JUDGMENT OF THE COURT (THIRD CHAMBER)
22 OCTOBER 1981 [1]

Établissements Rohr Société anonyme v Dina Ossberger (reference for a preliminary ruling from the Cour d'Appel Versailles)

(Brussels Convention: Objection contesting jurisdiction without a defence as to the substance)

Case 27/81

Convention on Jurisdiction and the Enforcement of Judgments — Agreement on jurisdiction — Appearance entered by the defendant in the court seised — Appearance entered not only to contest the jurisdiction but also to present a defence on the substance — Entering an appearance does not entail submission to the jurisdiction

(Convention of 27 September 1968, Art. 18)

Article 18 of the Convention of 27 September 1968 must be interpreted as meaning that it allows the defendant not only to contest the jurisdiction but to submit at the same time in the alternative a defence on the substance of the action without, however, losing his right to raise an objection of lack of jurisdiction.

In Case 27/81

REFERENCE to the Court under the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Cour d'Appel [Court of Appeal], Versailles, for a preliminary ruling in the action pending before that court between

1 — Language of the Case: French.

ÉTABLISSEMENTS ROHR SOCIÉTÉ ANONYME Sarcelles, France,

and

DINA OSSBERGER, trading as Firma Ossberger Turbinenfabrik, Weissenburg, Federal Republic of Germany,

on the interpretation of Article 18 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT (Third Chamber)

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

1. The undertaking Ossberger Turbinenfabrik (hereinafter referred to as "Ossberger"), Weissenburg, Bavaria, Federal Republic of Germany, has for some years supplied water turbines to the Établissements Rohr Société anonyme (hereinafter referred to as "Rohr"), Sarcelles, Val d'Oise, France, which sold them under its own name to customers in France.

Ossberger, founding on a clause conferring jurisdiction in its general conditions of sale, instituted proceedings against Rohr before the Landgericht [Regional Court] Ansbach, within whose jurisdiction Weissenburg is situated, for payment of various accounts amounting

in all to DM 120 216, together with interest. Before the Landgericht Rohr argued that that court had no jurisdiction *ratione loci* but did not submit any defence as to the substance.

By a provisionally enforceable final judgment of 15 December 1978 the Landgericht Ansbach considered that the clause in question conferring jurisdiction was valid under Article 17 of the Brussels Convention of 27 September 1968 and, having regard to the fact that Rohr failed to defend the substance of the claim, ordered it to pay Ossberger the principal sum of DM 120 216 with interest and to pay the costs. The costs were taxed at DM 4 742.24 with interest by an order of the Landgericht Ansbach of 5 February 1979.

Rohr appealed to the Oberlandesgericht Nürnberg [Higher Regional Court, Nuremberg]. In the course of the appellate procedure Rohr merely relied upon the objection of lack of jurisdiction and did not submit any defence as to the substance. The Oberlandesgericht Nürnberg, since it considered that the Landgericht Ansbach had jurisdiction under the provisions of the Brussels Convention and since Rohr had still failed to submit a defence as to the substance in the course of the appellate procedure, dismissed the appeal by a judgment of 13 June 1979. A further appeal on a point of law by Rohr to the Bundesgerichtshof [Federal Court of Justice] was dismissed as inadmissible by an order of 19 March 1980 because the grounds for the appeal were not stated within the prescribed time-limits.

2. Even before the judgment of the Landgericht Ansbach of 15 December 1978 had become final Ossberger requested the President of the Tribunal de Grande Instance [Regional Court], Pontoise, to declare enforceable in France that judgment together with the taxing order of the Landgericht Ansbach of 5 February 1979. The court acceded to that request by an order of 5 June 1979.

Rohr lodged an appeal against that order with the Cour d'Appel, Versailles, claiming in particular that pursuant to Article 18 of the Brussels Convention it was impossible to lodge a defence as to the substance before the German courts since the right to raise the objection of lack of jurisdiction would thereby be lost. The fact that the German courts did not restrict themselves to giving a ruling on jurisdiction but also gave judgment on the substance of the case constitutes a manifest infringement of the rights of the defence and is accordingly contrary to public policy within the meaning of Article 27 (1) of the Brussels Convention, which infringement precludes recognition of that judgment in France.

Ossberger contended before the Cour d'Appel, Versailles, that Article 18 of the Brussels Convention, like Articles 74 and 76 of the French Nouveau Code de Procédure Civile [New Code of Civil Procedure] and Article 39 of the German Zivilprozeßordnung [Code of Civil Procedure], does not prohibit the submission of a defence as to the substance in the alternative and subject to the objection of lack of jurisdiction but that Rohr voluntarily refrained from pursuing the appropriate procedures. The judgment obtained in Germany is accordingly enforceable in France under the provisions of the Brussels Convention.

Article 18 of the Brussels Convention is worded as follows:

"Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or

where another court has exclusive jurisdiction by virtue of Article 16."

Since the Cour d'Appel, Versailles, considered that the outcome of this case depended upon a question of the interpretation of the Brussels Convention it decided, in a judgment of 26 November 1980, to stay the proceedings and requested the Court of Justice to give a ruling, under the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Brussels Convention, on the following preliminary question:

"Must it be held with regard to all the versions of the Convention of 27 September 1968 which are drawn up in the Dutch, French, German and Italian languages in accordance with Article 68 of the Convention either that Article 18 thereof prohibits the simultaneous submission in the alternative of a defence concerning the substance of the case where an objection contesting jurisdiction as allowed by that provision has been raised, in order that a final decision on jurisdiction must be reached before any argument on the substance of the action, or that the said Article 18 permits, although it does not say so expressly, the objection contesting jurisdiction for which it makes provision to be submitted at the same time as a defence in the alternative regarding the substance of the action in order to permit the court before which the action is brought to give a decision in a single judgment, if that is appropriate, on both the objection and the substance of the action on the pattern of the express provisions of Article 76 of the Nouveau Code de Procédure Civile [New Code of Civil Procedure] together with the detailed procedures for the protection of rights of the defence?"

3. The judgment making the reference was received at the Court Registry on 16 February 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were lodged by the Government of the Italian Republic, represented by its Agent Arnaldo Squillante and Oscar Fiumara, Avvocato dello Stato, and by the Commission of the European Communities, represented by Anthony McLellan, a Legal Adviser at the Commission, acting as Agent, assisted by Denis de Ricci, Advocate, of the Cour de Paris.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. By an order of 17 June 1981 the Court, pursuant to Article 91 (1) and (2) of the Rules of Procedure, decided to assign the case to the Third Chamber.

II — Summary of the written observations submitted to the Court

1. Observations of the Italian Government

The Italian Government emphasizes first of all the linguistic differences between, on the one hand, the French version of Article 18 of the Brussels Convention which provides that the rule of implied submission to the jurisdiction where a defendant enters an appearance "n'est pas applicable si la comparution a pour objet de contester la compétence" [shall not apply where appearance was entered to contest the jurisdiction] and, on the other, the German, Italian and Dutch versions which provide that this is so where appearance was entered "only" ("nur", "solo" and "uitsluitend") for that purpose.

The Italian Government then describes the procedure relating to the objection of lack of jurisdiction under the Italian Codice di Procedura Civile [Code of Civil Procedure]. According to Articles 167, 183 and 184 the defendant may submit all the grounds of his defence not

only in the defence initially lodged (comparsa di risposta) but throughout the entire course of the inquiry, so long as the investigating judge has not submitted the case to the judges who are required to deliver judgment. Nevertheless all the conclusions, including those relating to the substance, must be set out in their entirety before the file is sent to the judges since, pursuant to Articles 187 and 189, they are in all cases to be seised of the matter in its entirety and may deliver a ruling on the substance even though the investigating judge has specifically treated the case as a question of inadmissibility only. These rules, which are similar to those adopted in the procedures of the other Contracting States, are intended to strike a balance between the need to avoid waste of time on procedural matters, the requirements of the judicial system, on the one hand, and to balance the need to observe the rights of the defence and ensure the quickest possible procedure, on the other. Within this framework, according to the decisions of the courts it is possible to submit the objection that a foreign court and not an Italian court has jurisdiction, as a means of avoiding implied submission to the jurisdiction of the Italian courts, at the beginning of the proceedings only, in the first statement of defence, the objection being accompanied or followed by the grounds of defence as to the substance where the defendant considers that appropriate in case the court enters into an examination of the substance of the case.

The Brussels Convention has not altered these rules.

No difficulty of interpretation arises from the French version of Article 18. It is clearly for the national legal system to establish the formalities in accordance with which the defendant may enter an appearance in order to contest the jurisdiction. The Convention does not prohibit the defendant from adding in the alternative other objections or grounds of defence on the substance. The compatibility of the objection and the alternative submissions must be appraised in accordance with the provisions of procedural law in the various Contracting States. They are compatible in Italian procedure and it is prudent for a defendant to set out all his grounds of defence as to the substance.

The versions in the other languages support these conclusions. The use of the adverb "soltano", "nur", "uitsluitend" is intended to reinforce the notion of appearance justified by the need to submit the objection of lack of jurisdiction. A contrary view seems illogical. A defendant who considered that the court before which the proceedings were brought had no jurisdiction would then have either not to appear or to appear and limit himself to claiming that the court had no jurisdiction, requiring it to give a ruling first of all on jurisdiction, and this would constitute a serious waste of time in the proceedings. The defendant's right of defence is not restricted by permitting the court to which an objection of lack of jurisdiction is submitted also to give a ruling as to the substance, as the defendant, being aware that this might happen, may immediately set out his defence on the substance in the alternative. The opposite method would pave the way for serious undesirable practices since any defendant who wished to postpone the conclusion of the proceedings could enter an appearance to submit an objection of no jurisdiction

thereby considerably protracting the proceedings by forcing the court first of all to give a ruling concerning jurisdiction alone.

The Italian Government accordingly suggests that the reply to the question submitted should be that Article 18 of the Brussels Convention permits the defendant, at the time when he submits the objection of lack of jurisdiction for which the article provides, at the same time to lodge a defence as to the substance, albeit in the alternative, so that the court dealing with the case may give a single ruling, where this is appropriate, covering both the substance and the objection submitted.

2. Observations of the Commission

The Commission observes first of all that a reply should be given not so much to the question submitted, but to the question whether the enforcement of the judgment of the Landgericht Ansbach may be refused in this case on one of the grounds definitively listed in Articles 27 and 28 and the second paragraph of Article 34 of the Brussels Convention since, pursuant to the third paragraph of Article 28 the provisions concerning public policy may not be relied upon even if the foreign court clearly has no jurisdiction under the rules of the Brussels Convention.

The Commission nevertheless gives its views first of all on the interpretation of Article 18 of the Brussels Convention and emphasizes the differences between the various language versions of the second sentence of that article. The article is intended to prevent the court of a Contracting State from declining jurisdiction of its own motion because its jurisdiction is not based on other provisions of the Convention and the defendant enters an appearance. The Jenard Report shows that "it will be necessary to refer to the rules of procedure in force in the State of the court seised of the proceedings in order to determine the point in time up to which the defendant will be allowed to raise this plea [of lack of jurisdiction], and to determine the legal meaning of the term 'appearance' ". Where the defendant puts forward as his principal defence the objection of lack of jurisdiction and submits a defence as to the substance in the alternative he is covered by the first contingency provided for in the second sentence of Article 18, in accordance with the procedural provisions of the *lex fori*. In this case under Article 39 of the German Zivilprozeßordnung, the provisions of which are in fact comparable to Articles 74 and 76 of the French Nouveau Code de Procédure Civile, the objection of lack of jurisdiction must be submitted prior to any defence as to the substance or the objection becomes inadmissible but those provisions permit a party to put forward at the same time any defence as to the substance in the alternative since the court may settle jurisdiction and give a ruling as to the substance in the same judgment. In this case the procedural arrangements relating to the objection of lack of jurisdiction are subject to the rules of procedure of German law.

With regard to the grounds on which the German judgment might not be recognized in France, the Commission considers that public policy, to which Article 27 (1) of the Brussels Convention refers, is inapplicable from the outset since that article does not concern the provisions relating to jurisdiction and Rohr's position was not prejudiced as in the initial proceedings it was entitled to appeal on matters of fact or of law on the basis of the infringement of Article 18. The Commission then argues that a clear distinction is drawn between the concept of the rights of the defence for the purposes of the Brussels Convention,

referred to in Article 27 (2), and that of public policy. Unlike the common law of certain States a serious irregularity in the procedure in a foreign State is not covered by the objection of public policy within the framework of the Convention. Article 27 (2) constitutes the only ground based on an infringement of the rights of the defence for refusing to recognize a judgment. The point whether the proceedings are contested or not is not a matter of public policy.

In conclusion the Commission suggests that the reply to be given to the question should be as follows:

"Pursuant to Article 34 the application may be refused only for one of the reasons specified in Articles 27 and 28.

Pursuant to the third paragraph of Article 28, saving the provisions concerning jurisdiction in matters relating to insurance and to sales on instalment credit terms and to exclusive jurisdiction:

— The court seised of the case may not review the jurisdiction of the court of the State where the main action takes place.

— The rules concerning the jurisdiction of the court of the State of the main action do not concern the provisions on public order referred to in Article 27 (1).

Article 27 (2) lays down the only infringement of the rights of the defence which may constitute grounds for the application.

Since Article 18 does not contain provisions concerning the time-limit for raising the objection of lack of jurisdiction it must be taken as inferring a reference in this matter to the rules of procedure of the court of the State of the main action. Where the defendant raises as his principal defence the objection of lack of jurisdiction and, in the alternative, advances a defence as to the substance the court must declare that it has no jurisdiction if it finds that it does not have jurisdiction under other provisions of the Convention. If, on the other hand, the defendant, after putting forward the objection, withdraws it and submits a defence as to the substance, the court, where there is no other court having exclusive jurisdiction under Article 18, must consider that the defendant has submitted to its jurisdiction."

III — Oral procedure

The Commission of the European Communities, represented by Denis de Ricci, Advocate, presented oral argument at the sitting on 1 October 1981.

The Advocate General delivered his opinion at the sitting on 15 October 1981.

Decision

1 By a judgment of 26 November 1980, which was received at the Court on 16 February 1981, the Cour d'Appel [Court of Appeal], Versailles, referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September

1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters a question as to the interpretation of Article 18 of the Convention.

2 The question was asked within the framework of appeal proceedings instituted by Société anonyme Établissements Rohr (hereinafter referred to as "Rohr"), having its registered office at Sarcelles, France, against a writ of execution issued by the President of the Tribunal de Grande Instance [Regional Court], Pontoise, on 5 June 1979. By that writ the court rendered enforceable, on the application of Ossberger Turbinenfabrik (hereinafter referred to as "Ossberger"), having its place of business at Weissenburg, in the Federal Republic of Germany, a provisionally enforceable judgment of the Landgericht [Regional Court] Ansbach of 15 December 1978, together with a taxing order in respect of the costs of that court of 5 February 1979.

3 The judgment in question was given by the Landgericht Ansbach following proceedings instituted by Ossberger against Rohr for payment of various accounts for goods supplied by Ossberger. Since Rohr merely argued before the Landgericht that the court had no jurisdiction *ratione loci* and did not submit any defence on the substance, and since the Landgericht considered that it had jurisdiction in accordance with Article 17 of the Convention by reason of a clause conferring jurisdiction contained in Ossberger's general conditions of sale, Rohr was ordered to settle the said accounts and pay the costs. Rohr submitted an appeal to the Oberlandesgericht Nürnberg [Higher Regional Court, Nuremberg], again relying upon the objection of lack of jurisdiction without submitting any defence on the substance; that appeal was dismissed by a judgment of 13 June 1979 since the Oberlandesgericht Nürnberg considered that the Landgericht had jurisdiction under the provisions of the Convention and that Rohr had still failed to submit a defence on the substance in the course of the appellate procedure. A further appeal on a point of law by Rohr the Bundesgerichtshof [Federal Court of Justice] was dismissed as inadmissible by an order of 19 March 1980 because the grounds for the appeal were not stated within the prescribed time-limits.

4 Rohr argued before the Cour d'Appel, Versailles, that the recognition and enforcement of the judgments of the Landgericht Ansbach were contrary to public policy within the meaning of Article 27 (1) of the Convention: since Article 18 of the Convention made it impossible for Rohr to submit a defence on the substance before the German courts without losing the right to raise an objection of lack of jurisdiction, the fact that these courts did not restrict themselves to giving a ruling on jurisdiction but also give judgment on the substance of the case constituted a manifest infringement of the rights

of the defence and thereby of public policy in France. Ossberger contended that Article 18 of the Convention, like the provisions of German law on civil procedure, did not prevent Rohr from submitting a defence on the substance but that Rohr voluntarily refrained from doing so.

5 The Cour d'Appel, Versailles, since it considered that this case raised a question concerning the interpretation of the Convention, referred to the Court a preliminary question which is essentially concerned to establish whether Article 18 of the Convention permits a defendant who contests the jurisdiction of the court before which an application has been brought to submit at the same time in the alternative a defence on the substance of the action without thereby losing his right to raise an objection of lack of jurisdiction.

6 The Italian Government and the Commission of the European Communities have argued that that question must be answered in the affirmative.

7 The Court of Justice has had occasion to give a preliminary ruling on a similar question in its judgment of 29 June 1981 *(Elefanten Schuh GmbH* v *Jacqmain,* Case 150/80, [1981] ECR 1671). In that judgment the Court declared: "Although differences between the different language versions of Article 18 of the Convention appear when it is sought to determine whether, in order to exclude the jurisdiction of the court seised, a defendant must confine himself to contesting that jurisdiction, or whether he may on the contrary still achieve the same purpose by contesting the jurisdiction of the court as well as the substance of the claim, the second interpretation is more in keeping with the objectives and spirit of the Convention. In fact under the law of civil procedure of certain Contracting States a defendant who raises the issue of jurisdiction and no other might be barred from making his submissions as to the substance if the court rejects his plea that it has no jurisdiction. An interpretation of Article 18 which enabled such a result to be arrived at would be contrary to the right of the defendant to defend himself in the original proceedings, which is one of the aims of the Convention."

8 This case has disclosed no factor of such a kind as to affect these findings. Accordingly the answer to the question submitted must be that Article 18 of the Convention of 27 September 1968 must be interpreted as meaning that it

allows the defendant not only to contest the jurisdiction but to submit at the same time in the alternative a defence on the substance of the action without, however, losing his right to raise an objection of lack of jurisdiction.

Costs

9 The costs incurred by the Government of the Italian Republic and by the Commission of the European Communities, which have 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 (Third Chamber)

in answer to the question referred to it by the Cour d'Appel, Versailles, by judgment of 26 November 1980, hereby rules:

Article 18 of the Convention of 27 September 1968 must be interpreted as meaning that it allows the defendant not only to contest the jurisdiction but to submit at the same time in the alternative a defence on the substance of the action without, however, losing his right to raise an objection of lack of jurisdiction.

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 22 October 1981.

For the Registrar

H. A. Rühl

Principal Administrator

A. Touffait

President of the Third Chamber