5. Article 27, point 2, of the Convention does not require proof that the document which instituted the proceedings was actually brought to the knowledge of the defendant. As a general rule the court in which enforcement is sought may accordingly confine its examination to ascertaining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time to arrange for his defence. Nevertheless the court must consider whether, in a particular case, there are exceptional circumstances which warrant the conclusion that, although service was duly effected, it was, however, inadequate for the purpose of causing time to begin to run.

In Case 166/80

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 Hoge Raad der Nederlanden for a preliminary ruling in the proceedings in cassation pending before that court between

PETER KLOMPS

and

KARL MICHEL

on the interpretation of Articles 27 and 52 of the Convention,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore and Lord Mackenzie Stuart (Presidents of Chambers), A. O'Keeffe, G. Bosco, A. Touffait, O. Due, U. Everling and A. Chloros, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

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

1. On 25 March 1976 Mr Michel, the respondent in an appeal in cassation to the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] applied, in the context of a procedure known as "Mahnverfahren" [summary proceedings for the recovery of a debt or liquidated demand], to the Amtsgericht [Local Court] Krefeld, in the Federal Republic of Germany, for an order against Mr Klomps, the appellant in cassation, for payment of the sum of DM 63 270. According to the claim that amount represented commission for his agency fees in connection with the purchase of land in Ratingen in the Federal Republic.

On 29 March 1976 the order for payment [Zahlungsbefehl] was authorized by a responsible officer [Rechtspfleger] of the Amtsgericht.

On 3 April 1976 the order was served, in the absence of Mr Klomps, by depositing it at the post office and by leaving a note at an address in Willich (in the Federal Republic of Germany) which had been indicated by Mr Michel.

On 9 April 1976, since Mr Klomps failed to submit an objection [Widerspruch] to the order for payment, an enforcement order [Vollstreckungsbefehl] was issued and served on Mr Klomps on 22 April in the same way as the order for payment.

On 29 April 1976 the period for lodging an objection [Einspruch] to the enforcement order expired, thereby rendering the enforcement order final and conclusive as between the parties.

On 1 September 1976 Mr Klomps raised an objection before the Amtsgericht Krefeld against the enforcement order, maintaining that, when the above-mentioned documents were served, his habitual residence was in the Netherlands and not in the Federal Republic.

On 19 April 1977 after the Amtsgericht found, after thorough examination, that, according to the provisions of German national law, Mr Klomps was also habitually resident in the Federal Republic, it overruled his objection on the ground that it was raised out of time.

On 12 July 1977 the decision of the Amtsgericht, against which no proceedings were instituted, became binding.

By judgment of 27 June 1978 the President of the Arrondissementsrechtbank [District Court], Roermond, The Netherlands, delivered a judgment in which it ruled, *inter alia*, that the order for payment and the enforcement order were enforceable in the Netherlands under the provisions of the Brussels Convention of 27 September 1968. Mr Klomps's objections relating to those two heads of the judgment were dismissed as unfounded by the Arrondissementsrechtbank in its judgment of 20 September 1979.

Mr Klomps then lodged an appeal in cassation against that judgment to the Hoge Raad der Nederlanden on the ground that at the time of service of the document which instituted the proceedings which, according to him,

was the order for payment, he had his habitual residence, or at least was living, in the Netherlands. Consequently service was not duly effected or effected in good time. He further claimed that, even although the Arrondissementsrechtbank considered whether service was duly effected, it failed to consider whether he had had sufficient time within which to arrange for his defence, that is, to submit, within the period of three days referred to in the order for payment, an objection [Widerspruch] to that order.

The Hoge Raad decided to stay the proceedings and to request the Court of Justice to deliver a preliminary ruling on the five following questions concerning the interpretation of the Convention:

"(1) Must a 'Zahlungsbefehl' [order for payment], or a 'Vollstreckungsbefehl' [enforcement order], issued under German law as it was in 1976, be regarded as 'the document which instituted the proceedings' within the meaning of the opening words and point 2 of Article 27 of the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters?

(2) If it must be assumed that in a case such as the present one the 'Zahlungsbefehl' is the document which instituted the proceedings within the meaning of the opening words and point 2 of Article 27 is it necessary, with regard to the question whether that document was served on the defendant in sufficient time to enable him to arrange for his defence, to take account only of the period for submitting a 'Widerspruch' [objection] to the 'Zahlungsbefehl', or must account also be taken of the fact that after the expiry of that period the defendant still has a period for lodging an 'Einspruch' [objection] to the 'Vollstreckungsbefehl'?

(3) Are the opening words and point 2 of Article 27 applicable if the defendant in the State of the court the recognition or enforcement of whose decision is sought (the court first seised), has objected to the decision given in default and the court first seised rules that the objection is inadmissible because it was not lodged within the period laid down for that purpose?

(4) If the court first seised has ruled that at the time of service of the document which instituted the proceedings the defendant had his habitual residence in the State of that court, with the result that in that respect service was duly effected, do the provisions of the opening words and point 2 of Article 27 require that a separate examination be carried out into the question whether the document was served in sufficient time to enable the defendant to arrange for his defence? If so, is that examination then confined to the question whether the document reached the defendant's habitual residence in good time or must, for example, the question also be examined whether service at that residence was sufficient to ensure that the document would reach the defendant personally in good time?

(5) In connection with the questions set out under (4), is the position altered, having regard to Article 52, by the question whether the court of the State in which recognition or enforcement is sought rules that under the law of that State at the time of service of the document which instituted the proceedings the defendant had his habitual residence in that State?"

2. The articles cited in those questions are worded as follows:

Article 27

"A judgment shall not be recognized:

...

2. ... 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."

Article 52

"In order to determine whether a party is domiciled in the Contracting State whose courts are seised of a matter, the court shall apply its internal law.

If a party is not domiciled in the State whose courts are seised of the matter then, in order to determine whether the party is domiciled in another Contracting State, the court shall apply the law of that State." [1]

3. The judgment making the reference to the Court was recorded at the Court Registry on 15 July 1980.

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 of the EEC, written observations were lodged by the respondent in cassation, Mr Michel, represented by J. Wuisman, of the Bar of The Hague, by the German Government, represented by W. Holtgrave, Director at the Federal Ministry of Justice, and by the Commission, represented by its Legal Adviser, E. Zimmermann, assisted by W. J. L. Calkoen; the appellant in cassation did not submit any written observations.

1 — *Translator's note:* The relevant provisions of the English version of the Convention published in Official Journal L 304 employ the word "domicile", which is accordingly used in direct quotations. Elsewhere the term "habitual residence" is used throughout this judgment to denote the concept in question.

II — Written observations

1. First question

Mr Michel explains first of all that he interprets this question as meaning that, in determining which is the document which instituted the proceedings there is a choice between the order for payment and the enforcement order. He remarks that, whilst service of the order for payment starts the proceedings and indeed has retroactive effect, the case does not become a pending suit until the German court, after receiving an objection to the order, fixes the date for the hearing. In his view the order itself is of no legal significance where it is not followed by an enforcement order and likewise, according to him, it does not constitute an enforceable decision or judgment. Since the Convention must be intepreted in isolation, on the basis of the objective and scope of its articles, it is necessary to consider the national provisions in the light of the guarantees offered by Article 27, point 2, and above all to take account of the fact that, according to German law, the debtor has two periods of time within which to defend himself in the summary proceedings, namely the time within which he must submit an objection to the order for payment and the time within which he must lodge an objection to the enforcement order, and it is only after the expiry of the latter period that the enforcement order becomes final and binding. The document which instituted the proceedings is thus the order authorizing enforcement of the order for payment.

The *German Government* states that Article 27, point 2, constitutes a provision for the protection of the defendant in that it guarantees his right to defend himself in adversary proceedings properly so-called. As service of the order for payment permits the defendant to submit observations by way of the objection, thereby transforming the summary proceedings into normal adversary proceedings, the order for payment must be considered as the document which instituted the proceedings, in place of an originating application.

On the other hand the enforcement order amounts to a judgment in default which is declared to be provisionally enforceable, that is, it is equivalent to a judgment in adversary proceedings.

According to the German Government the reply to the first question should be as follows:

"An order for payment made on the basis of the German provisions, in force in 1976, governing summary proceedings [Mahnverfahren] must be considered as the document which instituted the proceedings within the meaning of Article 27, point 2, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters."

The *Commission* emphasizes that both the order for payment, where an objection [Widerspruch] is submitted against it, and the enforcement order, where an objection [Einspruch] is lodged, are capable of initiating adversary proceedings, since, under the provisions of German national law, the enforcement order takes effect from the date of service of the order for payment. Accordingly either of these two orders may constitute the document which institutes the proceedings.

2. Second question

Mr Michel considers that, even if the order for payment is considered as the document which instituted the proceedings, the court of the State in which enforcement is sought may in any case take account both of the time for objecting to the order for payment and of the time for objecting to the enforcement order for the purpose of deciding whether service took place in sufficient time since, even after the issue of the enforcement order, the defendant may submit a comprehensive defence.

The *Commission* concurs in that view, at the same time emphasizing that, whilst the objection to the order for payment may be made informally, the objection to the enforcement order must comply with certain formal requirements. It proposes the following answer:

"In ascertaining whether service on the defendant was effected in sufficient time to enable him to arrange for his defence it is necessary to take account of the time for objecting to the order for payment, and, in addition, of the time for objection to the enforcement order."

The *Government of the Federal Republic of Germany,* on the other hand, states that only the objection to the order for payment may be made informally and prevent the issue of a provisionally enforceable document, so that, in its view, regard should be had only to the time allowed for objecting to the order for payment. It adds that, although the provisions of German law in force at the time as a general rule considered a period of three days as being sufficient for a defendant habitually resident within the district of the court seised of the matter, this was so precisely because it was possible to raise an objection to the order for payment by means of any written or oral statement to the competent official of the registry, indicating, even without reasons, that the debtor contested the order for payment.

The German Government accordingly proposes that the reply to the second question should be as follows:

"In ascertaining whether an order for payment for the purposes of Article 27, point 2, of the Convention was served in sufficient time it is necessary to have regard only to the period available to the debtor, prior to the issue of the enforcement order, for stating that he is raising objections to the claim."

3. Third question

Mr Michel contends that where the court first seised has held the objection to the enforcement order to be out of time and accordingly inadmissible this implies that an examination of the formal conditions of service had been undertaken and that the court considered that, according to national law, service was duly effected and in good time. The fact that after that finding was made by the court first seised, the court in the State where the enforcement was sought carried out a detailed examination of that point on the basis of Article 27, point 2, adversely affects "the free movement of judgments", legal certainty and the uniformity of enforcement of decisions which have become final and binding.

According to the *Government of the Federal Republic of Germany* the judgment in default remains unaffected if the court simply rules on the admissibility of proceedings instituted against that judgment and dismisses them as being out of time. Any defects as to procedure in the judgment in default thus continue to exist and may be pleaded in the procedure for recognition under Article 27, point 2, of the Convention.

The Government accordingly proposes the following answer:

"In the procedure for recognizing or enforcing a judgment in default the defendant is not precluded from relying upon defects in the procedure for the purposes of Article 27, point 2 of the Convention if the proceedings instituted by him against the judgment in default were dismissed as inadmissible because they were out of time."

The *Commission* concurs in the point of view of the German Government having regard to the second guarantee provided by Article 27, point 2, (". . not duly served . . . in sufficient time for him to arrange for his defence"). It emphasizes that the article is irrelevant for the court first seised which is not concerned with the stage of recognition and enforcement of its judgment.

4. Fourth question

Mr Michel considers that it is unnecessary for the court in the State in which enforcement is sought to consider whether service was effected in sufficient time if the court first seised has already considered that point, as occurred in this case. Due service implies that the court first seised took into consideration, in accordance with its national law, the time-limit in force which is intended to allow the defendant time to prepare his defence.

Due service, that is to say, service which is effected at the habitual residence as ascertained by the court first seised and which also satisfies the other formal requirements of national law must mean that service was also effected in sufficient time. In that case the court of the State in which enforcement is sought is not obliged to consider this matter comprehensively and in depth on the

basis of Article 27, point 2, of the Convention.

In any case the requirement that service must be effected in sufficient time simply means that the defendant must be enabled to arrange for his defence after due service and not that the document which instituted the proceedings has in fact been brought to his knowledge in good time.

The *Government of the Federal Republic of Germany* concurs in the point of view last expressed. The defendant must thus himself ensure that he is able personally to acquaint himself with the document served on him. Furthermore the German Government concurs with the Commission in saying that the Convention provides a double guarantee in that service must be correctly effected and in good time. Consequently, in determining whether or not service was effected in sufficient time, the court of the State in which enforcement is sought is not bound either by its own findings as to whether service was duly effected or by those of the court first seised. The German Government proposes the following reply:

"Article 27, point 2, of the Convention also requires a separate examination of the point whether a document which instituted the proceedings was served in sufficient time if the court in the State in which the judgment was given found that it was duly served. Whether a document was served in sufficient time depends exclusively on the date on which due service, in accordance with the law of the State in which the judgment was given, was effected on the defendant; actual knowledge of the contents of the document is unnecessary."

The *Commission* for its part does not rule out that in appropriate cases it may be necessary to take into account whether or not the defendant actually knew of the service. In this connection it proposes the following reply:

"The scope of the examination in question must not be confined to ascertaining whether the document reached the defendant's habitual residence in sufficient time. All the circumstances may be considered — as the case may be, subject to certain restrictions — for example, the nature of the parties to the action and their relationship; the requirement that the document must reach the defendant in person in sufficient time may not be laid down as a general rule; that condition may only be required if, in given circumstances, it would be unreasonable to expect the defendant to have made the necessary preparations to ensure that communications addressed to him in his absence actually reached him."

5. Fifth question

The *Government of the Federal Republic of Germany* considers that the rule laid down by Article 52 is not directly relevant to ascertaining whether the document which instituted the proceedings was served in sufficient time. That article is intended to overcome the difficulties inherent in the interpretation of the concept of habitual residence and the court of the State in which enforcement is sought is bound by the findings of the court first seised on the question of habitual residence. Similarly, the mere fact that the debtor may be habitually resident in two places is irrelevant in ascertaining whether service was effected in sufficient time.

The German Government accordingly proposes the following reply:

"Consideration of the question whether service was effected in sufficient time to enable the defendant to arrange for his defence, which is required under Article 27, point 2, of the Convention, is not affected by the fact that at the date of service of the document which instituted the proceedings the habitual residence of the defendant was, according to the provisions of the State in which recognition of a judgment is sought, within the territory of that State."

The *Commission* concurs in that point of view. *Mr Michel* did not give his views on this question.

III — Oral procedure

At the sitting on 17 February the Government of the Federal Republic of Germany, represented by W. Holtgrave, Director at the Federal Ministry of Justice, acting as Agent, and the Commission, represented by its Legal Adviser, E. Zimmermann, assisted by W. J. L. Calkoen, of the Rotterdam Bar, presented oral argument.

The Advocate General delivered his opinion at the sitting on 25 March 1981.

Decision

1 By judgment of 8 July 1980, which was received at the Court on 15 July 1980, the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] referred to the Court for a preliminary ruling 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, five questions, the first four of which concern the interpretation of Article 27, point 2, of that Convention whilst the fifth refers to Article 52.

2 These questions were submitted to the Court in the context of an appeal in cassation against a judgment of the Arrondissementsrechtbank [District Court], Roermond, of 20 September 1979 overruling the objection submitted against an order of 27 June 1978 whereby the president of that court declared enforceable in the Netherlands, by virtue of the provisions of the Convention, an order for payment and the order for its enforcement issued by German courts in the context of summary proceedings for the recovery of debts or liquidated demands, known as "Mahnverfahren".

3 Personal service of the order for payment [Zahlungsbefehl] was not effected but in the absence of the defendant the order was lodged at the post office and written notification of the order was left at the address in the Federal Republic of Germany provided by the creditor, which, according to German law, constituted service at that address. Under the legislation in force at the time the defendant was allowed a period of not less than three days in order to submit an objection [Widerspruch] to the order for payment but that

period was extended until such time as the court issued an order for its enforcement [Vollstreckungsbefehl]. In the present case that period was six days. After service of the enforcement order, which was effected by the same method, the defendant had a second period of one week within which to lodge an objection [Einspruch] to the enforcement order. However, the defendant allowed four months to pass before submitting such an objection and claimed that at the time of the summary proceedings his habitual residence was in the Netherlands. The objection was dismissed as being out of time following adversary proceedings in which the German court considered the question of habitual residence in order to establish whether service was duly effected and held that, according to German law, Mr Klomps was habitually resident at the address where service was effected.

4 It is clear from the file that under German law the objection to the order for payment might be made quite informally, without stating reasons, and even by a representative who was not required to prove that he was duly authorized for the purpose. Both the properly-introduced objection against an enforcement order and the objection to the order for payment had the effect of transforming the summary proceedings for obtaining that order into adversary proceedings but the enforcement order remained provisionally enforceable despite the objection and it was thus equivalent to a judgment in default.

5 In the course of the various proceedings before the Netherlands courts the defendant, who is the appellant in cassation, claimed that the recognition, and accordingly the enforcement, in the Netherlands, of the orders made against him by the German courts were contrary to Article 27, point 2, of the Convention which provides:

"A judgment shall not be recognized:

...

2. 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."

6 In these circumstances the Hoge Raad decided to stay the proceedings and to request the Court of Justice to answer the following questions:

"(1) Must a 'Zahlungsbefehl' [order for payment], or a 'Vollstreckungsbefehl' [enforcement order], issued under German law as it was in 1976, be regarded as 'the document which instituted the proceedings' within the meaning of the opening words and point 2 of Article 27 of the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters?

(2) If it must be assumed that in a case such as the present one the 'Zahlungsbefehl' is the document which instituted the proceedings within the meaning of the opening words and point 2 of Article 27 is it necessary, with regard to the question whether that document was served on the defendant in sufficient time to enable him to arrange for his defence, to take account only of the period for submitting a 'Widerspruch' [objection] against the 'Zahlungsbefehl', or must account also be taken of the fact that after the expiry of that period the defendant still has a period for lodging an 'Einspruch' [objection] against the 'Vollstreckungsbefehl'?

(3) Are the opening words and point 2 of Article 27 applicable if the defendant in the State of the court the recognition or enforcement of whose decision is sought (the court first seised) has objected to the decision given in default and the court first seised rules that the objection is inadmissible because it was not lodged within the period laid down for that purpose?

(4) If the court first seised has ruled that at the time of service of the document which instituted the proceedings the defendant had his habitual residence in the State of that court, with the result that in that respect service was duly effected, do the provisions of the opening words and point 2 of Article 27 require that a separate examination be carried out into the question whether the document was served in sufficient time to enable the defendant to arrange for his defence? If so, is that examination then confined to the question whether the document reached the defendant's habitual residence in good time or must, for example, the question also be examined whether service at that residence was sufficient to ensure that the document would reach the defendant personally in good time?

(5) In connection with the questions set out under (4), is the position altered, having regard to Article 52, by the question whether the court of the State in which recognition or enforcement is sought rules that under the law of that State at the time of service of the document which instituted the proceedings the defendant had his habitual residence in that State?"

7 Before a reply is given to those questions 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. It is in the light of these considerations that the provision relied upon by the appellant in cassation in the main proceedings must be interpreted.

The first two questions

8 By the first question the Hoge Raad asks whether, under a system like that which was in force in the Federal Republic of Germany in 1976 in accordance with which service on the defendant of an order for payment enables the plaintiff, where the defendant does not submit an objection to the order within the prescribed period, to obtain a decision which remains provisionally enforceable even after the submission of the objection against the enforcement order, but under which both that objection and the objection to the order for payment transform the procedure into adversary proceedings, the words "the document which instituted the proceedings" refers to the order for payment [Zahlungsbefehl] or the enforcement order [Vollstreckungsbefehl].

9 As has been indicated above, Article 27, point 2, is intended to ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised. It follows that a measure, such as the order for payment [Zahlungsbefehl] in German law, service of which on the defendant enables the plaintiff, where no objection to the order is made, to obtain a decision which is enforceable under the Convention, must be duly served on the defendant in sufficient time to enable him to arrange for his defence and accordingly that such a measure must be understood as being covered by the

words "the document which instituted the proceedings" in Article 27, point 2. On the other hand a decision, such as the enforcement order [Vollstreckungsbefehl] in German law, which is issued following service of an order for payment and which is in itself enforceable under the Convention, is not covered by those words even although the lodging of an objection against the enforcement order, like the objection to the order for payment, transforms the procedure into adversary proceedings.

10 With regard to the second question the same considerations show that for the purpose of examining whether the defendant has been able to arrange for his defence within the meaning of Article 27, point 2, the court in which enforcement is sought must take account only of the time, such as that allowed under German law for submitting an objection to the order for payment, available to the defendant for the purposes of preventing the issue of a judgment in default which is enforceable under the Convention.

11 The reply to those two questions must accordingly be that Article 27, point 2, must be interpreted as follows:

— The words "the document which instituted the proceedings" cover any document, such as the order for payment [Zahlungsbefehl] in German law, service of which enables the plaintiff, under the law of the State of the court in which the judgment was given, to obtain, in default of appropriate action taken by the defendant, a decision capable of being recognized and enforced under the provisions of the Convention;

— A decision such as the enforcement order [Vollstreckungsbefehl] in German law, which is issued after service of the order for payment has been effected and which is enforceable under the Convention, is not covered by the words "the document which instituted the proceedings";

— In order to determine whether the defendant has been enabled to arrange for his defence as required by Article 27, point 2, the court in which enforcement is sought must take account only of the time, such as that allowed under German law for submitting an objection [Widerspruch] to the order for payment, available to the defendant for the purposes of preventing the issue of a judgment in default which is enforceable under the Convention.

Third question

12 This question refers in substance to the jurisdiction of the courts of the State in which the judgment was given and the courts of another Contracting State before which proceedings have been brought for the recognition or enforcement of a judgment given in the former State. In this connection it should be emphasized that Article 27, point 2, is not addressed to the courts of the State in which the judgment was given, but only to the court before which proceedings have been brought for recognition or enforcement of the judgment in another Contracting State. In the case with which the question is concerned the defendant did not submit a defence as to the substance of the case before the court first seised. The dismissal of the objection to the enforcement order as inadmissible means that the decision given in default remains intact. For that reason the objective of Article 27, point 2, requires that in the case with which this question is concerned the court in the State in which enforcement is sought should carry out the examination prescribed by that provision.

13 The reply to the third question should therefore be that Article 27, point 2, remains applicable where the defendant has lodged an objection against the decision given in default and a court of the State in which the judgment was given has held the objection to be inadmissible on the ground that the time for lodging an objection has expired.

Fourth question

14 By this question the Hoge Raad asks first whether, where a court of the State in which the judgment was given has already found that service has been duly effected, the court seised in the other Contracting State is still required to consider whether service was effected in sufficient time to enable the defendant to arrange for his defence.

15 For the purposes of the reply to the first part of the question it should first of all be pointed out that Article 27, point 2, lays down two conditions, the first of which, that service should be duly effected, entails a decision based on the legislation of the State in which judgment was given and on the conventions binding on that State in regard to service whilst the second, concerning the time necessary to enable the defendant to arrange for his defence, implies appraisals of a factual nature. A decision concerning the first of those conditions made in the State in which the judgment was given accordingly does not release the court in the State in which enforcement is sought from its duty to examine the second condition, even if that decision was made in the context of separate adversary proceedings.

16 The reply to this part of the question must accordingly be that, even if the court in which the judgment was given has held, in separate adversary proceedings, that service was duly effected, Article 27, point 2, still requires the court in which enforcement is sought to examine whether service was effected in sufficient time to enable the defendant to arrange for his defence.

17 In the event of an affirmative reply to first part of the fourth question, the Hoge Raad asks further whether the examination in question must be limited to the finding that the document reached the habitual residence of the defendant in sufficient time or whether it is a further requirement, for example, that the service in question should provide a sufficient guarantee that the document would reach the defendant personally in good time.

18 The second condition contained in Article 27, point 2, is intended to ensure that the defendant has sufficient time to prepare his defence or to take the steps necessary to prevent judgment's being given in default. The question submitted to the Court is not concerned with how long this time is but rather with the point from which it begins to run. The Hoge Raad is in fact asking whether the court in which enforcement is sought must proceed on the assumption that a defendant is able to prepare his defence as soon as the document which instituted the proceedings reaches his habitual residence.

19 In this connection it must be stated first of all that Article 27, point 2, does not require proof that the document which instituted the proceedings was actually brought to the knowledge of the defendant. Having regard to the exceptional nature of the grounds for refusing enforcement and to the fact that the laws of the Contracting States on the service of court documents, like the international conventions on this subject, have as their objective the safeguarding of the interests of defendants, the court in which enforcement is sought is ordinarily justified in considering that, following due service, the defendant is able to take steps to defend his interests as soon as the document has been served on him at his habitual residence or elsewhere. As a general rule the court in which enforcement is sought may accordingly confine its examination to ascertaining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time to arrange for his defence. Nevertheless the court must consider whether, in a particular case, there are exceptional circumstances which warrant the

conclusion that, although service was duly effected, it was, however, inadequate for the purposes of enabling the defendant to take steps to arrange for his defence and, accordingly, could not cause the time stipulated by Article 27, point 2, to begin to run.

20 In considering whether it is confronted with such a case the court in which enforcement is sought may take account of all the circumstances of the case in point, including the means employed for effecting service, the relations between the plaintiff and the defendant or the nature of the steps which had to be taken in order to prevent judgment from being given in default. If, for example, the dispute concerns commercial relations and if the document which instituted the proceedings was served at an address at which the defendant carries on his business activities the mere fact that the defendant was absent at the time of service should not normally prevent him from arranging his defence, above all if the action necessary to avoid a judgment in default may be taken informally and even by a representative.

21 The reply to that part of the fourth question should therefore be 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 for his defence. However the court is also required to consider whether, in a particular case, there are exceptional circumstances such as the fact that, although service was duly effected, it was nevertheless inadequate for the purpose of causing that time to begin to run.

Fifth question

22 This question concerns Article 52 of the Convention, the relevant provisions of which read as follows:

"In order to determine whether a party is domiciled in the Contracting State whose courts are seised of a matter, the court shall apply its internal law.

If a party is not domiciled in the State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Contracting State, the court shall apply the law of that State."

23 That article states which law is applicable where, according to the other provisions of the Convention, in particular those concerning jurisdiction, it is necessary to determine the habitual residence (or one of the habitual residences) of a party. In the context of Article 27, point 2, the habitual residence of the defendant may be a decisive factor for the purpose of considering whether service has been duly effected but that question must in any case be resolved by applying the internal law of the State in which the judgment was given and of the relevant conventions. The question whether service was effected in sufficient time involves, as has been indicated above, assessments of fact to which the concept of habitual residence is irrelevant.

24 The reply to the fifth question should therefore be that Article 52 of the Convention and the fact that the court of the State in which enforcement is sought concluded that under the law of that State the defendant was habitually resident within its territory at the date of service of the document which instituted the proceedings do not affect the replies given above.

Costs

25 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of 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

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 8 July 1980, hereby rules:

Article 27, point 2, of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as follows:

1. **The words "the document which instituted the proceedings" cover any document, such as the order for payment [Zahlungsbefehl] in German law, service of which enables the plaintiff, under the law of the State of the court in which the judgment was given to obtain, in default of appropriate action taken by the defendant, a decision capable of being recognized and enforced under the provisions of the Convention.**

2. **A decision such as the enforcement order [Vollstreckungsbefehl] in German law, which is issued after service of the order for payment has been effected and which is enforceable under the Convention, is not covered by the words "the document which instituted the proceedings".**

3. **In order to determine whether the defendant has been enabled to arrange for his defence as required by Article 27, point 2, the court in which enforcement is sought must take account only of the time, such as that allowed under German law for submitting an objection [Widerspruch] to the order for payment, available to the defendant for the purposes of preventing the issue of a judgment in default which is enforceable under the Convention.**

4. **Article 27, point 2, remains applicable where the defendant has lodged an objection against the decision given in default and a court of the State in which the judgment was given has held the objection to be inadmissible on the ground that the time for lodging an objection has expired.**

5. **Even if a court of the State in which the judgment was given has held, in separate adversary proceedings, that service was duly effected Article 27, point 2, still requires the court in which enforcement is sought to examine whether service was effected in sufficient time to enable the defendant to arrange for his defence.**

6. 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 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.

7. Article 52 of the Convention and the fact that the court of the State in which enforcement is sought concluded that under the law of that State the defendant was habitually resident within its territory at the date of service of the document which instituted the proceedings do not affect the replies given above.

Mertens de Wilmars Pescatore Mackenzie Stuart O'Keeffe Bosco

Touffait Due Everling Chloros

Delivered in open court in Luxembourg on 16 June 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 25 MARCH 1981 [1]

Mr President,
Members of the Court,

The case on which I shall give my views today concerns the interpretation of Article 27, point 2, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Convention on Jurisdiction"), which is worded as follows:

"A judgment shall not be recognized:

...

2. where it was given in default of appearance, if the defendant was not

1 — Translated from the German.