OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 11 June 1987 *

Mr President,
Members of the Court,

1. The Italian Court of Cassation seeks an interpretation of the concept of *lis pendens* pursuant to the first paragraph of Article 21 of the Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention').

By a summons served on 12 December 1974, Giulio Palumbo, an Italian citizen, brought proceedings against Gubisch Maschinenfabrik KG, whose registered office is in Flensburg (Federal Republic of Germany), before the tribunale di Roma (District Court, Rome) for a declaration that the order he had placed with Gubisch for a machine tool was inoperative. Mr Palumbo argued that he had revoked the order even before it reached Gubisch for acceptance. In the event that the tribunale should hold that a sales contract had been concluded, Mr Palumbo claimed in the alternative its rescission for lack of consent or in any event its discharge for failure to comply with the mandatory time-limit for delivery.

In entering an appearance Gubisch lodged a preliminary objection to the effect that the Italian court lacked jurisdiction on the ground that it had already instituted proceedings before the Landgericht Flensburg seeking payment from Mr Palumbo for the machine tool purchased by the latter on the basis of a valid contract. There was therefore a situation of *lis pendens* as between the two actions, which, pursuant to the first paragraph of Article 21 of the Convention, had to be resolved in favour of the German court, which was the court first seised.

The tribunale di Roma dismissed the objection, stating that the two cases did not involve the same cause of action and it could not therefore decline jurisdiction in accordance with the aforesaid provision. Gubisch accordingly appealed to the Court of Cassation on the issue of jurisdiction. That court considered it necessary to submit the following question to the Court of Justice for a preliminary ruling:

'Does a case where, in relation to the same contract, one party applies to a court in a Contracting State for a declaration that the contract is inoperative (or in any event for its discharge) whilst the other institutes proceedings before the courts of another Contracting State for its enforcement fall within the scope of the concept of *lis pendens* pursuant to Article 21 of the Brussels Convention of 27 September 1968?'

In these proceedings, written observations were submitted by Gubisch, the Commission of the European Communities, the Government of the Federal Republic of Germany and the Government of the Italian Republic.

2. The view is generally held that the concept of *lis pendens* to which Article 21 refers must be interpreted independently, that is to say without reference to its definition under the *lex fori*. There is disagreement, however, as regards the conditions governing the operation of that

* Translated from the Italian.

provision. According to the Italian Government, that provision must be interpreted literally. In other words, for *lis pendens* to arise, the actions brought by the parties must involve 'the same subject-matter and the same cause of action'. Otherwise, the relationship, if any, between proceedings pending before the courts of different States is determined and regulated in the Convention by the rules on related actions. Consequently, and for the same reasons as those specified by the tribunale di Roma, the question submitted for a preliminary ruling must be answered in the negative.

However, the other interveners maintain that the objection of *lis pendens* is designed to prevent the same dispute from being brought before the courts of different States, with the result that judgments may be given which are irreconcilable and for that very reason incapable of being recognized (Article 27 (3)). The provision under consideration therefore operates not only in the case of proceedings involving exactly the same subject-matter and cause of action but also in the case of actions which, whilst differing in scope, are based on the same legal circumstances.

In this case, for instance, it is common ground that in order to be able to consider the substance of the action for enforcement brought by Gubisch the German court will in the first place have to establish whether a valid contractual relationship exists between the parties, which is precisely the main issue to be resolved by the Italian court. Hence a literal interpretation of Article 21 leads to the same problem being raised in different courts, but that danger is avoided by a broad interpretation of Article 21 which requires the court other than the court first seised to decline jurisdiction. Moreover, only the latter interpretation is in conformity with the spirit of the Convention; that is to say, only that interpretation is capable of ensuring that proceedings are swift and straightforward, so as to improve the mobility of national judgments.

3. Both points of view are plausible and are skilfully argued. In my view, however, the first is more persuasive.

I would recall that, according to the first paragraph of Article 21, *lis pendens* arises 'where proceedings involving the same subject-matter and cause of action and between the same parties are brought in the courts of different Contracting States'. Under those conditions, 'any court other than the court first seised shall of its own motion decline jurisdiction' in favour of the court first seised. On the other hand, the third paragraph of Article 22 provides that 'actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. In those circumstances, the court other than the court first seised 'may ... stay its proceedings'.

As I have said, on reading those two provisions it is clear in the first place that the authors of the Convention intended to regulate *lis pendens* and related actions in an independent manner, and took care to specify their constituent elements and their consequences. The two provisions are designed to prevent as far as possible any conflicts between judgments within the territory of the Community. Hence the need for a uniform definition of the situations to which they relate.

Turning to the substance of the rules, I would point out that the solutions they provide for diverge quite clearly from one another. Article 22 requires that the two

actions should be 'so closely connected' as to make it expedient to join them. Moreover, the proceedings in question must 'be pending at the same level of adjudication, for otherwise *the object of the proceedings would be different* and one of the parties might be deprived of a step in the hierarchy of the courts' (Report by Mr P. Jenard on the Convention of 27 September 1968, Official Journal 1979, C 59, p. 41, under Article 22; my italics). In the case of *lis pendens*, it is not sufficient that the actions should be 'connected'; they must involve the same subject-matter, the same cause of action and the same parties. That explains the mandatory nature of the provision in question, which requires the court other than the court first seised to decline jurisdiction *even in the absence of an application to that effect by one of the parties.*

The first paragraph of Article 21 is therefore very strict. It is certainly stricter than the corresponding national rules or those in other conventions — and, I should add, quite innovative. In most of the Contracting States the objection of *lis alibi pendens* does not exist, and the conventions which do make provision for it impose the further requirement that the decision of the court first seised must be capable of being recognized in the State concerned. From the point of view of the consequences, moreover, the court first seised usually has the option of declining jurisdiction or is able to choose between declining jurisdiction and staying the proceedings (see, generally, Droz, *Compétence judiciaire et effets des jugements dans le Marché commun*, Paris, 1972, p. 179 *et seq.*; for international rules, see Article 20 of The Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters).

In my view, those factors are decisive. It is clear that, with legislative traditions that are so unfavourable to the concept of *lis pendens*, the courts of the Contracting States would have complied with the obligation to decline jurisdiction only if that obligation had been conditional on straightforward and unequivocal criteria. Accordingly, the fact that the first paragraph of Article 21 makes the existence of 'proceedings involving the same subject-matter and cause of action and between the same parties' the basis for the objection does not reflect excessive formalism. On the contrary, the twofold or threefold use of the adjective 'same' ('samme', 'même', 'derselbe', 'idios', 'stesso' or 'medesimo', 'dezelfde') shows that that choice was dictated by a specific policy aim. If that is true, the broad interpretation according to which the provision should also be applicable in the case of actions which are different, although based on the same legal circumstances, ultimately confuses matters which the Convention was designed to keep apart, namely related actions and *lis pendens.*

Moreover, even from a practical point of view that interpretation does not provide all the advantages which are claimed for it by its exponents. With regard to obligations, for instance, it would be sufficient to challenge the validity of a contract in order to paralyse, by raising an objection of *lis pendens*, any subsequent action brought on the basis of that contract before the courts of another State. That is certainly not the objective pursued by the first paragraph of Article 21 of the Convention.

4. With that in mind, I now turn to this case. It is clear from the order for reference that the action pending before the tribunale di Roma is for a *declaration* that a contract of sale is *inoperative* because the offer was revoked, whilst the action before the German court assumes the validity of the contract and seeks to *obtain judgment* for the amount of the price. As the Commission has pointed out, the two cases do not involve either the same subject-matter or the

same cause of action. Both cases are indeed concerned with the question whether a contract exists and whether it is operative. In the case pending before the Landgericht Flensburg, however, that question is secondary or, to be more precise, preliminary to consideration of the substance of the action to enforce payment of the price. In such circumstances, it is impossible to endorse the argument of the German Government that, for the purposes of the first paragraph of Article 21, the action for a declaration that the contract is inoperative is substantially incorporated in the action to enforce the contract. From the procedural point of view, the relief sought by the plaintiff in the two cases differs widely in terms of its scope and its effects.

Instead, the two actions are 'so closely connected' — on a preliminary issue — 'that it is expedient to hear and determine them together' (third paragraph of Article 22). In other words, the actions are related, and since that does not permit the transfer of jurisdiction provided for by the first paragraph of Article 21 there are those — Germany and the Commission, to be precise — who see the risk of a conflict of decisions on the same question.

That fear is exaggerated, to say the least. According to the second paragraph of Article 22, a court other than the court first seised 'may', on application by the parties, decline jurisdiction 'if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions', and it may in any event stay the proceedings. Furthermore, those two possibilities do not imply that of disregarding an objection raised by one of the parties. On the contrary, the court other than the court first seised is required to rule on that objection. As I have said, in other words, the rules laid down in the case of related actions are also designed to prevent the delivery of conflicting judgments, and they do so by means which, whilst they may not be automatic like those provided for in the case of *lis pendens*, are not any the less effective.

5. In the light of all the foregoing considerations I suggest that the Court answer the question submitted by the Italian Court of Cassation by order of 28 May 1986 in proceedings brought by Gubisch Maschinenfabrik KG against Giulio Palumbo as follows:

'The first paragraph of Article 21 of the Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that *lis pendens* arises only where proceedings between the same parties involving the same subject-matter and the same cause of action are brought in the courts of different Contracting States. The term *lis pendens* does not cover a case where one party applies to a court in a Contracting State for a declaration that a contract is inoperative (or in any event for its discharge) whilst the other institutes proceedings before the court of another Contracting State for its enforcement.'