OPINION OF ADVOCATE GENERAL LÉGER

delivered on 21 February 2002 [1]

1. By the present reference for a preliminary ruling, the Court is asked to interpret Article 27(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. [2] This article provides that a judgment is not to be recognised in another Contracting State if it is irreconcilable with a judgment given in a dispute between the same parties in that State.

2. The particular feature of the national decisions at issue in the main proceedings is that they were made at the end of proceedings for interim relief governed by different rules in each of the two Contracting States. This feature of the dispute before it led the referring court to wonder whether the differences in the procedural requirements imposed for the adoption of provisional or protective measures in interim relief proceedings in each of those States render the decisions ruling on applications for the adoption of such measures irreconcilable.

3. Before examining the main question which has been referred to the Court, it is necessary to recall the facts giving rise to the dispute, the proceedings which ensued and the relevant legal background.

I — The facts and the main proceedings

4. Italian Leather SpA [3] is a legal person established in Italy. It markets leather-upholstered furniture under the name 'LongLife'.

5. WECO Polstermöbel GmbH & Co. [4] is a partnership established in Germany which also sells leather-upholstered furniture.

1 — Original language: French.

2 — OJ 1978 L 304, p. 36. The version of the Convention applicable to the case is that amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — amended text — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) (hereinafter 'the Convention'). A consolidated version of the Convention, as amended by these three accession Conventions, is published at OJ 1990 C 189, p. 2.

3 — Referred to as 'Italian Leather'.

4 — Referred to as 'WECO'.

6. In 1996 Italian Leather granted WECO, under an 'exclusive contract', the right to distribute its goods for a period of five years within a specified geographical area. The contract included the following clauses:

'(2) Dealers may use the LongLife brand name only when marketing suites that are covered in LongLife leather.

...

(4) No dealer may use the LongLife brand name for its own advertising without written authorisation from the supplier.' [5]

7. The parties to the contract conferred jurisdiction on the courts of Bari (Italy).

8. In 1998 WECO alleged defective performance of the contract by Italian Leather. It informed Italian Leather that, as a consequence, it would not be a party to any joint sales message at forthcoming exhibitions, but would present its own WECO mark.

9. Italian Leather brought proceedings for interim relief against WECO before the Landgericht Koblenz (Regional Court, Koblenz, Germany), within whose jurisdiction WECO was established, in order to prohibit the marketing of products, presented as being in easy-care leather, under the brand name 'naturia longlife by Maurizio Danieli'.

10. By judgment of 17 November 1998 the Landgericht Koblenz, which had been seised in accordance with Article 24 of the Convention, dismissed the application because there was no 'ground justifying the grant of interim relief'. [6]

11. The Landgericht Koblenz took the view that to grant Italian Leather's application would be tantamount to ordering WECO to perform the contract. Italian Leather had not proved that there was a risk of irreparable damage or of a definitive loss of rights, requirements which had to be met under German law before the relief sought could be granted. WECO had, moreover, already taken concrete steps to advertise and market its products with leather from other

5 — Page 4 of the order for reference.

6 — Article 24 of the Convention permits the courts of a Contracting State to order the provisional, including protective, measures available under the law of that State, even if, under the Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

suppliers. Accordingly, it equally would have suffered considerable damage if the restraining order sought had been granted.

12. Italian Leather also applied to the Tribunale di Bari (Bari District Court) for a restraining order. By order of 28 December 1998, the Tribunale di Bari prohibited WECO from using the word 'Long-Life' in marketing its leather furniture products in certain Member States, including Germany, holding that 'the *periculum in mora* (urgency) lies in the plaintiff's economic loss and the possible "extinction" of its rights resulting therefrom, for which there would be no compensation'. [7]

13. On application by Italian Leather, the Landgericht Koblenz, by order of 18 January 1999, endorsed a warrant for execution in the order of the Tribunale di Bari, coupling it with a financial penalty.

14. However, on an appeal brought by WECO, the Oberlandesgericht (the competent Higher Regional Court) varied the order of 18 January 1999, holding that the decision on interim relief of the Tribunale di Bari was irreconcilable, within the meaning of Article 27(3) of the Convention, with the judgment of 17 November 1998 by which the Landgericht Koblenz had dismissed Italian Leather's application for a restraining order.

7 — Cited by the Bundesgerichtshof, p. 10 of the order for reference.

15. Italian Leather appealed against the decision of the Oberlandesgericht to the Bundesgerichtshof (Federal Court of Justice).

II — The legal framework

The Convention

16. As stated in the first paragraph of Article 1 thereof, the Convention applies in civil and commercial matters whatever the nature of the court or tribunal.

17. Title III of the Convention lays down the rules under which judgments given by the courts of a Contracting State are recognised and enforced in the other Contracting States.

18. According to the first paragraph of Article 26, 'a judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required'.

19. The exceptions to the recognition of judgments in the State where recognition is sought include that provided for in Article 27(3), under which 'a judgment shall not be recognised ... if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought'.

German legislation

20. According to the Bundesgerichtshof, 'under Paragraph 935 of the Zivilprozessordnung, [8] an interim measure may be granted if it is feared that a change in the current situation could prevent or substantially impede the assertion by a party of his rights. Accordingly, the court seised is called on essentially to maintain the status quo'. [9]

21. The Bundesgerichtshof further states that 'under that provision, the court may also make an interim order regulating a legal relationship, in so far as that appears to be necessary in order to prevent substantial prejudice or imminent use of force or for other reasons'. [10]

8 — German Code of Civil Procedure.
9 — Page 9 of the order for reference.
10 — Ibid.

III — The questions referred for a preliminary ruling

22. The Bundesgerichtshof has doubts as to how Article 27(3) of the Convention should be interpreted where, as in the present case, two decisions have been made, at the end of proceedings for interim relief, on the basis of different procedural requirements. Should it uphold the decision authorising enforcement made by the Landgericht Koblenz on 18 January 1999, it is uncertain whether it may or must maintain the administrative financial penalty which that court attached to the Italian decision in case the latter was not enforced.

23. Consequently, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can judgments be irreconcilable within the meaning of Article 27(3) of the Brussels Convention when the only difference between them lies in the specific requirements for the adoption of a particular type of autonomous provisional measure (within the meaning of Article 24 of the Convention)?

(2) May and must the court of the State of enforcement which has declared a

foreign judgment requiring the party against whom enforcement is sought to desist from certain activities to be enforceable in accordance with the first paragraph of Article 34 and the first paragraph of Article 31 of the Convention at the same time order the measures necessary, under the law of the State of enforcement, for enforcement of a restraining order?

(3) If the answer to Question 2 is in the affirmative, must the measures necessary, under the law of the State of enforcement, for enforcement of the restraining order be ordered even if the judgment to be recognised does not itself include comparable measures in accordance with the law of the State of origin, and that law makes no provision at all for the immediate enforceability of such restraining orders?'

IV — Irreconcilability, for the purposes of Article 27(3) of the Convention, of conflicting judgments given under procedures for interim relief governed by different procedural requirements (first question referred for a preliminary ruling)

24. The first question from the referring court relates to irreconcilability under Article 27(3) of the Convention of two judgments [11] concerning interim relief given by the courts of two Contracting States following an application for an order to prohibit the use of a brand name.

25. The question as formulated by the Bundesgerichtshof assumes that the only difference between the two judgments lies in the conditions required for the grant of the restraining order. According to that court, the grounds laid down by German law for interim relief are stricter than those provided for under Italian legislation, so that an application for a restraining order lodged in Italy would have a greater chance of succeeding than the same application made before a German court.

26. Two observations must be made at the outset.

27. First, while the question from the referring court lays emphasis on the differences between the German and Italian

11 — It is evident from the order for reference, and it is not contested, that the judgment in proceedings for interim relief whereby the Landgericht Koblenz dismissed Italian Leather's application to prohibit WECO from using the brand name 'LongLife' is a 'judgment' within the meaning of Article 25 of the Convention. The same is true of the order in interim relief proceedings whereby the Tribunale di Bari granted the same application for a restraining order, the recognition of which in Germany is at issue in the main proceedings. Article 25 states that any judgment given by a court or tribunal of a Contracting State, whatever the name by which it may be called, constitutes a judgment for the purposes of the Convention.

procedures, the order for reference does not describe precisely the rules of procedure applicable under Italian law. On the contrary, after setting out the reasons why the Landgericht Koblenz considered that the requirement for grant of the restraining order had not been met, the Bundesgerichtshof indicated that the Tribunale di Bari assessed that requirement differently. [12] This suggests that the difference between the two judgments is attributable to differing assessments by the two courts of one and the same procedural requirement, and not to the existence of substantially different national legal frameworks.

28. However, in the absence of more precise information on the reasons why the referring court is concerned in its question with the procedural requirements for granting the measure sought, it must be accepted that the grounds for interim relief laid down by national law are not identical in the two Contracting States.

29. Secondly, the assumption that the only difference between the two decisions on interim relief stems from this difference in the requirements which the national procedures set for grant of a restraining order *disregards the fact that the decisions also differ as to their effects*. The German decision dismisses the application for a restraining order, whereas the Italian judgment grants such a prohibition.

30. This finding is not without consequences for the substance of the question on which the Court will have to give a preliminary ruling. The question submitted by the referring court would not arise if, despite differences in the grounds for interim relief, their effects were similar. In such a case, there is no doubt that the foreign judgment would be reconcilable with the judgment given in the State of enforcement.

31. Article 27 constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention which seeks to facilitate, to the greatest extent possible, the free movement of judgments by providing for a simple and rapid enforcement procedure. This exception to the principle that judgments should be recognised must therefore be interpreted strictly. [13] Furthermore, it must be applied only to judgments whose legal effects, if they were produced simultaneously in the same Contracting State, would disturb the rule of law in the State of enforcement. [14]

12 — Ibid., p. 9. The requirement mentioned by the referring court is, in essence, the need to avert substantial harm or an imminent danger threatening the interests of the applicant for interim relief.

13 — See, as a recent example of established case-law, Case C-38/98 *Renault* [2000] ECR I-2973, paragraph 26.

14 — See P. Jenard, 'Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters', p. 45 (OJ 1979 C 59, p. 1; 'the Jenard Report').

32. It should be recalled that in *Hoffmann* the Court ruled that, in order to ascertain whether two judgments are irreconcilable within the meaning of Article 27(3) of the Convention, it should be examined whether they entail legal consequences that are mutually exclusive. [15] It is therefore difficult to claim, for example, that judgments which diverge as to their reasoning but not as to their legal effects are irreconcilable in that they would be liable to disturb the rule of law in the State in which enforcement is sought. [16] Despite being different, the grounds on which judicial decisions are based can coexist, provided that the rules of law deriving from them are not incompatible.

33. It can be accepted all the less that, if the grounds for interim relief laid down in national legislation diverge but the judgments given pursuant to those procedural requirements do not produce mutually incompatible effects, the foreign judgment should be considered irreconcilable with the judgment given in the State in which enforcement is sought.

34. Consequently, the fact that the requirements laid down by the national procedures are not identical cannot be separated from the finding that the two judgments at issue gave diametrically opposing responses to applications for a restraining order. It is precisely because of this irreconcilability of the judgments that is attributable to the effects which they produce, as referred to in the judgment in *Hoffmann*, that the Bundesgerichtshof is uncertain whether the judgments remain irreconcilable even if the irreconcilability arises from differences in the procedural requirements pursuant to which they were given.

35. The hesitation as to the interpretation of Article 27(3) of the Convention also stems from the fact that, while different, the judgments do not decide the case as to the merits, that is to say in accordance with substantive law. The chances of a party's succeeding in its application depend mainly on the degree of accessibility, as laid down by national law by means of the grounds for the grant of interim relief, of the measures which the court in interim relief proceedings has the power to grant.

The procedural differences in themselves create risks that decisions will be irreconcilable, so that it is not certain that, in the present case, an Italian judgment on the merits, given pursuant to the substantive law applicable to the dispute, would be irreconcilable with a German judgment given under the same conditions.

36. The Bundesgerichtshof thus states that the Landgericht Koblenz did not refuse a claim by Italian Leather for a restraining

15 — Case 145/86 *Hoffmann* [1988] ECR 645, paragraph 22.

16 — See the Opinion of Advocate General Darmon in *Hoffmann*, cited above, points 10 and 11.

order on the merits. [17] It merely considered that the condition for obtaining the measure sought was not met. [18] According to the Landgericht Koblenz, Italian Leather's application was seeking to settle the legal relationship between the contracting parties and was not confined to maintaining the existing situation, so that the need to prevent substantial prejudice, one of the preconditions for making a decision granting interim relief, was not met. [19] Applying its national procedural provisions, the Tribunale di Bari reached a different decision.

37. The referring court's question should therefore be read as seeking to establish whether Article 27(3) of the Convention is to be interpreted as meaning that a foreign judgment granting a restraining order is irreconcilable, within the meaning of that article, with a judgment refusing to grant such an order, given in a dispute between the same parties in the State in which recognition is sought, where the conflicting effects of the two judgments are attributable to the differences in the procedural requirements laid down by national law for the grant of a restraining order in the State of origin and in the State in which recognition is sought.

38. As I have said, judgments such as those at issue in the main proceedings have legal consequences which are mutually exclusive.

39. The Italian court granted Italian Leather's application for a restraining order after the German court had dismissed an identical application by the same applicant.

40. The fact that a court of a Contracting State grants an application identical to the application dismissed by the court of another Contracting State is not invariably the element in enforcement procedures that is liable to give rise to doubts as to the reconcilability of two judgments.

In *Hoffmann*, for example, a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her was held to be irreconcilable with a national judgment pronouncing the divorce of the spouses. Although not relating to the same subject-matter, the two judgments given in disputes between the same parties were nonetheless considered to fall within Article 27(3) of the Convention.

41. In the present case, the facts of the main proceedings are easier to analyse because the two courts, ruling on the same application, gave conflicting judgments.

17 — Page 9 of the order for reference.
18 — Ibid.
19 — Ibid.

42. The argument that the judgment granting the measure sought is reconcilable with the judgment dismissing the application, on the ground that one has positive effects while the other leaves the applicable right unchanged, cannot be accepted. [20]

43. Whatever its legal basis, a judgment which declares an application inadmissible or unfounded must be considered to produce legal effects. Refusal to order a restraining measure is in itself a positive act, even if it is characterised by the absence of substantive effects. The decision to dismiss is thus capable of conflicting with a decision producing opposing effects.

44. It is necessary to examine whether judgments may still be categorised as irreconcilable within the meaning of the judgment in *Hoffmann* if their mutual irreconcilability stems from differences in the procedural requirements laid down by national law in order for restraining measures to be granted.

20 — The United Kingdom Government appears to endorse this view when it states that 'it is hard to see from the order ... how it can be said that the decisions are irreconcilable at all' (paragraph 9 of its observations) or (at the hearing) how the legal effects of the German judgment can be irreconcilable with the positive effects of the Italian judgment. It adds that a refusal to grant a provisional or protective measure constitutes a judgment that is not to be recognised or enforced in other Contracting States, so that it is debatable whether its irreconcilability with a judgment from one of the other Contracting States should justify a refusal to recognise that other judgment (ibid., paragraph 22). According to the United Kingdom Government, it is inimical to the Convention's purpose for recognition of a foreign judgment to be refused on the basis of its irreconcilability with a judgment of the State in which enforcement is sought that can itself thus not be recognised (ibid., paragraph 24).

45. To do so, it is necessary to examine both the wording and the objectives of the Convention.

46. Article 27(3) of the Convention provides no indication as to the meaning of the term 'irreconcilable'. It makes classification as such contingent on the condition that the foreign judgment refused recognition and the judgment given in the State in which recognition is sought have been given in a dispute between the same parties, but it adds no other condition, such as a requirement that the two national courts have comparable or identical procedures.

47. Also, there is a risk of irreconcilability within the meaning of Article 27(3) of the Convention whatever the nature of the judgment in question, provided that the judgment meets the definition in Article 25 of the Convention.

48. In interpreting the latter provision, the Court has stated that in order to be a 'judgment' for the purposes of the Convention the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties. [21] Article 25 draws no distinction between national judicial decisions on the basis of the characteristics of the procedures under which they have been made.

21 — Case C-414/92 *Solo Kleinmotoren* [1994] ECR I-2237, paragraph 17.

49. The Court has made it clear that a different construction cannot be entertained where the application of Article 27(3) of the Convention is concerned, since the definition of 'judgment' given in Article 25 applies to all the provisions of the Convention in which that term is used. [22]

50. It must therefore be acknowledged on reading the applicable provisions that decisions made at the end of national interim relief proceedings — which are characterised by specific rules and thus more likely than other proceedings to vary from one Contracting State to another — are subject to the same legal regime as the other judgments included in Article 25 of the Convention.

51. This point is confirmed by the case-law of the Court according to which Article 24 of the Convention does not preclude provisional or protective measures from being the subject of recognition and an authorisation for enforcement on the conditions laid down in Articles 25 to 49 of the Convention. [23] It cannot be concluded that the Convention is applicable to proceedings leading to measures of this kind without at the same time envisaging the possibility that the judgments involved will be incompatible.

It is true that in the main proceedings the judgment given under Article 24 of the Convention is not the one to which the application for enforcement relates. The fact nevertheless remains that judgments ordering provisional or protective measures, which may be regarded as including a restraining order intended to avert permanent economic damage, [24] have not been considered by the Court to be, by their nature, excluded from the regime provided for in Article 27(3) of the Convention for judgments in general. [25]

52. The purpose of the Convention confirms what its wording suggests.

53. According to the Jenard Report, 'there can be no doubt that the rule of law ... would be disturbed if it were possible to take advantage of two conflicting judgments'. [26] The test of whether the rule of law is disturbed, which as we know underlies the rule laid down by Article 27(3) of the Convention, must serve as a guide for interpreting this provision.

22 — Ibid., paragraph 20.

23 — Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 17. See, also, Case 120/79 *De Cavel* [1980] ECR 731, paragraphs 9 and 10.

24 — These measures have been defined as being those 'which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case' (Case C-391/95 *Van Uden* [1998] ECR I-7091, paragraph 37).

25 — See also *Van Uden*, cited above, paragraph 34, which states that 'where ... the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Convention, the Convention is applicable ...'.

26 — Page 45.

54. The judgment in *Hoffmann* illustrates perfectly the requirement for a strict reading of Article 27(3) of the Convention, because it makes the irreconcilability of two judgments dependent on the legal rule pronounced by the court of the State of origin being incompatible with that pronounced in the State in which recognition is sought. This approach to the incompatibility of judgments based on the effects which they produce, rather than their 'substantive content', [27] appears to me both more pragmatic and more faithful to the requirement for a strict interpretation of the provision.

55. In that judgment, the Court implicitly held that a judgment of a Contracting State the enforcement of which in another Contracting State produces legal consequences that are mutually exclusive disturbs the rule of law. This assessment covers first and foremost judgments which produce opposite effects, as in the present case.

56. If proof be needed, it is sufficient to imagine the consequences for a State of a situation in which it were called upon, in accordance with its national law, to provide the assistance of the law-enforcement agencies for the enforcement of two judgments, one of which grants an application that the other dismisses. The legal order in the Contracting States is safeguarded by the existence of the State governed by the rule of law. The continued existence of the State governed by the rule of law depends on the right of each individual to have recourse to the judicial system that has been set up, in order to have the legal rules in force actually applied. This entire edifice would be jeopardised if the judgments emanating from it could be called into question by the recognition or enforcement of conflicting judgments.

57. The requirements in accordance with which the judgments have been delivered are of little importance. The risk of disturbing the rule of law is no less great where judgments with irreconcilable effects are given pursuant to different procedural requirements.

58. If it is accepted that a judicial act, even if it has been adopted in accordance with specific requirements laid down by national law, constitutes a judgment within the meaning of Article 25 of the Convention, it is intended to apply like any other judgment in the territory of the Contracting States. The risk lies in the conflict of opposing legal rules, the binding force of which is not diminished by the fact that the judgments have been given at the end of interim relief proceedings organised in different ways.

It is not claimed in the main proceedings that a decision made under the Italian interim relief procedure or the German

27 — The term is that of Advocate General Darmon in his Opinion in *Hoffmann*, at point 10.

interim relief procedure has less binding force than a judgment as to the substance.

59. I consider that the recognition of a decision on interim relief such as that at issue in the main proceedings on the ground that its irreconcilability is attributable to procedural differences would create a risk of disturbing the rule of law in the State of recognition that is equivalent to that resulting from recognition of an irreconcilable decision as to the substance.

60. Furthermore, an interpretation of Article 27(3) of the Convention which excluded judgments that are irreconcilable on procedural grounds from the scope of that provision would reduce its usefulness, as the judicial procedures established by the Contracting States in civil and commercial matters are far from being mutually harmonised, be they general procedures or procedures relating to interim relief.

61. I am therefore of the view that the nature of the reasons resulting in mutually incompatible judgments, whether those reasons are purely legal or stem from the applicable procedure, is not to be taken into account in the reasoning of the court seised that intends to rule on their irreconcilability.

62. For the sake of completeness, it is necessary to examine the point raised by the Bundesgerichtshof concerning the discretion of the court before which an application for recognition or enforcement of a foreign judgment has been brought. The referring court enquires whether it would not be appropriate, in the event of a divergence between two judgments warranting the application of Article 27(3) of the Convention, to give the court of the State of enforcement the power to refrain from applying that provision if, from the point of view of that State, it did not appear that the rule of law was particularly affected. [28]

63. The approach suggested by the Bundesgerichtshof does not appear to me to be consistent with the Convention, in particular with Article 27(3) thereof.

64. A finding that a foreign judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought constitutes, in my view, an insurmountable obstacle to the recognition and enforcement of the former judgment in that State.

65. The simultaneous enforcement of two judgments whose legal effects are mutually exclusive constitutes nothing more nor less

28 — Page 10 of the order for reference, point 3.

than the negation of the effectiveness of the law, which is paralysed by the pronouncement of two contradictory legal rules. A society founded on the rule of law loses some of its essence if the rules of social organisation on which it rests are deprived of force, so that this contradiction between two legal rules — or, if you prefer, their mutual cancellation — is in itself contrary to the rule of law.

66. It follows that it is not for a court to assess the extent to which a foreign judgment is capable of disturbing the rule of law, once it has been established that it is irreconcilable, within the meaning of the judgment in *Hoffmann*, with the judgment given in the State in which recognition is sought. Disturbance of the rule of law is inherent in this incompatibility between the legal effects produced by the two judgments.

67. Recognition of such discretion would be tantamount to granting the court the right to rule in favour of one judgment or the other, depending on its own assessment relating to the rule of law and notwithstanding the legal effects inherent in each judgment. Such recognition would thus in effect create an exception to Article 27(3) of the Convention that does not in any way derive from the wording of that provision.

68. For those reasons, courts cannot be granted such power.

69. It follows from the foregoing that a foreign judgment granting a restraining order is irreconcilable with a judgment refusing to grant such an order, given in a dispute between the same parties in the State in which recognition is sought, even where the conflicting effects of the two judgments are attributable to the differences in the procedural requirements laid down by national law for the grant of a restraining order in the State of origin and in the State in which recognition is sought.

70. The court to which application is made for recognition or enforcement of the foreign judgment does not have the power to grant the application on the basis that that judgment does not sufficiently disturb the rule of law where the judgment given in the State of origin is irreconcilable, within the meaning of Article 27(3) of the Convention, with the judgment given in the State in which recognition is sought.

71. The second and third questions referred for a preliminary ruling call for a reply only should a reply in the negative be given to the question whether the foreign judgment can be considered irreconcilable, within the meaning of Article 27(3) of the Convention, with the judgment given in the State in which recognition is sought, irrespective of the conditions to which the grant of a restraining order is subject under national law. There is therefore no need to reply to the other questions submitted by the Bundesgerichtshof.

Conclusion

72. In the light of these considerations, I propose that the Court reply as follows to the first question submitted by the Bundesgerichtshof:

Article 27(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be interpreted as meaning that a foreign judgment granting a restraining order is irreconcilable, within the meaning of that article, with a judgment refusing to grant such an order, given in a dispute between the same parties in the State in which recognition is sought, even where the conflicting effects of the two judgments are attributable to the differences in the procedural requirements laid down by national law for the grant of an order in the State of origin and in the State in which recognition is sought.

The court to which application is made for recognition or enforcement of the foreign judgment does not have the power to grant the application on the basis that that judgment does not sufficiently disturb the rule of law where the judgment given in the State of origin is irreconcilable, within the meaning of Article 27(3) of the Convention, with the judgment given in the State in which recognition is sought.