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.

duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence;

..."

The interpretation is requested in relation to the following facts.

Mr Michel, the respondent in cassation in the main action, is an estate agent in Neuss. It appears that he has a claim, in respect of his agency fees, for a sum amounting to DM 63 270 against Mr Klomps, the appellant in cassation in the main action. In order to enforce his claim he had recourse to summary proceedings for the recovery of debts and liquidated demands known as "Mahnverfahren" the details of which I shall discuss later. On the application of Mr Michel a court officer [Rechtspfleger] of the Amtsgericht [Local Court] Krefeld issued on 29 March 1976 a Zahlungsbefehl [order for payment], as it was then called, for DM 63 270 together with interest and costs. The method of service on the debtor, which took place on 3 April 1976, was by depositing the order at the Post Office at Willich and by leaving notification of this at the debtor's address, 34 Heiligenweg, Willich. This was considered to be substituted service for the purposes of Article 182 of the German Zivilprozeßordnung [Code of Civil Procedure]. Since an objection to the order for [Widerspruch] payment was not made within the period of three days, the time-limit which was at that time prescribed by Articles 692 and 499 of the Code of Civil Procedure for debtors whose habitual residence was within the district of the court seised of the matter, an enforcement order [Vollstreckungsbefehl] was issued on 9 April 1976. It was served in the same way as the order for payment and the debtor was notified of it on 22 April 1976. In German law the enforcement order constitutes a provisionally enforceable title against which an objection [Einspruch] may be submitted within a period of one week, that is, in this case before 29 April 1976.

However, the objection to the enforcement order was not submitted until 1 September 1976. This gave rise to proceedings before the Amtsgericht [Local Court] Krefeld in the course of which investigations were carried out as to the habitual residence [1] of the debtor since he claimed that he was not in fact residing at 34 Heiligenweg, Willich, but had his habitual residence in the Netherlands, as was established by an entry in the population register of Venlo of 31 December 1971 and another entry in the register of Meijel of 28 August 1976. However, the court found on the basis of the evidence of witnesses that the debtor's habitual residence for the purposes of Article 7 of the German Civil Code [Bürgerliches Gesetzbuch] and of Article 13 of the Code of Civil Procedure was in fact in Willich. The relevant factors on which the court based its finding were that the debtor's wife and children, who were not living apart from him, resided in Willich, the children attended school there, that the debtor ran a business in Willich, that his name was entered in the telephone directory for Willich and that he came regularly to Willich to collect post sent to him there. Accordingly the court considered that the order for payment and enforcement order had been correctly served and, in its judgment of 19 April 1977, which became binding on 12 July 1977, dismissed the objection against the enforcement order as inadmissible on the ground that it was out of time.

In the following year Mr Michel tried to have the order executed against Mr Klomps in the Netherlands. On the application of Mr Klomps the President of the Arrondissementsrechtbank [District Court] Roermond, issued, on the basis of Articles 31, 32 and 34 of the Convention on Jurisdiction, an order dated 27 June 1978, for the enforcement

1 — *Translator's note:* The relevant provisions of the official English version of the Convention on Jurisdiction 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 opinion to denote the concept in question.

of the above-mentioned order for payment and execution of the enforcement order together with — in relation to the costs — the judgment of the Amtsgericht Krefeld of 19 April 1977. The debtor appealed in accordance with Article 36 of the Convention on Jurisdiction and the Arrondissementsrechtbank Roermond gave judgment on that appeal on 20 September 1979. In that judgment the court found that the order for payment and enforcement order were to be considered as "judgments" within the meaning of Article 25 of the Convention on Jurisdiction, in particular since an enforcement order is stated by Article 700 of the Code of Civil procedure to be equivalent to a judgment in default declared to be enforceable. The procedure which preceded their issue was not irregular, service was not effected at a wrong address and there were no grounds for refusal of recognition under Article 27, point 2, of the Convention on Jurisdiction. Accordingly, the order for payment and the enforcement order could be recognized as being in accordance with Articles 25 and 26 of the Convention on Jurisdiction and an order for enforcement could be issued in accordance with Article 31 of that Convention. With regard to the judgment of the Amtsgericht Krefeld it was found that it might indeed be recognized that its enforcement was temporarily excluded since the costs were not specified, on which point the debtor's application, which as to the other heads was to be dismissed, must be allowed.

Thereafter the case came before the Hoge Raad [the Supreme Court of the Netherlands] on an appeal in cassation. The appellant based his appeal on Article 27, point 2, of the Convention on Jurisdiction and claimed that the document which instituted the proceedings (the order for payment) was not served in due form, and not in sufficient time to enable him to arrange for his defence. At the time of service of the order for payment and of the enforcement order he was not residing in Willich but in Meijel in the Netherlands. He was entered on the population register in Meijel and was in fact staying there, as were his wife and children at the time. For that reason the order for payment and the enforcement order did not in fact reach him and, since he was unable to present his defence in regard to them in good time, they should not be recognized.

The Hoge Raad decided that the order for payment and the enforcement order must be considered as duly served within the meaning of Article 27, point 2, of the Convention on Jurisdiction. Doubt remained only on the point whether it might be considered that service was "in sufficient time" for the purposes of the said provision since it had to be accepted that the order for payment and the enforcement order had not in fact reached the debtor because at the time of service he was in fact in the Netherlands, staying there with his wife and children.

Accordingly the Hoge Raad, by a decision of 8 July 1980, stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 3 of the Protocol on the interpretation of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters:

"(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?"

My opinion on these questions is as follows:

1. Let me begin with a few remarks on the course of the "Mahnverfahren" which at the time was governed, by virtue of the Law of 12 September 1950, by Articles 688 to 703 of the Code of Civil Procedure. The procedure, which is appropriate only to certain claims, was initiated by an informal claim which was not communicated to the opposite party. It was processed by an officer of the Amtsgericht having jurisdiction in the matter [Rechtspfleger] who, after carrying out certain examinations, in particular as to jurisdiction and whether the claim was *prima facie* well-founded issued an order for payment, a demand enjoining the debtor to satisfy the claim. That order for payment was served by the court of its own motion, thus making it possible, in the absence of the debtor, for substituted service of the kind described above to be effected. An objection [Widerspruch] to the order for payment might be submitted within a period of (at that time) three days where the debtor had his habitual residence within the district of the court, a period

of one week being allowed in other cases. In any case, by virtue of Article 694 of the Code of Civil Procedure an objection to the order for payment might be submitted as long as an enforcement order had not been issued. On the submission of an objection to the order for payment the action was transformed into normal adversary proceedings in which, in accordance with Article 596 of the Code of Civil Procedure, the order for payment was treated as equivalent to an originating application. If no such objection was made, then upon application by the creditor, which might be made even before the expiry of the period prescribed in the order for payment, there would be issued an enforcement order in the form of an endorsement on the order for payment, enabling enforcement to be carried out as if there had been a default judgment. An objection [Einspruch] might be lodged within a period, which at that time amounted to one week, against the enforcement order, service of which might be effected in the same manner as service of the order for payment. If no such objection was made no remedy lay against the enforcement order; if an objection was made the case was likewise transformed into a normal court action, which was deemed to have become a pending suit upon service of the order for payment.

I have also to point out that this procedure was altered with effect from 1 July 1977 by the Law of 3 December 1976. The alteration consisted of an adaptation of the system to the requirements of data-processing and resulted, having regard in particular to the comprehensive nature of a change of this kind, in an alteration of the relevant time-limits so that thereafter a period of 14 days was prescribed both for objections to orders for payment and objections to enforcement orders.

2. By its *first* question the Hoge Raad wishes to ascertain whether the order for payment or the enforcement order must be considered as the document which instituted the proceedings within the meaning of Article 27, point 2, of the Convention on Jurisdiction.

In answering that question it is unnecessary to consider further whether the words "the document which instituted the proceedings" must be interpreted independently, in accordance with the system and objective of the Convention on Jurisdiction, as the respondent in the main action considers, or whether it is necessary to decide, in accordance with the law of the court first seised, what constitutes such a document, as the Commission considers, pointing out that the said words are already to be found in the second paragraph of Article 20 (2) of the Convention on Jurisdiction which concerns the procedure to be observed by that court.

It is clear in any event that, unlike the *request* for the issue of an order for payment, which request is not notified to the opposite party, the *order for payment* fulfils the requirements which, in accordance with the concepts forming the basis of the protective provisions in Article 27, are intended to provide such a party with an opportunity to put forward an effective defence to the document which instituted the proceedings. It contains particulars of the grounds of the claim, in regard to which a description of the relevant facts and their legal consequences is sufficient, it is served on the opposite party who then has a specified time-limit within which to contest it. If he does so the dispute is deemed, as I have already mentioned, to have become a pending suit as from the date of service of the order for payment. The order itself is considered as the originating application instituting the proceedings and forms the basis for the judgment of the court which is delivered at the conclusion of adversary proceedings.

Reference is also made in the first question to the enforcement order. In regard to this it may be stated in the first place that, although it is not issued by a judge it must be considered as fully equivalent to a judgment within the meaning of Article 25 of the Convention on Jurisdiction. This is emphasized in legal literature (Bülow-Böckstiegel *"Internationaler Rechtsverkehr in Zivil- und Handelssachen"*, Note III (2) to Article 27 of the Convention on Jurisdiction), it is to be inferred from the Jenard Report (page 42 of Official Journal of the European Communities C 59 of 5. 3. 1979) which also constitutes confirmation of the view that in any case the order for payment, which in fact forms the basis for the enforcement order, is to be considered as the document which instituted the proceedings within the meaning of Article 27 of the Convention on Jurisdiction. It is, then, difficult to argue that the enforcement order also constitutes the document which instituted the proceedings in accordance with Article 27, point 2, of the Convention on Jurisdiction. Even though, according to German procedural law, which must form the point of departure with regard to Article 27, it is clear that the lodging of an objection against the enforcement order leads to normal civil proceedings in which the decision as a whole (the order for payment and the enforcement order) is at issue, nevertheless the essential point is that the claim is deemed, by virtue of Article 700 of the Code of Civil Procedure, to have become a pending suit as from the date of service of the order for payment. It follows from this that in such a case too the *order for payment* must be classified as the document which instituted the proceedings.

3. The Hoge Raad also wishes to know whether, if it is accepted that the order for payment constitutes the document which instituted the proceedings, as regards the question whether service was effected on the defendant in sufficient time to enable him to arrange for his defence, account is to be taken only of the period within which the objection to the order for payment may be made or also of the further period within which the objection to the enforcement order may be lodged.

In the view of the respondent in the main action the answer to that question is that account should also be taken of the period allowed for objecting to the enforcement order. In this connection it is pointed out that, after the objection has been lodged it is possible to put forward a full defence against the claim. In addition it is noted that the execution of an enforcement order which is provisionally enforceable is usually carried out with some hesitation as there may be a claim for damages if an objection is successful and after the submission of an objection the debtor may have the execution stayed.

The Commission's view corresponds very closely to these conclusions. The Commission considers it important that an objection, made out of time, to an order for payment is treated as an objection to the enforcement order and that, as it were, through the latter objection the former can be restored. Following on from this, the Commission, too, refers to the possibility of putting forward a comprehensive defence after lodging an objection against the enforcement order, in which case detailed grounds of defence do not have to be lodged at the same time as the objection but, as a rule, only within a period which is subsequently fixed. However, if I have properly understood the Commission's arguments in the oral procedure, it apparently considers such a far-reaching proposition as applicable only where the circumstances of a particular case are as follows: when an enforcement order is not immediately

executed and when it is clear, at the time of the proceedings for recognition, that no objection against the enforcement order has been lodged within the prescribed time-limit.

The Government of the Federal Republic of Germany has on the other hand clearly opposed, at least in its written observations, taking into account the time for lodging an objection against the enforcement order. In this connection it is significant that the enforcement order provides the same authority for enforcement as a judgment in default. The protective purpose of Article 27 of the Convention on Jurisdiction requires however that it should be possible to put forward a defence *before* the authority for enforcement is issued, that is to say, that between service of the document which instituted the proceedings, in this case the order for payment, and the decision taken on the basis of it, there must be sufficient time to arrange for the defence.

In this matter I am in principle disposed to share the Federal Government's view, which, on the basis of the general scheme of the Convention on Jurisdiction and the objective of Article 27, clearly has very weighty arguments in its favour. In addition it should not be forgotten that, according to Article 46 of the Convention on Jurisdiction, a party applying for enforcement is required to produce, in the case of a judgment in default, the original or a certified copy of the document which establishes that the party in default was served with the document which instituted the proceedings. Accordingly, it ought to be clear that the last-mentioned document must be different from the one which constitutes the actual basis for enforcement. Since in the summary proceedings for recovery of a debt or liquidated demand the document which instituted the proceedings is the order for payment, what is important is what time remained after service of that order for preparing the defence. In that connection it is of course necessary to take into account a number of factors in ascertaining whether this period is reasonable. What is concerned is not a strict exclusionary time-limit. On the contrary, it was possible for an objection to the order for payment to be made until the enforcement order was issued, which, owing to the volume of work, was often not done until some considerable time had elapsed, in this case six days after the issue of the order for payment. It is also important that during that time the debtor is simply required to make it known that he does not admit the claim. That may be done without giving reasons and without observing any requirements as to form; for example, it may be done orally in the presence of the appropriate officer at the court registry or, as the representative of the Federal Government has informed the Court, by telephone or telegram and a representative is not in this connection required to establish his authority to act in the matter. In view of the fact that submission of the objection to the order for payment transforms the procedure into a legal action properly so-called there is sufficient time afterwards for detailed preparation of the defence which usually requires to be lodged before or at a hearing, the date of which is subsequently fixed.

Nevertheless I should like to add that the views of the Commission are not to be dismissed out of hand. For the Commission what is important is that, in interpreting the Convention on Jurisdiction, the primary consideration should be its objective — the requirement of the free movement of judgments. On this basis, and also in view of the fact that Title II of the Convention on Jurisdiction already provides guarantees for the procedure to be followed before the court first seised and that in principle recognition is granted without any special procedure a *restrictive* application of the provisions of Articles 27 and 28 is appropriate. If this view is accepted it may in fact appear

arguable that, in a case such as this, in which the enforcement order was served on 22 April 1976 and in which, during the procedure for recognition in 1978, it became clear that the time for lodging an objection to the enforcement order had expired without being used for that purpose, in answering the question whether the debtor had sufficient time to defend the claim made against him the time for lodging an objection to the enforcement order should also be taken into account. This would give twenty-five days in all for the defence.

4. Following on from these considerations it is further necessary to consider what significance, for the purposes of the application of Article 27, point 2, of the Convention on Jurisdiction, should be ascribed to the fact that the respondent lodged an objection to the enforcement order in the State of the court first seised which was dismissed as inadmissible because it was out of time.

On this point the respondent in the main action expressed the view that the court in which recognition is sought is bound by the appraisal of the court first seised. Not only would it be contrary to the spirit and objective of the Convention on Jurisdiction if the court in which recognition is sought were to undertake a special examination based on Article 27, point 2, of the Convention. The principles of legal certainty and the uniformity of the enforcement also militate against such an examination. Nevertheless the Federal Government and the Commission challenge that view. In my opinion their arguments are more persuasive.

Proceeding on the basis of the narrow interpretation of Article 27, point 2, which the Federal Government considers to be proper for the purposes of answering the question when it may rightly be said that the document which instituted the proceedings was served in sufficient time for the defendant to arrange for his defence, an important point is that the court first seised was required to decide on an objection lodged on 1 September 1976 against the *enforcement order.* Thus what was concerned was not the submission of a defence *before* the issue of the authorization for enforcement but an attempt to put forward a defence *subsequently.* That attempt did not in fact result in an investigation of the claim in question but, because of the expiry of the period prescribed by national law, in a refusal to carry out that investigation and consequently in a refusal to examine any possible defects in the proceedings before the Court first seised. It must further be borne in mind that Article 27 of the Convention on Jurisdiction constitutes a protective provision within the framework of the procedure for recognition and enforcement which only comes into operation when an application is made under Article 31 of the Convention. The court in which the judgment was given, the court first seised, does not participate in that procedure. In principle it only applies its national law and does not carry out any verification such as that required by Article 27, point 2. It is furthermore clear, as reference to the Jenard Report confirms, that Article 27, point 2, constitutes an independent provision in relation to the national law of both the court first seised and the court in which recognition is sought. The court in which recognition is sought is thus required to ascertain independently whether both requirements mentioned in that provision have been fulfilled and, in connection with the question whether service was effected in good time, is perfectly entitled to criticize the time-limits prescribed by national law, because it is required to investigate what actually happened.

In my opinion it is clear that a reference to the principles of legal certainty and the uniformity of enforcement provides no answer to the foregoing considerations. If in fact these principles were required to form the decisive guidelines for the enforcement procedure under the Convention on Jurisdiction a provision like Article 27, point 2, of the Convention would not have been adopted. Instead, the observance of the rules to be applied by the court first seised would simply have been made the sole criterion and no additional protection for the debtor in the procedure for recognition and enforcement would have been provided.

5. The fourth question submitted to the Court by the Hoge Raad, which must now be considered, consists of two parts: it must first of all be considered whether, when the court first seised has reached the conclusion that when the document which instituted the proceedings was served the defendant had his habitual residence in the State of that court and that service was thus duly effected there, a further examination must be carried out by the court in which recognition is sought, namely as to whether service was effected *"in sufficient time"* within the meaning of Article 27, point 2, of the Convention on Jurisdiction. If the answer to the first part of the fourth question is in the affirmative the Hoge Raad wishes to know secondly whether the examination may be confined to the question whether the document which instituted the proceedings reached the habitual residence of the defendant in good time or whether it must be ascertained in addition whether service of that nature provided a sufficient guarantee that the document would reach the defendant *personally* in good time.

(a) The first part of the fourth question appears to embody a problem relating to the matters covered by Article 27, point 2, of the Convention on Jurisdiction. It is natural first of all to consider whether that provision concerns only cases where it is necessary to effect service abroad, that is to say, that it does not apply to matters which appear to the court in which recognition is sought to constitute purely national cases since both the habitual residence of the parties and the place where the dispute occurs are on the national territory. In fact it may indeed appear in the last-mentioned case that the application of Article 27, point 2, amounts to providing additional protection which may be considered unjustified. It might in fact be said that, when in such a situation enforcement under national law is perfectly possible because there is no reason to consider that the rights of the defence have been restricted, it is hard to see why a different criterion should apply with regard to the conservation of the rights of defence in the case of execution levied on assets situated abroad.

Nevertheless the very general terms of Article 27 do not in fact appear to provide any grounds for a conclusion of that nature, especially when they are compared with Article 20 of the Convention on Jurisdiction which expressly concerns the case of a defendant who has his habitual residence in *one* Contracting State and who is sued in a court of *another* Contracting State. It also appears to be generally accepted in legal literature that the provision with which we are concerned applies even when the defendant is habitually resident in the State of the court first seised and all that is required for the transmission of the document which instituted the proceedings is service within the national territory (cf. Bülow-Böckstiegel, loc. cit. Note III to Article 27; Martha Weser,

"Convention Communautaire sur la Compétence Judiciaire et l'Exécution des Décisions", p. 332; Droz, *"Compétence Judiciaire et Effets des Jugements dans le Marché Commun"*, p. 315).

However, if this view is taken to be correct, that is to say, if it is accepted that Article 27, point 2, of the Convention on Jurisdiction applies in principle when enforcement is to be effected abroad the answer to the first part of the fourth question does not, for the rest, cause any difficulties. According to the Jenard Report it is clear that Article 27, point 2, must be considered as a provision providing special protection within the framework of the procedure for recognition, which requires the court in which recognition is sought to carry out an independent examination from two points of view which must be taken together. It follows from this not only that the second court is not bound by the findings of the court first seised as to whether the document which instituted the proceedings was duly served, a matter which is to be judged in accordance with the law of the court first seised and the international agreements which it must apply (cf. Bülow-Böckstiegel, loc. cit. Note III (4) (a) to Article 27). The court in which recognition is sought must in all cases also examine whether service was effected in sufficient time to enable the defendant to arrange for his defence. In this respect, as Bülow-Böckstiegel, loc. cit., for example, emphasizes, the court in which recognition is sought is not bound by the provisions which the court first seised had to apply and instead it must carry out the examination, of its own motion if necessary, independently and having regard to all the circumstances of the case (the kind of action, the parties to it, the need to obtain a legal adviser, whether translations are required, etc.).

(b) With regard to the second part of the fourth question I should like to emphasize in the first place that the view of those who in principle are in favour of a *restrictive* interpretation of Article 27, point 2, seems to me to be the correction. The decisive point in this connection is that as early as the procedure leading to judgment the Convention on Jurisdiction provides substantial guarantees which derive in particular from Article 20 and from The Hague Convention on Service of 1965. Accordingly the Jenard Report states that Article 27 applies only in exceptional cases and this view is also taken by Martha Weser (loc. cit., p. 333) when she emphasizes that refusal of recognition under Article 27, point 2, will be unusual.

Further, it is an important factor in relation to this part of the question that, under the Convention on Jurisdiction or other relevant agreements, there is no principle that a procedural document must be communicated *directly and personally* to the person to whom it is addressed. Where such a requirement is contemplated it is expressly stated, as for example in Article 36 of the Convention on Jurisdiction which is concerned with service of the decision on the person against whom enforcement is sought either in person or at his residence. Accordingly, it may be accepted in principle that service at the habitual residence of the defendant is sufficient and that the question whether service has been effected in sufficient time does not depend on whether the document which instituted the proceedings was in fact brought to the knowledge of the defendant, but that it is enough that he should have the possibility of having knowledge of it. Linke *(Die Versäumnisentscheidungen im deutschen, österreichischen, belgischen und englischen Recht, ihre Anerkennung und Vollstreckbarerklärung*, p. 157) and Bülow-Böckstiegel, (loc. cit., Note III (4) (b) to Article 27) stress this, emphasizing the similarity of the requirements of Articles

20 and 27, and the same thing may also be inferred from the remarks made in the Jenard Report concerning Article 20 of the Convention on Jurisdiction. Anyone who became habitually resident in one or more places — possibly in different Member States — must accordingly be aware of the consequences of this. When service is effected in such circumstances it may in principle be expected that the addressee, particularly if he is a businessman, will take steps to ensure that he is informed of documents communicated in this way.

As was however emphasized in the proceedings, variations from this rule may be admitted only in rare cases. Only when, owing to special circumstances, such as sudden and necessary hospitalization, it cannot be expected that arrangements have been made for information to be obtained in good time of the service of documents, must it be held that service at the habitual residence is not sufficient for the purposes of Article 27 and its protective function and that arrangements must be made to effect personal service.

I consider that there is nothing more to be said in general on the problem to which the fourth question of the Hoge Raad gives rise. According to the information which we have obtained in the course of the proceedings it should accordingly be found, and this should be sufficient for the judgment in the main action, that the essential point is that service was effected at the German address of the appellant and that it is necessary to examine only whether as from the time of service there was sufficient time for a first, adequate defence to be prepared in accordance with the requirements of the "Mahnverfahren".

6. The last question is solely concerned to clarify the problem whether another answer to the fourth question would be obtained by taking into consideration Article 52 of the Convention on Jurisdiction. That article reads as follows:

"In order to determine whether a party is domiciled in the Contracting State whose courts are seised of the 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.

The domicile of a party shall, however, be determined in accordance with his national law if, by that law, his domicile depends on that of another person or on the seat of an authority."

This question was put in case the court in the State in which enforcement is sought takes the view that at the time of service of the document which instituted the proceedings the defendant had his habitual residence, according to the law of that State, on its territory.

As the Federal Government and the Commission concurred in stating — the respondent in the main action did not give his views on the point — this question can immediately be answered in the negative.

The function of Article 52, in view of the fact that there is no uniform definition of the concept "habitual residence" in the legal systems of the Contracting States, is to determine the proper law and thereby to make good a hiatus which would otherwise have existed in the application of the Convention on Jurisdiction. The article is accordingly

relevant in all cases in which habitual residence is concerned under the Convention. This applies in particular in determining the jurisdiction of courts and also in the context of proceedings for enforcement (cf. Article 32 of the Convention on Jurisdiction). It also applies, for example, in the calculation of the time for appeals under Article 36 of the Convention.

As has already been made clear, the determination of the habitual residence of the defendant has in principle no decisive influence on the question whether the document which instituted the proceedings was served in sufficient time in accordance with Article 27, point 2, of the Convention on Jurisdiction. If, as is generally emphasized, the *actual* circumstances in the individual case are important in this respect, there can clearly be no question of using as a basis a rule which relates to determining the law applicable to the question of habitual residence. It was accordingly properly pointed out in relation to the fifth question that the court in which enforcement is sought may not draw conclusions in regard to the question whether the document which instituted the proceedings was served in sufficient time on the basis of the provisions which it has to apply in relation to the question of habitual residence. In this matter that court should instead be bound by the findings in regard to habitual residence made by the court first seised, above all, because otherwise a situation might arise amounting almost to a review of the jurisdiction of the court first seised, which is precluded by Article 28 of the Convention on Jurisdiction.

7. I accordingly propose that the following answer should be given to the questions submitted by the Hoge Raad:

(a) An order for payment ["Zahlungsbefehl"; now "Mahnbescheid"] issued in accordance with Article 688 et seq. of the German Code of Civil Procedure must also be regarded as "a document which instituted the proceedings" within the meaning of Article 27, point 2, of the Convention on Jurisdiction.

(b) With regard to the question whether the document which instituted the proceedings was served on the defendant in sufficient time to enable him to arrange for his defence, in principle the only time to be taken into consideration is that within which the objection to the order for payment may be made. The fact that after the expiry of that time the defendant has a further period within which to lodge an objection to the enforcement order may also be taken into account if it is established at the time when the proceedings for recognition are instituted that the last-mentioned period has expired without an objection being lodged.

(c) Article 27, point 2, of the Convention on Jurisdiction is also applicable if the defendant in the State of the court the recognition or enforcement of

whose decision is sought (the court first seised) has instituted proceedings for the judgment given in default of appearance to be set aside and the court first seised rules that the proceedings are inadmissible because they were not brought within the period prescribed for that purpose.

(d) A separate examination of the question whether the document which instituted the proceedings was served in sufficient time to enable the defendant to arrange for his defence is also required where the court first seised concluded that, at the time of service of that document, the defendant had his habitual residence in the State of the court first seised and that such service was duly effected. In this respect, since personal service on the defendant is not generally stipulated, examination of the question may usually be restricted to the point whether the document reached the habitual residence of the defendant in good time; a further examination is only appropriate where exceptional circumstances give reason to believe that the defendant was unable to make arrangements for the transmission to him of documents reaching his habitual residence during his absence.

(e) Article 52 of the Convention on Jurisdiction and the fact that the court of the State in which recognition 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 do not affect the answer to the preceding question.