OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 11 APRIL 1984 [1]

Mr President,
Members of the Court,

1. The present reference for a preliminary ruling requires the Court to interpret Article 21 of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (27 September 1968). The Court must lay down the criteria according to which the court first seised is to be identified when, in the same case, the parties bring actions before two courts in different Member States. More specifically, the Court is called upon to define the concept of *lis pendens* recognized by the Convention and therefore to choose between two possible interpretations of Article 21. The first of those interpretations regards Article 21 as a uniform rule for the definition of *lis pendens* and the second views it as a rule of private international law, that is, a provision which refers to the legal system applicable to one or the other court in order to ascertain, case by case, the concept of *lis pendens* to be applied in each action. Obviously, the second interpretation implies that there are as many concepts of *lis pendens* as there are legal system in the Contracting States.

Siegfried Zelger, merchant, owner of the undertaking of the same name, whose registered office is in Munich (Federal Republic of Germany), brought an action before the Landgericht [Regional Court], Munich, against Sebastiano Salinitri, also a merchant, who resides in Mascali, in Italy. He sought an order against Mr Salinitri for the repayment of the amount outstanding on a loan contracted in 1975 and 1976, and, as a justification for the international jurisdiction of the German court, he claimed that the contracting parties had verbally agreed that Munich should be the place of performance of the obligation to repay the loan. For his part, the defendant denies both the obligation and the existence of such an agreement. The Landgericht rejected the plaintiff's argument and declined jurisdiction. It stated that there was such an agreement but, since it was not in writing, as required by Article 17 of the Convention, it could not derogate from the general criteria relating to jurisdiction. Later, however, the Bundesgerichtshof [Federal Supreme Court] (to which the plaintiff had appealed after an unsuccessful appeal to the Oberlandesgericht [Higher Regional court], Munich) stayed the proceedings and asked this Court to decide whether, on the basis of Article 5 (1) and Article 17 of the said Convention, an agreement on the place of performance of an obligation, concluded without observing the formalities specified in Article 17, was sufficient to found jurisdiction in that place.

By its judgment of 17 January 1980 ([1980] ECR 89), the Court replied that the problem was to determine if the clause by which the parties fixed the place of performance of a contractual obligation was valid according to the national law applicable to the contract. If it was, Article 5 (1) gave the court for that place jurisdiction to take cognizance

1 — Translated from the Italian.

of disputes relating to that obligation irrespective of whether the formal conditions provided for under Article 17 had been observed. Since the clause at issue was valid under German law, that decision implied that the Munich court had jurisdiction in the principal action. Accordingly, the Bundesgerichtshof quashed the earlier decisions declining jurisdiction and remitted the case to the Landgericht for a fresh decision.

However, the story did not end there. Having heard new evidence and having requested an opinion from the Institute of Comparative Law of the University of Munich, the Landgericht once again declined jurisdiction, but this time on the ground that proceedings involving the same cause of action had been brought (and were still pending) before the Tribunale di Catania [District Court, Catania], the court which had jurisdiction for the place in which the defendant resided. In accordance with the criterion of priority, it was the court first seised which had jurisdiction, and there was no doubt that, at the time when proceedings were brought before the Landgericht, proceedings had already been initiated before the Italian court, the documents initiating the proceedings having been served on 13 January 1977 and 23 September 1976 respectively.

The plaintiff did not accept that unfavourable decision and brought an appeal, contending that the decisive time for identifying the court having jurisdiction was not the moment at which the document initiating the proceedings was served but that at which the proceedings were brought before the court. The Oberlandesgericht therefore stayed the proceedings and referred the following question to the Court for a preliminary ruling: "For the purposes of resolving the question which court of a Contracting State was first seised of proceedings (Article 21 of the Convention) is it the moment at which the document initiating them was lodged with the court ("Anhängigkeit") that is decisive or the moment at which — by service of that document on the defendant — the proceedings have become fully instituted ("Rechtshängigkeit")?"

2. Since it provided for a plurality of courts (general and special), the Brussels Convention allows several international jurisdictions to exist concurrently, and, as the Jenard Report (Official Journal, C 59, 5. 3. 1979, p. 41) observes, that made it necessary to regulate the question of *lis pendens.* That was done in Article 21 which provides that the courts of a Contracting State are of their own motion to decline jurisdiction in regard to proceedings brought before them when such proceedings are also pending before the courts of another State. The terms of that provision are clear: "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different... States, any court other than the court first seised shall ... decline jurisdiction ...".

The problem raised by the national court in this case concerns the expression "court other than the court first seised". The question which must be decided is whether the priority therein referred to is related to the lodging at the court registry of the document initiating the proceedings or to service of that document on the defendant. The doubt arises from the fact that the German version of Article 21 speaks of "Anhängigkeit". In the terminology of German legal writing on the law of procedure and of German case-law, that term designates pendency deriving from lodgment (and capable of producing certain effects, such as causing time to cease to run for the purposes of limitation periods as provided for in

Paragraph 270(3) of the Zivilprozeßordnung [Code of Civil Procedure]) whereas pendency which derives from service and which removes jurisdiction from a court later seised is defined as *Rechtshängigkeit.* The national court suggests that it can be deduced from the foregoing that Article 21 was intended to make priority dependent on the simple lodging of the document initiating the proceedings.

That interpretation, which, obviously, sees in the expression "court other than the court first seised" a uniform concept of law, is confirmed, according to the national court, by the first paragraph of Article 22, which governs the staying of proceedings pending before any court other than the court first seised where the action in question is related to another action, brought before a court in a different State. In the German text of that provision, the past participle "brought" is rendered as *erhoben* which, in the language of German procedure, designates the bringing of an action by means of service of the document initiating it *(Zustellung).* The Oberlandesgericht observes that the use of two different words allows the conclusion to be drawn that the authors of the Convention, modifying concepts peculiar to German law, intended to lay down two different types of pendency, one under Article 21, based on the lodging of the document initiating the proceedings, and the other under Article 22, based on service of that document on the party.

3. Let me say straight away that Article 21 cannot be interpreted as the national court proposes. I would exclude in particular the proposition that that provision lays down a concept of *lis pendens* which is valid for the legal systems of the six Contracting States and, even more, that the concept is based on a concept of the institution of proceedings coincident with the lodging of the originating document. Let us leave aside for the moment the obviously marginal argument derived from the German text of the Convention. A problem such as the one before the Court can only be resolved by (a) ascertaining what is meant by *lis pendens* in the context of Article 21, and (b) examining the six legal systems to see if they provide a uniform rule in this case and, therefore, if a uniform rule of law can be found in Article 21.

Let us begin therefore with (a). The concept of *lis [alibi] pendens* implies, on the one hand, that proceedings involving the same cause of action have been brought before different courts and, on the other, that there is a criterion for deciding which of the two courts is to be "master" of the proceedings. However, those criteria vary greatly. An English court, for example, can "disregard the fact that proceedings may already be pending before foreign courts" and can even "exceptionally . . . refuse to hear or decide a case, if they believe it would be better for the case to be heard before a court having equivalent jurisdiction in another State . . . because this would increase the likelihood of an efficient and impartial hearing of the particular case" (see Schlosser Report, Official Journal, C 59, 5. 3. 1979, p. 97). As has been seen, however, the Brussels Convention employs the criterion of priority. It therefore resolves the conflict before the court to the disadvantage of the "court other than the court first

seised". That, moreover, is the rule by which the national court must abide.

However, what does "court other than the court first seised" mean? The question presupposes a definition of the moment at which proceedings are initiated and there are in theory two conceivable ways of carrying out that task. The first is to identify that moment without taking account of the many substantive and procedural effects which the various legal systems attach to it and the second is to determine it on the basis of the effects of a *lis pendens* and therefore deny jurisdiction in the proceedings to the court seised later.

In my opinion, the first method leads nowhere. Its purpose is to establish an autonomous and neutral concept of the institution of proceedings. It is futile, however, to seek support for that proportion in the Convention itself. The concept to which Article 21 refers when it speaks of "court other than the court firt seised" is, on the contrary, variable and divisible into its constituent parts according to the effects which are sought to be obtained from it, and the national legal systems offer us many examples of this. Let us take German law. When it is a question of time ceasing to run for the purposes of a period of limitation, reference is made purely to the lodging of the document initiating the proceedings. When it is a question of identifying the *lis pendens,* that is, of saying which court is "master" of the proceedings, it is service of that document which is decisive. For two different consequences, therefore, there are two different concepts of the institution of proceedings.

I pointed out that, in the view of the Oberlandesgericht, a different conclusion can be drawn from the German text of Article 21. By defining *anhängig* (that is, pending from the moment of lodgment) as what Article 22 calls *erhoben,* it would appear to be establishing an autonomous concept of the institution of proceedings. I do not agree. I believe that the authors of the Convention did not employ the two terms to indicate different things. Nor did they use *anhängig* to lend credence to the idea that, for the purposes of *lis pendens,* proceedings must always and everywhere be considered initiated by the lodgment of the necessary document. Three factors militate in fact against the doubts of the national court. The first is that the distinction made in the German version is not to be found in the French, Italian or Dutch versions. The second is that a *lis pendens* does not arise in any of the other five countries prior to service of the document initiating proceedings upon the other party. The third is that, in German law itself, a *lis pendens* arises, as I have already said, from service of the document originating proceedings and that law relies upon the earlier moment of lodgment for various other purposes (such as, in certain cases, to stop time running for the purposes of limitation periods).

4. We have thus ascertained what Article 21 means by *lis pendens.* Turning now to the second aspect of the problem before the Court, it must be asked if the rule laid down in that article is a uniform rule of law, that is, common to all the Contracting States, or if it refers to the rules governing *lis pendens* under the legislation of each of those States. As we know, both possibilities are open (see in this context, as regards all the legal concepts to be found in the Convention, the judgment of 6 October 1976 in Case 12/76 *Tessili* v *Dunlop* (1976) ECR 1473), and, in order to choose one or the other, there is no alternative but to examine successively each of the six legal

systems. Can it be said that they contain a common concept of *lis pendens?* Better still, can it be said that they designate the same step in the procedure as the decisive moment for the purposes of identifying the court having jurisdiction when the proceedings have been brought at different times before different courts?

I stated at the end of part 3 of this Opinion that they have something in common: *none* of them places that moment in the procedural phase preceding service of the document initiating the proceedings on the defendant. According to Article 29 of the Belgian Judicial Code, the court first seised is identified by reference to the date of registration of the proceedings on the roll (an event, mind, you, which follows and presupposes service of the document initiating the proceedings on the other party). Germany has already been spoken of several times (see Paragraph 253 (1) and Paragraph 261 (1), Zivil prozessordnung). In France, Article 100 of the New Code of Civil Procedure provides that "si le même litige est pendant devant deux juridictions ... également compétences ..., la juridiction saisie en second lieu doit se dessaisir en faveur de l'autre". Moreover, according to Article 54, "la demande initiale" (which according to Article 53 "introduit l'instance") "est formée par assignation ou par remise d'une requête conjointe au secrétariat de la jurisdiction". However it is not the mere unilateral lodging at the court registry of the document initiating the proceedings which gives rise to a *lis pendens.* For this to occur, according to the way in which Article 100 has been interpreted by the Cour de Cassation [Court of Cassation], it is essential that the document initiating the proceedings be notified to the other party (judgment of 24 April 1981, Bull. Civ., II, No 104).

Italian law is clearer. According to the third paragraph of Article 39 of the Code of Civil Procedure, "priority is determined by service of the document initiating proceedings", while registration of proceedings on the roll, which takes place after service and upon the initiative of the parties, has no effect on that situation. The same is true in Luxembourg. A *lis pendens* arises upon service (Article 61 and 171 of the Code of Civil Procedure) and, as the Tribunal d'Arrondissement [District Court], Luxembourg and the Cour Supérieure de Justice [Supreme Court of Justice] have pointed out, it is in no way affected by registration of the proceedings on the roll (judgment of 21 November 1957, Pas. lux., Vol. 17, p. 207 and judgment of 9 November 1964, Pas. Lux., Vol. 19, p. 426). The Netherlands rules are no different. According to the first paragraph of Article 158 of the Wetboek van Burgerlijke Rechtsvordering [Code of Civil Procedure], there is a *lis pendens* when the document initiating the proceedings is served on the defendant. Registration, which must take place at the latest on the day preceding the hearing for which the document initiating proceedings has been issued, is not relevant (first paragraph, Article 135).

5. There are similar tendencies, therefore, but not identical rules. That, principally because of the Belgian rules and of the ambiguity of the French provisions, seems to me to be the conclusion to which the comparative examination I have undertaken leads. If such is the case, it is not possible to elaborate a concept of *lis pendens* common to and valid for all the legal systems. Moreover, the Jenard Report

takes the same view. It is stated in that report that the Committee of Experts which prepared the draft Convention decided that there was "no need to specify in the text [of Article 21] the point in time from which the proceedings should be considered to be pending" and decided therefore to leave "this question to be settled by the internal law of each Contracting State".

However, the result which we have arrived at does not provide the complete answer to which the national court is entitled. Having decided that the provision is a rule of private international law, it is now a question of ascertaining if *any* national rules on *lis penders* are legitimate in the eyes of Community law and therefore capable of causing the renvoi provided for in Article 21 to become operative. I would doubt it. For example, I would not consider legitimate rules which limited the rights of the defence. In fact, the Convention attaches particular importance to those rights when it includes among the conditions which will prevent recognition of a foreign judgment the fact that 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 27 (2)).

It seems to me that to establish a link between a *lis pendens* and a procedural step preceding service of the document initiating the proceedings runs the risk of undermining the possibilities of defence open to the defendant from two points of view. In the first place, because he is unaware that proceedings have been initiated against him before another court, he cannot raise the plea of *lis alibi pendens* in time and therefore take prompt action to ensure that the case is heard by the court first seised; secondly, because the rights of the defence would also be undermined because the mere lodging by the plaintiff of the document initiating the proceedings would prevent the defendant, even before that document had been served on him, from taking proceedings before another court which also had jurisdiction. Thus, Article 21 only permits solutions which do *not* cause a *lis pendens* to arise before service. Obviously, that does not prevent the moment at which a *lis pendens* arises from being shifted to a later stage (such as, at the time of registration on the roll: Article 29 of the Belgian Civil Code).

Nor is that all. In my opinion, the only systems which are in conformity with the objectives of the Convention are those which make use of an automatic criterion to resolve the conflict between two courts before which proceedings involving the same cause of action have been brought. Leaving the choice to the discretion of those courts or to the parties would give rise to a situation of uncertainty and of competition between several authorities (what rule is to be applied, for example, if two courts in two different States both accept or decline jurisdiction?). It is precisely that situation that the concept of *lis pendens* is intended to overcome and that the Convention intended to eliminate. I doubt therefore if the English, once they have ratified the Convention, can maintain in being the system to which I referred to in part 3 of this Opinion.

6. For all the foregoing reasons, I propose that the Court reply as follows to the question referred to it by the Oberlandesgericht, Munich, by order of 22 June 1983, in the proceedings brought by Siegfried Zelger against Sebastiano Salinitri:

Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (27 September 1968)), must be interpreted as meaning that the decisive time for determining the order of priority of two or more sets of proceedings involving the same cause of action and between the same parties brought in courts of different Contracting States, is the moment at which a *lis pendens* arises under the law of the court seised. That moment, however, must be identifiable by the application of objective criteria and must not precede service of the document initiating the proceeding on the defendant.