OPINION OF ADVOCATE GENERAL JACOBS
delivered on 4 May 1995 *

1. This case concerns the interpretation of Article 27(2) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (hereinafter 'the Brussels Convention' or simply 'the Convention') as amended by the Convention of 9 October 1978 on the accession of Denmark, Ireland and the United Kingdom. [1] The point raised is whether a *decreto ingiuntivo* — a summary order provided for in Italian law — may be enforced in another Contracting State under the Brussels Convention.

2. The question referred by the Arrondissementsrechtbank Zwolle is worded as follows:

'Must a *decreto ingiuntivo* within the meaning of Book IV of the Italian Code of Civil Procedure (Articles 633 to 656), together with the application introducing the proceedings or on its own, be regarded as "the document which instituted the proceedings" within the meaning of Article 27(2) or Article 46(2) or the second paragraph of Article 20 of the Brussels Convention?'

The facts

3. Mrs Campese, domiciled in Italy, sold consignments of shoes to Firma Hengst BV ('Hengst'), a company established in the Netherlands. Mrs Campese alleged that Hengst had not paid the full purchase price. On 28 March 1989 she applied, under Article 638 of the Italian Code of Civil Procedure ('CCP'), to the Tribunale di Trani, in Italy, for a *decreto ingiuntivo* requiring Hengst to pay her the sum of LIT 11 214 875 with interest and costs. On 1 April 1989 the President of the Tribunale di Trani made such an order under Article 641 of the CCP. On 23 May 1989 the order, together with the application which instituted the proceedings before the court in Trani, was served on Hengst pursuant to Article 643 of the CCP in the manner prescribed by Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial mat-

* Original language: English.

1 — OJ 1978 L 304, p. 79.

ters. [2] In accordance with Article 641 of the CCP, Hengst then had 20 days either to pay the amount specified in the order or to oppose the order before the court in Trani. It did neither. On 31 July 1989 the President of the court in Trani declared the order to be executory in accordance with Article 647 of the CCP and that declaration was inscribed on the order by the clerk of the court on 27 September 1989. Mrs Campese applied to the President of the Arrondissementsrechtbank Zwolle to have the order enforced against Hengst in the Netherlands under Article 32 of the Brussels Convention. Enforcement was authorized on 20 November 1990. Hengst appealed against the decision authorizing enforcement to the Arrondissementsrechtbank Zwolle, which referred the question reproduced above.

The *decreto ingiuntivo*

4. The procedure by which the *decreto ingiuntivo* is obtained is a rapid, simple, *ex parte* procedure by which a creditor may obtain an enforceable court order against a debtor. The creditor applies, with all supporting written evidence, for an order for payment of the sum of money owed or for delivery of specified goods (Article 633 of the CCP). Where all the conditions of Article 633 are fulfilled, the court makes an order that the sum claimed shall be paid or the goods delivered within 20 days (Article 641). That period can be reduced to five days if the applicant shows just cause or it can be increased to 30 days. According to Article 643 of the CCP a copy of the order together with a copy of the application is served on the defendant who then has until the end of the period set in accordance with Article 641 to oppose the order. Article 643, paragraph 3, states that the joint service of the order and the application mark the start of the proceedings: it is only upon that joint service that the defendant is made aware that proceedings have been commenced against him. In normal circumstances, the order itself is not executory until after the expiry of the period set and until the court has declared it to be executory, but the applicant may request that it be made executory on an interim basis if the action is based on a cheque or a negotiable instrument or in other specified cases (Article 642). If the defendant does not oppose the order within the time specified or if the court finds that the opposition is unfounded, the applicant can apply to the court, either orally or in writing, for a declaration that the order is executory. The court must require that the order be served again if it knows or has reason to believe that the defendant did not know of it (Article 647, paragraph 1, *in fine*). According to Article 650, the defendant may oppose the order after the expiry of the period laid down in the order if he can demonstrate that he did not know of it because of an irregularity in the service or for reasons amounting to *force majeure*. If the defendant opposes the order, the procedure becomes a normal adversary procedure before the court

2 — Article 15, paragraph 1, reads as follows:
'Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that —
(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
(b) the document was actually delivered to the defendant or to his residence by another method provided by this Convention,
and that in either of these cases the service or delivery was effected in sufficient time to enable the defendant to defend.'

seised (Article 645, paragraph 2). Finally, it may be noted that Article 633, paragraph 3, specifies that the order cannot be made if it has to be served outside Italy or the Italian sovereign territories.

The purpose of the question referred is to ascertain whether the referring court must refuse to recognize the *decreto ingiuntivo* granted to Mrs Campese in accordance with Article 27(2). To that end, the referring court needs to know whether the *decreto ingiuntivo*, either alone or together with the application commencing the proceedings, constitutes the 'document which instituted the proceedings' within the meaning of Article 27(2).

The relevant provision of the Brussels Convention

5. The referring court is concerned essentially with the interpretation of Article 27(2) of the Brussels Convention, which provides that:

'A judgment shall not be recognized:

[...]

2. Where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence'.

6. The question referred also mentions Articles 20, second paragraph, and 46(2) of the Convention, in which the same expression occurs. However, those articles are not directly relevant. Article 20 is addressed to the court in which the original proceedings are commenced in the State of adjudication, while Article 46(2) is concerned with the obligation of the party requesting recognition or enforcement of a judgment in default to produce documentary evidence establishing service of the document instituting the proceedings. The proceedings before the referring court do not appear to be concerned with the issue whether Mrs Campese produced such evidence. I shall therefore concentrate on the interpretation of Article 27(2).

Legal analysis

7. I am of the opinion that service of the 'document which instituted the proceedings'

referred to in Article 27(2) means service of both the *decreto ingiuntivo* and the application as required by Article 643 of the CCP. The fundamental concern of Article 27(2) of the Convention is to ensure that the rights of the defence are adequately protected. The Court stated in *Denilauler* v *Couchet Frères* [3] that:

'All the provisions of the Convention, both those contained in Title II on jurisdiction and those contained in Title III on recognition and enforcement, express the intention to ensure that, within the scope of the objectives of the Convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed. It is because of the guarantees given to the defendant in the original proceedings that the Convention, in Title III, is very liberal in regard to recognition and enforcement.'

Thus, the important element is whether the defendant has had an opportunity to put in a defence or not. [4] Indeed, the Court continued:

'In the light of these considerations it is clear that the Convention is fundamentally concerned with judicial decisions which, before the recognition and enforcement of them are sought in a State other than the State of origin, have been, *or have been capable of being*, the subject in that State of origin and under various procedures, of an inquiry in adversary proceedings.' (emphasis added). [5]

8. It is clear from an examination of the provisions of the Italian Code of Civil Procedure that the *decreto ingiuntivo* was indeed capable of being 'the subject of an inquiry in adversary proceedings'. Hengst could have opposed the order before the Tribunale di Trani under Article 645 of the CCP. Had Hengst done so, the procedure would, according to the second paragraph of Article 645, have become a normal adversary one.

9. In addition to allowing the defendant to oppose the *decreto ingiuntivo* within a period of (normally) 20 days, Italian law contains further procedural safeguards in order to ensure that the rights of the defence are respected. As stated above, Article 650 of the CCP provides that the defendant can oppose the order out of time in certain

3 — Case 125/79 [1980] ECR 1553 at 1569, paragraph 13 of the judgment.

4 — See also Case C-123/91 *Minalmet GmbH* v *Brandeis Ltd* [1992] ECR I-5661 at I-5679, paragraph 18 of the judgment.

5 — See note 3.

circumstances. Article 647 of the CCP obliges the court to order fresh service of the *decreto ingiuntivo* and the application if it knows or has reason to believe that the defendant did not know of it.

10. In *Klomps* v *Michel* [6] the Court had to determine whether a similar kind of order for payment (Zahlungsbefehl [7]) which existed in German law was 'the document which instituted proceedings' within the meaning of Article 27(2) of the Convention. It is clear from the description given in the Opinion of Advocate General Reischl [8] that the procedure in issue in that case was similar to the procedure described above in the Italian Code of Civil Procedure. Under the German procedure, a creditor could make an *ex parte* application to a court officer, who, after making a prima facie examination of the claim, issued an order for payment. The order was then served on the debtor, who then had three days in which to oppose the order. That period was subsequently changed to 14 days. On the lodging of an objection to the order the action was transformed into normal adversary proceedings. However, if no objection was made, the creditor could apply for an enforcement order. An objection could be made to that enforcement order also.

6 — Case 166/80 [1981] ECR 1593.

7 — Now known as a Mahnbescheid.

8 — [1981] ECR 1593 at 1615 and 1616.

11. In *Klomps* v *Michel* the Court had no difficulty in interpreting 'the document which instituted the proceedings' in Article 27(2) as covering the order for payment (Zahlungsbefehl) in German law. The Court stated that:

'It follows that a measure, such as the order for payment [Zahlungsbefehl] in German law, service of which on the defendant enables the plaintiff, where no objection to the order is made, to obtain a decision which is enforceable under the Convention, must be duly served on the defendant in sufficient time to enable him to arrange for his defence, and accordingly that such a measure must be understood as being covered by the words "the document which instituted the proceedings" in Article 27(2).'

12. One point raised in the order for reference which remains to be dealt with is whether the *decreto ingiuntivo* alone or together with the application constitutes 'the document which instituted the proceedings'. Given that Article 643 of the CCP requires service on the defendant of both the *decreto ingiuntivo* and the application, I am of the opinion that it is the conjunction of those documents which constitutes 'the document which instituted the proceedings' within the meaning of Article 27(2). Indeed, as stated in the third paragraph of Article 643 of the CCP, the service of both of those documents marks the start of the time in which to oppose the order. The Italian Government has pointed out in its observations that the court making the order must check whether service was carried out properly before

declaring the *decreto ingiuntivo* executory. If one of the two documents is missing, the court would have to order fresh service pursuant to Article 647 of the CCP.

13. Before concluding, I address one matter which the Commission has raised, although I do not consider that it affects the answer which should be given to the question referred. The Commission has raised the issue whether the *decreto ingiuntivo* given in this case comes within the meaning of the term used in Article 27(2) because it was served on a defendant domiciled outside Italy. Article 633 of the CCP states that the Italian court cannot make the order if it has to be served outside Italy. The Commission concludes that only a *decreto ingiuntivo* served on a defendant domiciled in Italy constitutes, together with the application, 'the document which instituted the proceedings' within the meaning of Article 27(2).

14. I disagree. In Article 27(2), the important element is whether the defendant was duly served with the relevant document or its equivalent in sufficient time to enable him to arrange for his defence. That provision seeks to ensure that default judgments given in circumstances in which the defendant had no opportunity of defending himself do not come within the simplified rules on recognition and enforcement laid down in Title III of the Convention. Whether the Italian court was right or wrong in making the order in the present case is a different issue.

15. The answer proposed by the Commission would have the effect of allowing the Dutch court to refuse to enforce (or recognize) the Italian order because of a possible mistake contrary to Italian law. That would lead the Dutch court to examine whether the Italian court had been correct as a matter of Italian law in making the order. Article 29 of the Convention precludes the court of the State in which enforcement is sought from undertaking such an examination.

16. It is true that in *Pendy Plastic* v *Pluspunkt* [9] the Court ruled that jurisdiction to determine whether the document instituting the proceedings was properly served was conferred both on the court of the original State and on the court of the State in which enforcement was sought. However, the examination that may be carried out by the latter court is limited, in my opinion, to the question whether service was duly effected in such a way that the defendant was put in a position to be able to organize his defence. That interpretation accords with the fundamental purpose of Article 27(2), namely to ensure that the rights of the defence are protected. [10]

9 — Case 228/81 [1982] ECR 2723 at 2736, paragraph 13 of the judgment.

10 — Case C-305/88 *Lancray* [1990] ECR I-2725 at I-2750, paragraph 28 of the judgment.

Conclusion

17. Accordingly, I am of the opinion that the question referred by the Arrondissementsrechtbank Zwolle should be answered as follows:

Article 27(2) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended by the Convention of 9 October 1978 on the accession of Denmark, Ireland and the United Kingdom must be interpreted as meaning that the words 'the document which instituted the proceedings' cover any document, such as the order known as the 'decreto ingiuntivo' under Italian law together with the application initiating the procedure for obtaining it, service of which enables the plaintiff, under the law of the State of the court in which judgment was given, to obtain, in default of appropriate action taken by the defendant, a decision capable of being recognized and enforced under the provisions of the Convention.