedings to the Netherlands Procureur Generaal, as evidenced by the document drawn up on 26 March 1979, was sufficient and delivered a judgment in default on 14 September 1979, in respect of which Pendy applied to the German courts for the issue of an enforcement order.

Pendy's application for the issue of an enforcement order was rejected by the Landgericht Düsseldorf, whose decision was upheld, on appeal, by the Oberlandesgericht Düsseldorf.

The latter court considered that pursuant to Article 27 (2) and the third paragraph of Article 34 of the Brussels Convention, a precondition for the issue of an order for the enforcement of the Netherlands judgment given in default is verification that the document which instituted the proceedings was properly served on the defendant.

The Oberlandesgericht noted that the Netherlands and the Federal Republic of Germany are parties to The Hague Convention of 15 November 1965; therefore the documents should have been served on the defendant in accordance with the provisions of that Convention. According to the certificate issued by the Amtsgericht Neuss, no such service was effected since it was impossible to locate the defendant at the address given by the plaintiff, the latter being unaware that the defendant had moved its business address in April 1979 from 36 Kaarster Straße, Neuss, to 80b Erftstraße, Neuss.

In the opinion of the Oberlandesgericht, the procedural principle of the right to a proper hearing was breached in this case with regard to Pluspunkt, since the measures taken by Pendy to discover the defendant's business address and to give proof thereof to the Netherlands court were wholly inappropriate; the German commercial register merely mentions the town where a company has its registered office, in this case Neuss, a factor which had not changed in relation to Pluspunkt. Therefore, the fact that the Netherlands court considered that service had been properly effected was not sufficient to justify the issue of an enforcement order under the Brussels Convention.

Pendy appealed on a point of law to the Bundesgerichtshof against the decision of the Oberlandesgericht Düsseldorf.

By order of 8 July 1981, the Eighth Civil Senate of the Bundesgerichtshof decided to submit the following question to the Court:

"May recognition of a judgment be refused in accordance with Article 27 (2) of the Brussels Convention where the defendant did not enter an appearance in the proceedings in the adjudicating State and he was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence, even where the court of the State in which the judgment was given established, in accordance with the third paragraph of Article 20 of the Convention in conjunction with Article 15 of The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, that the defendant had an opportunity to receive the writ in sufficient time to enable him to arrange for his defence?"

In the statement of grounds on which its order making the reference was based, the Bundesgerichtshof points out that in accordance with the second paragraph of Article 34 of the Brussels Convention, an application for the issue of an enforcement order may be rejected only for one of the reasons specified in Articles 27 and 28 of the Convention. The Bundesgerichtshof takes the view that Articles 34, 27 and 28 of the Brussels Convention determine the jurisdiction of the courts of the State in which enforcement is sought to examine the judgment in

question. If the courts of the State in which enforcement is sought did not have jurisdiction to verify whether, in the case of a judgment by default, the documents which instituted the proceedings had been served in sufficient time in accordance with Article 27 of the Brussels Convention whenever the court of the State in which judgment was given has fulfilled its obligation to carry out the investigation referred to in Article 20 of the Brussels Convention, the courts of the State in which enforcement is sought would be largely deprived of any jurisdiction to examine the judgment in question. However, it might also be asserted that, regard being had to the terms of the third paragraph of Article 34 of the Brussels Convention, the result arrived at by the courts of the State in which judgment was given, pursuant to Article 20 of the Brussels Convention, ought necessarily to be accepted without further review by the courts of the State in which enforcement is sought.

The order making the reference was received at the Court Registry on 6 August 1981.

Pursuant to Article 5 of the Protocol of 3 June 1971 and in accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted by the Government of the Federal Republic of Germany, represented by Christof Böhmer, acting as Agent; by the Government of the Italian Republic, represented by Arnaldo Squillante, Head of the Department of Contentious Diplomatic Proceedings, Treaties and Legislative Affairs, acting as Agent, and Ennio Viola, Avvocato dello Stato; by the Government of the United Kingdom, represented by R. N. Ricks, of the Treasury Solicitor's Department, acting as Agent, and by the Commission, represented by its Legal Adviser, Erich Zimmermann, assisted by Wolf-Dietrich Krause-Ablass, of the firm of lawyers Bruckhaus Kreifels Winkhaus, 8 Lieberknecht, Düsseldorf. The parties to the main proceedings made no submissions.

By order of 24 March 1982 the Court decided to assign the case to the Second Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

II — Summary of the written observations

According to the German Government, the question submitted to the Court concerns the relationship between Article 27 (2) an Article 20 of the Brussels Convention, the third paragraph of Article 20 being replaced by Article 15 of The Hague Convention of 15 November 1965.

The German Government draws attention to the fact that in its judgment of 16 June 1981 in *Klomps* v *Michel*, the Court held that before answering the questions submitted "it must be recalled that Title II of the Brussels Convention contains provisions regulating directly and in detail the jurisdiction of the courts of the State in which judgment was given, and also provisions concerning the verification of that jurisdiction and of admissibility. These provisions, which are binding on the court in which judgment was given, are of such a nature as to protect the interests of defendants. This has made it possible, at the stage of recognition and enforcement which is governed by Title III of the Convention, to facilitate the free movement of judgments within the Community by simplifying the procedure for recognition and by reducing the number of grounds which may operate to prevent the recognition and enforcement of judgments. Amongst these grounds are that contained in Article 27, point 2, which, for the sole purpose of safeguarding the rights of the

defendant, provides for refusal of recognition and, read together with Article 34, for refusal of enforcement, in exceptional cases where the guarantees contained in the law of the State in which the judgment was given and in the Convention itself are insufficient to ensure that the defendant has an opportunity of arranging for his defence before the court in which judgment was given".

Article 27 (2) of the Convention is addressed to the court in the State in which recognition and enforcement are sought and not to the court in the State where judgment was given. In order to protect a defendant who fails to enter an appearance the rules seek to ensure that a decision is not enforced against him unless he effectively had sufficient opportunity, during the course of the proceedings which led to the judgment, to present his defence.

According to the German Government, Article 27 (2) of the Convention is complemented by Article 46 (2) and Article 48 of the Convention, which provide that a party seeking recognition or applying for enforcement of a judgment given in default must, as a general rule, produce the original of the document which establishes that the defendant was served with the document instituting the proceedings.

By virtue of Article 27 (2) and the second paragraph of Article 34, it is incumbent upon the court in the State in which enforcement is sought to verify, on the basis of those documents, whether service was duly effected and whether it took place in sufficient time.

As regards verification of service in due time, the German Government is of the opinion that the court in the State in which enforcement is sought is not bound by the legal provisions in force in the State in which judgment was given or by the provisions of its own law. It must consider whether the period available to the defendant was in fact sufficient. A consequence thereof might be that, although service was duly effected, it might be appropriate to refuse to recognize the judgment if the defendant did not in fact have sufficient time in which to make arrangements for his defence.

As regards the task of verifying, pursuant to Article 27 (2) of the Convention, whether service was duly effected, it appears to be recognized that the court in the State in which enforcement is sought must carry out that verification having regard to the law of the State in which judgment was given. In the opinion of the German Government, the question then arises — and it is the central issue in this reference — whether the court in the State in which enforcement is sought is free of any restrictions in carrying out its verification or whether it is bound by the finding of the first court under Article 20 of the Brussels Convention that the provisions in force in the adjudicating State regarding service were observed.

The German Government considers that in order to answer that question it is appropriate to have regard in particular to the internationally recognized principle, whereby the court's freedom in its investigation of the facts and its legal assessment of a situation is restricted only in those cases where a limitation is laid down expressly. The German Government cites the example of the Convention between the Netherlands and the Federal Republic of Germany on Recognition and Enforcement of 30 August 1962 (Bundesgesetzblatt 1965, Part II, p. 27), Article 5 (1) of which provides that the court in the State in which enforcement is sought is bound by the findings of the first court in so far as they relate to jurisdiction.

In the opinion of the German Government, since Article 27 (2) of the Brussels Convention places no limitation on the jurisdiction of the court in the State in which enforcement is sought, the latter is not bound either by the findings of fact or by the findings of law of the Court in the State in which the judgment was given.

That interpretation is confirmed by the objectives of the Brussels Convention and of the Hague Convention, which seek to protect the defendant and entrust such protection to two different courts, the court in the State in which judgment

was given and the court in the State in which enforcement is sought.

If the court in the State in which enforcement is sought were bound by the findings of fact and the legal assessment of the first court, Article 27 (2) of the Brussels Convention would be meaningless and observance of the right to a proper hearing, a principle of public policy, would no longer be guaranteed.

According to the German Government, that principle must not be left exclusively to the discretion of the first court. Its decision may therefore be reviewed by the court in which enforcement is sought.

That interpretation is confirmed by the judgment of 16 June 1981 (Case 166/80 *Klomps* v *Michel* [1981] ECR 1593) in which the Court held that even if a court in the State in which the judgment was given expressly recognized that service had been duly effected, the court in which enforcement was sought would be obliged, pursuant to Article 27 (2) of the Convention, to examine whether such service actually took place in sufficient time.

The Government of the Federal Republic of Germany proposes that the question submitted should be answered as follows:

"The finding of fact by the court of the State in which judgment was given, pursuant to the provisions of the third paragraph of Article 20 of the Brussels Convention in conjunction with those of Article 15 of the Hague Convention on service abroad, to the effect that the defendant had an opportunity to receive the writ in time to make arrangments for his defence does not prevent the court in the State in which enforcement is sought from determining whether it is appropriate to withhold recognition from the judgment given in default in the first State in accordance with Article 27 (2) of the Brussels Convention."

The *United Kingdom* points out that the Federal Republic of Germany and the Netherlands have ratified The Hague Convention of 15 November 1965. Accordingly, the court originally seised of the matter is bound, by virtue of the third paragraph of Article 20 of the Brussels Convention of 27 September 1968, to apply Article 15 of The Hague Convention and to satisfy itself that service has been effected in accordance with that article.

In its observations, the United Kingdom proceeds on the assumption, inferred from the terms of the question submitted, that the Netherlands court concluded that the requirements of Article 15 of The Hague Convention and Article 20 of the Brussels Convention had been satisfied.

According to the United Kingdom, the question submitted seeks to ascertain whether the fact that the Netherlands court regarded the summons to the defendant as valid precludes the German court from refusing recognition of the judgment under the Brussels Convention.

The second paragraph of Article 34 of the Brussels Convention provides that an application for enforcement may be refused only for one of the reasons specified in Articles 27 and 28. The pertinent reason in this case is contained in Article 27 (2), 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 in sufficient time to enable him to arrange for his defence".

In the opinion of the United Kingdom, those clear words operate so as to direct a court which has made a finding that there was no due service, or no service in sufficient time, to refuse recognition. A

court would be permitted to derogate from such a duty only where it was clearly excluded, expressly or by implication, by other terms of the Convention. Article 27 of the Brussels Convention cannot be construed as excluding such a duty expressly or by implication. Moreover, there are no grounds for considering that the object of Article 20 is to limit the authority conferred by Article 27 (2) on the court in the State in which enforcement is sought.

According to the United Kingdom, which cites the judgment of 21 May 1980 (Case 125/79 *Denilauer* v *Couchet Frères* [1980] ECR 1553, at p. 1569) it would be objectionable to oblige the court in the State in which enforcement is sought to recognize a judgment in circumstances where the defendant had been denied the right to a fair hearing in the State in which the judgment was given.

In the opinion of the United Kingdom, which refers to the work by Mr Droz entitled "Compétence Judiciaire et Effets des Jugements dans le Marché Commun" (Dalloz 1972, paragraphs 504 and 505), Article 27 (2) is intended to ensure observance of a principle of natural justice whereby recognition of a judgment must be withheld if the defendant did not have an opportunity to acquaint himself with the content of the instrument served.

That point of view is confirmed by Mr Jenard who states at page 44 of his report on the Brussels Convention (Official Journal 1979, C 59) that: "... even where service has been duly effected, recognition can be refused if the court in which recognition is sought considers that the document was not served in sufficient time to enable the defendant to arrange his defence". The United Kingdom is of the opinion that recognition should be refused *a fortiori* where, as in the present case, the document which instituted the proceedings was not served on the defendant.

The question submitted by the Bundesgerichtshof accordingly calls for an answer in the affirmative.

According to the *Italian Government*, the terms of Articles 27 (2) of the Brussels Convention indicate that the courts in each Contracting State have not only the power but also the duty not to recognize a foreign decision in the cases to which that provision refers. Thus, the court in the State in which enforcement is sought may independently verify whether the document which instituted the proceedings was duly served and whether the period granted to the defendant to arrange for his defence was sufficient.

The Italian Government considers that that interpretation of the provisions in question is confirmed in particular by the existence of the third paragraph of Article 34. If the authors of the Convention thought it relevant to state that "under no circumstances may the foreign judgment be reviewed as to its substance" it is clear that, on the contrary, the court of the State in which enforcement is sought has an independent power of verification, the scope of which is defined in Article 27 (2) of the Convention.

That interpretation is also confirmed by the fact that enforcement proceedings involve questions of public policy since the right to a fair hearing is an fundamental, inviolable and sacred right which implies the right to adequate time and facilities for the preparation of a defence (Articles 7 and 8 of the Universal Declaration of Human Rights approved by the General Assembly of the United Nations Organization on 10 December 1948; Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950).

In the opinion of the Italian Government, the issue of an order for the enforcement of a foreign judgment presupposes that the judgment was given in properly conducted proceedings. Where the right to a fair hearing has not been respected, there can be no question of a judgment delivered in default of appearance. The procedure is irregular and therefore the judgment is void, indeed non-existent.

That conclusion confirms the view that the court of the State in which enforcement is sought is empowered to verify that the correct procedure has been followed and therefore that the foreign judgment is valid.

It is therefore appropriate to answer the question submitted in the affirmative.

The *Commission* states that, in view of the terms of Article 27 (2) of the Brussels Convention, it is the responsibility of the court of the State in which enforcement is sought to verify that the document which instituted the proceedings was duly served in sufficient time.

It may be seen from the Jenard report (with reference to Article 27 of the Convention) and from paragraph 15 of the judgment of 16 June 1981 (in Case 166/80 *Klomps* v *Michel*) that in order to verify that service was duly effected the court of the State in which enforcement is sought must refer to the municipal law of the State in which the judgment was given and is not bound by the findings of fact in that regard made by the court in that State.

The Commission draws attention to the fact that the service of judicial documents abroad is governed by different rules in the various States which are parties to the Convention. As pointed out in the Jenard report (with reference to Article 20), the German system of service involves the cooperation of the public authorities of the place of residence of the addressee which have jurisdiction to deliver to him a copy of the instrument. The German court may not in principle give judgment in default of appearance unless it receives conclusive evidence that the instrument has been delivered to the addressee. In other countries, in particular the Netherlands, a document addressed to a person residing abroad is regarded as served when the process-server transmits it to the competent official attached to the court having jurisdiction or sends it to the Minister for Foreign Affairs.

In view of the foregoing and having regard to the terms of Articles 20 and 27 (2) of the Brussels Convention, which contain no requirement whatsoever that the defendant should have had actual knowledge of the document to be served, it appears that the German courts in which recognition of a judgment is sought must confine themselves to establishing whether, in any particular case, the formal requirements laid down by Netherlands law for service by means of transmission to the competent court official were observed.

The Commission points out, however, that the rules in force in the Netherlands to the effect that service of process on a foreign defendant may take place on the territory of the State in which the action is brought give rise to the possibility that judgment may be given in default against a defendant who is unaware of the proceedings instituted against him.

In the Commission's view, the Contracting States were aware, when settling the provisions of the second and third paragraphs of Article 20 and Article 27 (2) that, where such a system of service is adopted, the defendant should be assured of the benefit of further measures of protection. It was to that end that the task of verifying that the document instituting the proceedings was

duly served in sufficient time was entrusted both to the court in the original State and to the court of the State in which enforcement is sought.

That interpretation appears to have been confirmed by the Court in its judgment of 16 June 1981 (Case 166/80 *Klomps* v *Michel*) in which it stated that "the court in which enforcement is sought may as a general rule confine itself to examining whether the period, reckoned from the date on which service was duly effected, allowed the defendant sufficient time to arrange for his defence. It must, however, consider whether, in a particular case, there are exceptional circumstances, such as the fact that, although service was duly effected, it was inadequate for the purposes of causing that time to begin to run".

According to the Commission, it appears from the facts set out in the order making the reference that service of the document which instituted the proceedings was effected in circumstances such as not to allow Pluspunkt the opportunity to arrange for its defence. Transmission to the Netherlands Procureur Generaal's office in March 1979 of the document which instituted the proceedings in no way enabled the defendant to learn of the action brought against it.

The Commission proposes that the question submitted by the Bundesgerichtshof should be answered as follows:

"The court in which enforcement is sought may refuse to recognize and enforce a judgment in the circumstances described in Article 27 (2) of the Convention, even though the court of the State in which the judgment was given established in accordance with the provisions of the third paragraph of Article 20 of the Convention, in conjunction with those of Article 15 of The Hague Convention on Service Abroad, that the defendant had an opportunity to receive the writ in sufficient time to arrange for his defence."

III — Oral procedure

At the sitting on 6 May 1982, oral argument was presented by the Commission of the European Communities, represented by Dr W.-D. Krause-Ablass (assistant to Mr Zimmermann), Rechtsanwalt practising in Düsseldorf.

The Advocate General delivered his opinion at the sitting on 17 June 1982.

Decision

By order of 8 July 1981, which was received at the Court Registry on 6 August 1981, 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 Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters a question on the interpretation of Article 27 (2) of that Convention, having regard to the provisions of the third paragraph of Article 20 thereof in conjunction with those of Article 15 of the

Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Tractatenblad 1966, No 91).

2 That question was raised in an appeal on a point of law lodged by Pendy Plastic Products (BV) (hereinafter referred to as "Pendy"), whose registered office is in Helmond in the Netherlands, against a decision of the Oberlandesgericht [Higher Regional Court] Düsseldorf dismissing its application for the issue of an order for the enforcement of a judgment given in default by the Netherlands court in 's-Hertogenbosch on 14 September 1979 ordering Pluspunkt Handelsgesellschaft mbH (hereinafter referred to as "Pluspunkt"), whose registered office is in Neuss in the Federal Republic of Germany, to pay Pendy the sum of HFL 29 979.25, plus interest calculated from 6 December 1978 and the costs of the proceedings until the date of that judgment, amounting to HFL 1 042.15.

3 It appears that the document instituting the proceedings which culminated in the judgment by default of the Netherlands court was transmitted on 26 March 1979 to the Netherlands Officier van Justitie for the purpose of service. That document, together with the summons to appear at the hearing on 27 April 1979, was to be served on the defendant at 36 Kaarster Straße, Neuss. On 17 May 1979, the Amtsgericht [Local Court] Neuss issued a certificate, in accordance with Article 6 (2) of the Hague Convention of 15 November 1965, ratified by the Kingdom of the Netherlands and by the Federal Republic of Germany, indicating that it had not been possible to serve the documents in question.

4 The defendant, Pluspunkt, failed to enter an appearance and the court in 's-Hertogenbosch enjoined the plaintiff, Pendy, by an interlocutory judgment dated 8 June 1979, to prove that the defendant had been able to receive the summons in sufficient time or that all necessary steps had been taken in that respect to enable it to make arrangements for its defence. At the hearing on 20 July 1979, the plaintiff lodged an extract from the commercial register and a communication from the Amtsgericht Neuss to the effect that the files in its possession showed the defendant's address as 36 Kaarster Straße.

5 On the basis of that information, the court in 's-Hertogenbosch considered that transmission of the document instituting the proceedings to the Officier van Justitie, as evidenced by the document issued on 26 March 1979, was sufficient and delivered a judgment in default on 14 September 1979, in respect of which Pendy applied to the German courts for the issue of an enforcement order.

6 In its order of 8 July 1981 the Bundesgerichtshof restated the findings of the Oberlandesgericht Düsseldorf. According to the latter court, the measures taken by the plaintiff to discover the defendant's business address and to give proof thereof to the Netherlands court were inappropriate, in view of the fact that the commercial register merely mentions the town where a company has its registered office, in this instance Neuss, a factor which had not changed in the case of the defendant. Therefore, the procedural principle of the right to a proper hearing was held to have been contravened with regard to the defendant. In the opinion of the Oberlandesgericht, the fact that the Netherlands court considered service to have been properly effected was not sufficient to justify the issue of an enforcement order under the Brussels Convention.

7 Those are the circumstances in which the Bundesgerichtshof decided to stay the proceedings and to request the Court of Justice to give a preliminary ruling on the following question:

"May recognition of a judgment be refused in accordance with Article 27 (2) of the Brussels Convention where the defendant did not enter an appearance in the proceedings in the adjudicating State and he was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence, even where the court of the State in which the judgment was given established, in accordance with the third paragraph of Article 20 of the Convention in conjunction with Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial documents in Civil or Commercial Matters, that the defendant had an opportunity to receive the writ in sufficient time to enable him to arrange for his defence?"

8 It must be observed *in limine* that, according to the grounds of the order making the reference, the dispute which the Bundesgerichtshof seeks to resolve by way of a reference for a preliminary ruling relates not only to the recognition but also to the enforcement in the Federal Republic of Germany of a judgment given by a Netherlands court. In the present case, however,

that necessary finding is of very limited scope. The recognition and enforcement of judicial decisions are both governed by Title III of the Brussels Convention. Article 34, which is concerned with enforcement, provides that an application for the issue of an enforcement order may be refused only for one of the reasons specified in Articles 27 and 28, which are concerned with the recognition of judicial decisions.

9 Thus the question raised by the Bundesgerichtshof seeks in substance to ascertain whether, under the Brussels Convention, the court of the State in which enforcement is sought may rely on Article 27 (2) of the Convention in order to justify a refusal to recognize or enforce a judgment given by the court of another State which has acceded to the Convention, or whether it is bound by the conclusions which the adjudicating court drew from the application of the third paragraph of Article 20 of the Brussels Convention and Article 15 of the Hague Convention of 15 November 1965.

10 Article 27 (2) of the Brussels Convention provides that a judgment given by a court of another Contracting State "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 in sufficient time to enable him to arrange for his defence". Furthermore, Article 46 (2) of the same Convention requires a party seeking recognition or applying for enforcement, in one Member State, of a judgment given in default in another Member State to produce the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings.

11 The second paragraph of Article 20 of the Brussels Convention provides that, where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court must stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to that end. The third paragraph of Article 20 provides that the aforegoing provisions are to be replaced by those of Article 15 of the Hague

Convention of 15 November 1965 if the document instituting the proceedings or notice thereof had to be transmitted abroad in accordance with that Convention.

12 As the Bundesgerichtshof has established, that was precisely the case in this instance, since both the Kingdom of the Netherlands and the Federal Republic of Germany are parties to the Hague Convention. Article 15 of that Convention specifies, in the same way as the second paragraph of Article 20 of the Brussels Convention but in accordance with rules which are far more detailed and more precise, the circumstances in which a document instituting proceedings may be regarded as having been served on a defendant who is domiciled abroad and has failed to enter an appearance.

13 Although they do not seek to harmonize the different systems of service abroad of legal documents which are in force in the Member States, the provisions of the Brussels Convention are designed to ensure that the defendant's rights are effectively protected. For that reason, jurisdiction to determine whether the document introducing the proceedings was properly served was conferred both on the court of the original State and on the court of the State in which enforcement is sought. Thus, in accordance with the objective of Article 27 of the Convention, the court of the State in which enforcement is sought must examine the question posed by paragraph (2) of that article, notwithstanding the decision given by the court of the original State on the basis of the second and third paragraphs of Article 20. That examination is subject only to the limitation set by the third paragraph of Article 34 of the Convention to the effect that the foreign judgment may under no circumstances be reviewed as to its substance.

14 Accordingly, the answer to the question submitted by the Bundesgerichtshof must be that the court of the State in which enforcement is sought may, if it considers that the conditions laid down by Article 27 (2) of the Brussels Convention are fulfilled, refuse to grant recognition and enforcement of a judgment even though the court of the State in which the judgment was given regarded it as proven, in accordance with the third paragraph of Article 20 of that Convention in conjunction with Article 15 of the Hague Convention of 15 November 1965, that the defendant, who failed to enter an appearance, had an opportunity to receive service of the document instituting the proceedings in sufficient time to enable him to make arrangements for his defence.

Costs

15 The costs incurred by the Governments of the Federal Republic of Germany, the Italian Republic and the United Kingdom, and by the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 (Second Chamber),

in answer to the question submitted to it by the Bundesgerichtshof by order of 8 July 1981, hereby rules:

The court of the State in which enforcement is sought may, if it considers that the conditions laid down by Article 27 (2) of the Brussels Convention are fulfilled, refuse to grant recognition and enforcement of a judgment, even though the court of the State in which the judgment was given regarded it as proven, in accordance with the third paragraph of Article 20 of that Convention in conjunction with Article 15 of the Hague Convention of 15 November 1965, that the defendant, who failed to enter an appearance, had an opportunity to receive service of the document instituting the proceedings in sufficient time to enable him to make arrangements for his defence.

Due Chloros Grévisse

Delivered in open court in Luxembourg on 15 July 1982.

For the Registrar

H. A. Rühl

Principal Administrator

O. Due

President of the Second Chamber