Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 6 September 2012 [1]

Case C-456/11

Gothaer Allgemeine Versicherung AG, ERGO Versicherung AG, Versicherungskammer Bayern-Versicherungsanstalt des öffentlichen Rechts, Nürnberger Allgemeine Versicherungs AG, Krones AGv Samskip GmbH

(Reference for a preliminary ruling from the Landgericht Bremen (Germany))

(Judicial cooperation in civil matters — Recognition and enforcement of judgments — Regulation (EC) No 44/2001 — Concept of 'judgment' — Judgment of a court of a Member State declining jurisdiction — Judgment based on a finding as to the validity and scope of a term conferring jurisdiction on the Icelandic courts — Effect — Scope)

1. Does a judgment of a court of a Member State declaring, in the operative part, that it 'has no authority to hear and decide the case' after accepting, in the grounds of the judgment, the validity of a term conferring jurisdiction on the courts of a third State oblige the court of another Member State before which the same claim is brought also to decline jurisdiction?

2. That is in essence the question put by the Landgericht Bremen (Regional Court, Bremen, Germany) in connection with an action brought by Krones AG and its insurers against Samskip GmbH for compensation for damage allegedly caused during the transport of goods.

3. By that question the Court is asked to interpret Articles 32 and 33 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2] which deal respectively with the definition of the term 'judgment' within the meaning of Regulation No 44/2001 and the principle of automatic recognition of any 'judgment' given in a Member State.

I – Legal context

4. Recitals 2, 6, 15 and 16 in the preamble to Regulation No 44/2001 read as follows:

'(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

1 — Original language: French.
2 — OJ 2001 L 12, p. 1.

…

(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

…

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.

(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.'

5. Article 32 of Regulation No 44/2001 provides:

'For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.'

6. Article 33 of that regulation is worded as follows:

'1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.'

7. In accordance with Article 34 of the regulation:

'A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.'

8. Article 35 of the regulation provides:

'1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.'

II – The main proceedings

9. Krones AG, a German company whose transport insurers are Gothaer Allgemeine Versicherung AG, ERGO Versicherung AG, Versicherungskammer Bayern-Versicherungsanstalt des öffentlichen Rechts and Nürnberger Allgemeine Versicherungs AG,[3] which had sold a brewing installation to a Mexican undertaking, engaged Samskip GmbH, the German subsidiary of Samskip Holding BV, a transport and logistics undertaking founded in Iceland and established in Rotterdam (Netherlands), to organise and perform the transport of that equipment from Belgium to Mexico under a bill of lading which contained a term conferring jurisdiction on the courts of Iceland.

10. On 30 August 2007 the consignee and Gothaer and Others brought proceedings against Samskip GmbH in the Belgian courts, alleging that the consignment had been damaged during transport.

11. By judgment of 5 October 2009 quashing the judgment at first instance, the Hof van Beroep te Antwerpen (Court of Appeal, Antwerp, Belgium) declared, in the operative part of the judgment, that it had 'no authority to hear and decide the case' after finding, in the grounds of the judgment, that the term in the bill of lading conferring jurisdiction on the courts of Iceland was valid and that, while Gothaer and Others could sue as successors in title to Krones AG, they were bound by that term.

12. In September 2010 Krones AG and Gothaer and Others brought a fresh action for compensation before the German courts, and the Landgericht Bremen, raising the question of the legal effects of the judgment given in Belgium, decided by order of 25 August 2011 to stay the proceedings.

III – The questions referred for a preliminary ruling

13. The Landgericht Bremen has referred the following three questions to the Court for a preliminary ruling:

'1. Are Articles 32 and 33 of Regulation No 44/2001 to be interpreted as meaning that the term "judgment" also covers in principle those judgments which are restricted to the finding that the procedural requirements for admissibility are not satisfied (so-called "procedural judgments")?

3 — Referred to below as 'Gothaer and Others'.

2. Are Articles 32 and 33 of Regulation No 44/2001 to be interpreted as meaning that the term "judgment" also covers a final judgment by which a court rules that it has no international jurisdiction because of an agreement on jurisdiction?

3. Are Articles 32 and 33 of Regulation No 44/2001 to be interpreted, in the light of the case-law of the Court of Justice on the principle of extended effect (Case 145/86 *Hoffmann* [1988] ECR 645), as meaning that each Member State is required to recognise the judgments of a court or tribunal of another Member State on the effectiveness of an agreement between the parties on jurisdiction, where the finding as to the effectiveness of the agreement on jurisdiction has become final under the national law of the first court, even where that decision forms part of a procedural judgment dismissing the action?'

IV – My analysis

A – *Preliminary observations*

1. Admissibility and scope of the questions referred

14. In order to delimit the scope of the questions, it must be pointed out that the dispute in the main proceedings concerns the recognition, as an incidental question, of a judgment of the Hof van Beroep te Antwerpen declaring that it had 'no authority to hear and decide the case'. While that judgment, according to the Landgericht Bremen, is regarded by German law as a 'Prozessurteil' (a 'procedural' judgment), the fact remains that the first question, which relates to all judgments 'which are restricted to the finding that the procedural requirements for admissibility are not satisfied', is too wide.

15. In agreement with Krones AG and Gothaer and Others, I consider that the answer to be given by the Court should be limited to what is strictly necessary for resolving the dispute in the main proceedings.

16. To that end, I propose to examine the first two questions together, while reformulating them. By those two questions the referring court essentially seeks to know whether the term 'judgment' within the meaning of Article 32 of Regulation No 44/2001 covers a judgment by which a court of a Member State declines jurisdiction on the ground of an agreement on jurisdiction, even though that judgment is classified as a 'procedural judgment' by the law of the Member State addressed.

17. With regard to the third question, the ambiguity of the expression 'finding [which] has become final' must be noted. While that expression appears to refer to the exhaustion of remedies, the order for reference shows that the uncertainty of by the Landgericht Bremen in fact derives from the fact that the finding in question, which relates to the jurisdiction of the Icelandic courts on the basis of the agreement on jurisdiction, appears in the grounds of the judgment, not in its operative part.

18. Consequently, I consider that the third question should be understood in the following terms. If the answer to the first two questions is in the affirmative, it has to be determined whether Articles 32 and 33 of Regulation No 44/2001 must be interpreted as meaning that the court before which recognition is pleaded of a judgment by which a court of an other Member State has declined jurisdiction on the basis of an agreement on jurisdiction is bound by the finding relating to the validity and scope of that agreement which appears in the grounds of the judgment.

2. Admissibility of the observations of the Swiss Confederation

19. The Swiss Confederation is a party to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007.[4] The 'parallel' Lugano Convention extends to the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation almost all the rules laid down in Regulation No 44/2001, in particular those concerning the definition of the judgments that can be recognised and the method of recognition. The interpretation the Court gives to Articles 32 and 33 of that regulation will therefore be taken into account in the interpretation of the equivalent articles in the Lugano Convention.

20. Pursuant to the provisions of Article 64(1) of the Lugano Convention in conjunction with Article 2 of Protocol 2 on the uniform interpretation of the Convention and on the Standing Committee, the Swiss Confederation is entitled to submit observations to the Court, in accordance with the procedure governed by Article 23 of the Statute of the Court of Justice of the European Union, in connection with the present reference for a preliminary ruling on the interpretation of Regulation No 44/2001.

B – *Questions 1 and 2*

21. By its first two questions the referring court essentially seeks to know whether the term 'judgment' within the meaning of Article 32 of Regulation No 44/2001 covers a judgment by which a court of a Member State declines jurisdiction on the ground of an agreement on jurisdiction, even though that judgment is classified as a 'procedural judgment' by the law of the Member State addressed.

1. Observations of the parties

22. Samskip GmbH, the German, Belgian, Austrian and Swiss Governments and the European Commission, on the one hand, and Krones AG and Gothaer and Others, on the other, adopt diametrically opposed interpretations of Article 32 of Regulation No 44/2001.

23. The former consider that the term 'judgment' covers judgments which rule on international jurisdiction on the basis of an agreement on jurisdiction.

24. Relying on the wording and origin of Article 32 of Regulation No 44/2001 and on the general scheme and objectives of that regulation, Samskip GmbH observes that it would be contrary to the objective of creating a uniform European judicial area to exclude generally from the scope of Articles 32 and 33 of that regulation those judgments which are regarded as 'procedural judgments' either under the law of the Member State of origin or under the law of the Member State addressed. According to Samskip GmbH, while it may legitimately be questioned whether interlocutory procedural decisions such as an order to a party to appear personally before the court or an order for a measure of inquiry may be classified as 'judgments' within the meaning of Articles 32 and 33 of Regulation No 44/2001, that question has no bearing in practice because such decisions cannot produce binding cross-border effects. By contrast, a judgment declaring a claim inadmissible because of the lack of jurisdiction of the court seised and putting an end to the proceedings can produce effects across borders and must therefore be recognised. The applicant could otherwise ignore the judgment and bring a new action before a court of another Member State, which would be contrary to the objective of Regulation No 44/2001 of preventing duplicate or parallel proceedings and potentially conflicting decisions.

4 — OJ 2009 L 147, p. 5, 'the Lugano Convention'.

25. The German Government considers, in the same way, that it follows from the scheme, object and purpose of Regulation No 44/2001 that procedural judgments finding the presence or absence of international jurisdiction must be regarded as judgments that can be recognised, while noting that the effect of recognition cannot go beyond that finding. According to the government, which refers to the Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters drawn up by Mr Jenard,[5] the principle of extended effect developed by the Court for judgments on the substance[6] must be transposed to a procedural judgment by which the court of origin declares that it does or does not have international jurisdiction. Referring to recitals 2 and 15 in the preamble to and Article 27(2) of Regulation No 44/2001, it further considers that a system based on rules that may be interpreted with the same authority by any court in the European Union[7] applies to the international jurisdiction of the Member States and that the findings on jurisdiction made by the courts of one Member State must be accepted by the courts of the other Member States.

26. The Belgian Government considers that the lack of a precise definition of the term 'judgment' in Regulation No 44/2001 allows it to be given a wide interpretation, which is in line with the case-law of the Court.[8]

27. The Austrian Government, submitting that the starting-point for reflection should be the need for an interpretation that is favourable to integration, and referring to the Jenard Report and to the Report on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, drawn up by Mr Schlosser,[9] states that the judgment of the Hof van Beroep te Antwerpen, which definitively established the legal relations between the parties to the dispute, must, if only in the interests of the greatest possible consistency of judgments within the European Union, be covered by the term 'judgment' within the meaning of Article 32 of Regulation No 44/2001 and benefit from the system of recognition laid down in Article 33 of that regulation.

28. The Swiss Government observes that neither that regulation nor the Lugano Convention distinguishes between judgments on admissibility and judgments on the substance. It adds that the question whether a judgment may be recognised or enforced cannot depend on the classification of the judgment in the State of origin. Noting that judgments 'which are restricted to the finding that the procedural requirements for admissibility are not satisfied' do not form a homogeneous category, the Swiss Government considers that it must be examined whether the judgment sought to be recognised concerns a condition of admissibility that has been harmonised by Regulation No 44/2001 and the Lugano Convention and whether, according to the law of the State of origin, the judgment has binding effects extending beyond the original procedure, which presupposes that the original court examined the condition of admissibility in full cognisance, not merely summarily.

29. The Commission, relying, like Samskip GmbH, both on the wording of Article 32 of Regulation No 44/2001 and on the general scheme of the regulation and its objective as shown in particular by recitals 2 and 6 in the preamble, considers that it must be accepted that a judgment which does no more than declare an action inadmissible because of lack of international jurisdiction falls, like a judgment on the substance, within the conceptual scope of the term 'judgment' within the meaning of Article 32 of that regulation. To deny recognition to judgments on admissibility would in its view have an adverse effect on the free movement of judgments in civil and commercial matters and on legal certainty. The Commission further observes that Article 35(3) of Regulation No 44/2001 excludes

5 — OJ 1979 C 59, p. 1, 'the Jenard Report'.

6 — The German Government refers to *Hoffmann*, paragraph 11, and Case C-420/07 *Apostolides* [2009] ECR I-3571, paragraph 66.

7 — Case C-159/02 *Turner* [2004] ECR I-3565, paragraph 25.

8 — Case C-39/02 *Mærsk Olie & Gas* [2004] ECR I-9657.

9 — OJ 1979 C 59, P. 71, 'the Schlosser Report'.

review of the jurisdiction of the court of the Member State of origin and provides that the test of public policy may not be applied to the rules relating to jurisdiction, while Article 36 of the regulation provides that the judgment of the Member State of origin may not under any circumstances be reviewed as to its substance. It also submits that if, in accordance with the Jenard Report, judgments which have not yet become binding can be recognised, that must *a fortiori* be the case with judgments which give definitive rulings on international jurisdiction.

30. Krones AG supports the contrary view, referring to a document drawn up by Mr Geimer,[10] annexed to its observations, which states that 'in accordance with a theory that is put forward more and more' Article 32 of Regulation No 44/2001 concerns only judgments on the substance, not those dismissing an action because of the lack of international jurisdiction of the court seised.

31. Gothaer and Others, while submitting that procedural judgments are not judgments that can be recognised and that the second question is devoid of purpose, and referring to the arguments in the document annexed to the observations of Krones AG, nevertheless propose that the Court's answer to the first two questions should be that Articles 32 and 33 of Regulation No 44/2001 are to be interpreted as meaning that procedural judgments and judgments rejecting international jurisdiction because of the existence of an agreement on jurisdiction are covered by the term 'judgment'.

2. My analysis

32. Article 32 of Regulation No 44/2001 defines 'judgment' within the meaning of that regulation as 'any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court'.

33. It is settled case-law that, to ensure its full effect and uniform application throughout the Member States, the concepts in Regulation No 44/2001 must be interpreted uniformly and independently, reference being made principally to the scheme and purpose of the regulation.[11] It follows that classification as a 'judgment' cannot depend on what the document is called in the law of the Member State of origin or the law of the Member State addressed. I can therefore start by regarding as immaterial the definition of a 'procedural judgment' in German law.

34. Moreover, the Court, on the basis of recital 19 in the preamble to Regulation No 44/2001, which states that continuity should be ensured between the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters[12] and that regulation, has repeatedly held that, in so far as that regulation replaces the Brussels Convention in relations between the Member States with the exception of the Kingdom of Denmark, an interpretation given by the Court concerning that convention also applies to the regulation, where its provisions and those of the Brussels Convention may be treated as equivalent.[13]

35. That is the case with Article 32 of Regulation No 44/2001, which repeats the definition that appeared in Article 25 of the Brussels Convention, on the basis of which the case-law has identified three criteria.

10 — Document entitled 'Report on the relevance at European level of judgments dismissing actions on the ground of lack of international jurisdiction within the scope of Regulation No 44/2001 and the Lugano Convention'.

11 — Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, paragraph 19 and the case-law cited, and Case C-347/08 *Vorarlberger Gebietskrankenkasse* [2009] ECR I-8661, paragraph 35 and the case-law cited.

12 — OJ 1978 L 304, p. 36, 'the Brussels Convention'.

13 — See inter alia Case C-406/09 *Realchemie Nederland* [2011] ECR I-9773, paragraph 38 and the case-law cited.

36. The first criterion is organic. The judgment must emanate from a court or tribunal, that is to say, a body which acted independently of the other institutions of the State and impartially. That criterion follows from the very wording of Article 32 of Regulation No 44/2001 and has been recalled on several occasions in the case-law of the Court. [14]

37. The second criterion, which cannot be separated from the first, is procedural. It requires that the rights of the defence were observed in the procedure which led up to the adoption of the judgment. Applying that criterion has led the Court not to class as 'judgments' provisional and protective measures which are taken without the party against whom they are directed having been summoned to appear and are intended to be enforced without being notified beforehand. [15] However, the Court has held that, for a judgment to be capable of recognition, it suffices that it can be subject of an inquiry in contested proceedings before the time when its recognition and enforcement are sought in a State other than the State of origin, so that it has regarded as falling within the definition of 'judgment' a provisional decision taken without both sides being heard but capable of being challenged, [16] an order for payment [17] or a judgment in default given without examining the substance of the claim. [18]

38. The third criterion is substantive. The judgment is characterised by the exercise of a power of assessment by the judicial body from which it emanates. That criterion means that a distinction must be drawn depending on whether the authority has a decision-making role or restricts itself to a more passive function, consisting for example in receiving the intentions of the parties to the proceedings. As the Court has held, 'in order to be a "judgment" … the decision in question must emanate from a judicial body … *deciding on its own authority on the issues between the parties* [[19]]'. [20] It has concluded from this that a judicial settlement, which is essentially contractual in nature in that its content depends first and foremost on the parties' intentions, is not a judgment. [21]

39. The case-law has not set up any other criteria, so that the term 'judgment' can cover non-contentious and contentious judgments, provisional [22] or protective judgments and those which are final, and judgments that have become irrevocable and those against which an appeal may still be brought.

40. Since those three criteria are satisfied in the case of a judgment, such as that of the Hof van Beroep te Antwerpen, ruling on international jurisdiction, I consider that a judgment of that kind is covered by the definition of the term 'judgment' within the meaning of Article 32 of Regulation No 44/2001.

41. That conclusion is borne out by the wording, objectives and general scheme of that regulation.

42. In the first place, the wording of the definition of 'judgment' lends itself to an extensive interpretation, or rather a non-restrictive one, since it relates to 'any' judgment, regardless of what it is called or the circumstances in which it is drawn up, and 'has general application'. [23]

43. That approach is confirmed by the Jenard and Schlosser Reports, to which the Court has referred on numerous occasions.

14 — Case C-414/92 *Solo Kleinmotoren* [1994] ECR I-2237, paragraph 17, and *Mærsk Olie & Gas*, paragraph 45.

15 — Case 125/79 *Demilauler* [1980] ECR 1553, paragraph 17.

16 — *Mærsk Olie & Gas*, paragraphs 50 to 52.

17 — Case C-474/93 *Hengst Import* [1995] ECR I-2113, paragraph 14.

18 — Case C-394/07 *Gambazzi* [2009] ECR I-2563, paragraph 23.

19 — Emphasis added.

20 — *Solo Kleinmotoren*, paragraph 17, and *Mærsk Olie & Gas*, paragraph 45.

21 — *Solo Kleinmotoren*, paragraph 18.

22 — For example, a judgment given in proceedings for interim measures. See, in this respect, Case C-80/00 *Italian Leather* [2002] ECR I-4995, paragraph 41.

23 — Ibid.

44. Thus the Jenard Report states that the definition covers 'any judgment, whatever the judgment may be called'[24] in civil and commercial matters, and that recognition can be given to provisional judgments and judgments given in non-contentious matters, whether or not those judgments have become final and binding.

45. Similarly, according to the Schlosser Report, the wording covers all judgments, even interlocutory ones, which either 'determine or regulate the legal relationships of the parties'.[25] That report, which observes that a judgment delivered in one State as a decision on a procedural issue may be treated as a decision on an issue of substance in another State, notes that one fact seemed obvious to the working party, namely that '[j]udgments dismissing an action as [inadmissible] must be recognised',[26] and explains that '[i]f a German court declares that it has no jurisdiction, an English court cannot disclaim its own jurisdiction on the ground that the German court was in fact competent'.[27]

46. In the second place, the objectives pursued by Regulation No 44/2001 must be taken into account. It may be seen from recitals 2, 6, 16 and 17 in the preamble to that regulation that it seeks to ensure the free movement of judgments from Member States in civil and commercial matters by simplifying the formalities with a view to their rapid and simple recognition and enforcement.[28] It follows, in addition, from recitals 11, 12 and 15 in the preamble that the regulation also aims to ensure predictability as to the courts having jurisdiction and therefore legal certainty for litigants, to guarantee the sound administration of justice, and to minimise the risk of concurrent proceedings.[29]

47. Those aims, which are based on the principle of mutual trust between the Member States, each being required to recognise the equivalence of the judicial decisions given by the others, would be seriously compromised if judgments on jurisdiction were not covered by the system of recognition and enforcement of judicial decisions established by Regulation No 44/2001.

48. It should be noted here that it would be directly contrary to the principles of predictability and the sound administration of justice if it were accepted that, where a court of a Member State has ascertained that it has jurisdiction, a party wishing to challenge that decision can bring proceedings before the courts of the other Member States, when he should be making use of the remedies provided for by the law of the former Member State.

49. In the third place, that interpretation is supported by the general scheme of Regulation No 44/2001, in particular by its provisions on the grounds for refusal to recognise foreign judgments and the provisions intended to govern situations of *lis pendens* in order to prevent conflicting decisions.

50. The exhaustive listing of the grounds for refusal of recognition of foreign judgments expresses the intention of promoting their recognition, even if the court of the Member State of origin has ruled only on whether it has jurisdiction.

51. Because of the principle of mutual trust which governs relations between the Member States and the establishment of common rules of jurisdiction, which all courts of the Member States are obliged to observe, Regulation No 44/2001 excludes in principle any review of the jurisdiction of the court of the State of origin, whether directly by reviewing the findings of fact or the criteria of jurisdiction on

24 — Page 42.
25 — Point 184.
26 — Point 191.
27 — Ibid.
28 — Case C-283/05 *ASML* [2006] ECR I-12041, paragraph 23.
29 — Case C-533/08 *TNT Express Nederland* [2010] ECR I-4107, paragraph 49.

which that court based its decision,[30] or indirectly by reference to public policy,[31] while prohibiting in the same vein any review of the substance of the foreign judgment. According to the Jenard Report, '[t]he absence of any review of the substance of the case implies complete confidence in the court of the State in which judgment was given; it is similarly to be assumed that that court correctly applied the rules of jurisdiction'.[32]

52. In the same way, the provisions on situations of *lis pendens* are characterised by the obligation of the court second seised to decline jurisdiction in favour of the court first seised, where that court's jurisdiction is established.[33] In *Gasser*[34] the Court even held that the court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

53. In my opinion, it follows from those provisions that Regulation No 44/2001 includes among judgments that are capable of being recognised judgments by which the court first seised has ruled on its jurisdiction, whether it has declared itself to have jurisdiction or, on the contrary, has declined jurisdiction.

54. The answer is clear where the court declares that it has jurisdiction.

55. If the court of the Member State of origin has, in the same judgment, declared that it has jurisdiction and ruled on the substance of the claim, the court second seised cannot reopen the question of jurisdiction and declare itself to have jurisdiction without breaching at the same time the principle that there is to be no review of the jurisdiction of the court of the Member State of origin and the prohibition of any review of the substance of the foreign judgment. Where the court of the Member State of origin has declared itself to have jurisdiction but has decided to stay the proceedings on the substance, for example so that the parties who have made an exclusive agreement on jurisdiction can submit observations, to accept that the court second seised could reconsider the question of jurisdiction would run directly counter to the rule in Article 27(2) of Regulation No 44/2001 that it must decline jurisdiction.

56. In my view, the same answer should be given if the court declines jurisdiction. Two essential reasons militate in favour of this.

57. The first is legal. A judgment declining jurisdiction and terminating the proceedings displays the same features, from the point of view of the definition of 'judgment' within the meaning of Regulation No 44/2001, as a judgment in which the court finds that it has jurisdiction. Like the latter, it emanates from a judicial entity which, even if it no longer has authority to decide the dispute for which it declines jurisdiction, none the less first exercises a minimum judicial power by ruling on its own jurisdiction.

58. The second reason is practical. It relates to the fact that the recognition of judgments declining jurisdiction makes it possible to avert the risk of a negative conflict of jurisdiction, which Regulation No 44/2001 was also intended to avoid. A conflict of that kind could arise if the court second seised refused to acknowledge the judgment previously given and declined jurisdiction on the ground that the court first seised had jurisdiction.

30 — Article 35(2) and the first sentence of Article 35(3) of the regulation.

31 — Second sentence of Article 35(3) of the regulation.

32 — Page 46.

33 — Article 27(2) of Regulation No 44/2001.

34 — Case C-116/02 *Gasser* [2003] ECR I-14693.

59. Those are the reasons for which I propose that the Court's answer to Questions 1 and 2 should be that Articles 32 and 33 of Regulation No 44/2001 must be interpreted as meaning that a judgment by which a court of a Member State rules on its international jurisdiction, whether it accepts or declines jurisdiction, falls within the concept of 'judgment' within the meaning of that regulation, regardless of the fact that the judgment is classified as a 'procedural judgment' by the law of the Member State addressed.

C – *Question 3*

60. By its third question the referring court essentially asks whether Articles 32 and 33 of Regulation No 44/2001 must be interpreted as meaning that the court before which recognition is pleaded of a judgment by which a court of another Member State has declined jurisdiction on the basis of an agreement on jurisdiction is bound by the finding relating to the validity of that agreement which appears in the grounds of the judgment.

61. It also seeks to know the extent of the effects produced by the judgment declining jurisdiction, and asks in particular whether it is bound by the reasoning concerning the existence and validity of the agreement conferring jurisdiction on the Icelandic courts, which would in that case prevent it declaring that it has jurisdiction.

62. The views put forward in the present proceedings may be grouped into three theories.

63. According to the first theory, supported by Krones AG, Gothaer and Others, and the German Government, the effect of recognition of the judgment is exclusively negative, in that it extends solely to the finding that the court first seised has no international jurisdiction. Krones AG submits that observance of the negative effect of the decision declining jurisdiction must be understood as an autonomous binding effect which is exhausted in the finding that the court first seised lacks jurisdiction. Any further considerations are not binding on the courts of the other Member States, since neither Regulation No 44/2001 nor the Lugano Convention allows the court seised to rule on the jurisdiction of the courts of the other Member States or contracting States. According to Krones AG, there cannot be any restriction of the German court's free assessment of its own jurisdiction under Article 26(1) of Regulation No 44/2001. Furthermore, the grounds for refusal of recognition set out in Articles 34 and 35 of that regulation do not apply to judgments on jurisdiction. Gothaer and Others argue similarly, on the basis that the regulation does not contain a mechanism for one court to give binding instructions to another, and that the system of Chapter III of the regulation shows that each Member State always decides itself whether its courts have jurisdiction. As to the German Government, it submits that it is for each court seised to assess, in accordance with the law applicable in its territory, the validity of the term conferring jurisdiction on the court of a third State. Moreover, in its view, the law of the Member State of origin determines the upper limit of the extent of the effect of recognition, and a judgment from another Member State cannot produce more extensive effects in the Member State addressed than those of a comparable judgment delivered in that State.

64. Opposing that interpretation, the Belgian Government and the Commission submit that the Member States are obliged to recognise not only the operative part of the judgment but also the reasoning in the judgment relating to the validity of the agreement on jurisdiction. According to the Belgian Government, the force of *res judicata* of a judgment extends to what, in view of the dispute brought before the court and argued between the parties, constitutes, even implicitly, the necessary foundation of the decision. The Commission considers that the theory of extended effect must apply without any distinction being drawn according to whether the decision on the validity of the term conferring jurisdiction leads to confirming or rejecting the jurisdiction of the court seised. In its view, the answer cannot depend on whether, according to the national law of the court first seised, the ruling on the validity of the agreement on jurisdiction has become 'final' or not.

65. Finally, according to an intermediate theory pout forward by Samskip GmbH and the Austrian and Swiss Governments, each Member State must recognise the judgments of a court of another Member State as regards the validity of an agreement on jurisdiction, but only when, under the national law of the court first seised, the ruling on the validity of the agreement 'becomes *res judicata*' or 'has binding effect'. Referring both to the Jenard Report and to the Court's case-law on the principle of extended effect,[35] the Austrian and Swiss Governments take the view that the principle of recognition must have the consequence of 'conferring on judgments the authority and effect they enjoy in the State of delivery'.[36]

66. I subscribe to the second of these three theories. To my mind, a judgment by which a court of a Member State has ruled on its jurisdiction after considering the validity and scope of a term conferring jurisdiction, in the system of recognition and enforcement laid down by Regulation No 44/2001, is not like other judgments and must, in view of its particular character, produce a specific, uniform and autonomous extraterritorial effect.

67. I consider that a judgment declining jurisdiction is binding on the court of the Member State addressed in so far as that court cannot, without giving a judgment that is irreconcilable with the first one, declare that it lacks jurisdiction on the ground that the court of the Member State of origin has jurisdiction. Without that minimum effect, recognition of the judgment declining jurisdiction would be deprived of all effect. Krones AG acknowledges that effect, moreover, while considering, not without a certain contradiction, that a judgment dismissing an action on the grounds of lack of international jurisdiction of the court seised is not a 'judgment' within the meaning of Article 32 of Regulation No 44/2001.

68. I further consider that the binding effect of the judgment declining jurisdiction must necessarily extend to the finding on the validity and scope of the term conferring jurisdiction, irrespective of whether or not that finding is regarded as *res judicata* under the national law of the Member State of origin or that of the Member State addressed.

69. I base my position, first, on the objectives of Regulation No 44/2001, next, on the general scheme of the procedural rules of that regulation relating to jurisdiction and, finally, on the principle of effective judicial protection.

1. The objectives of Regulation No 44/2001

70. As I have already indicated in point 46 above, Regulation No 44/2001 aims to promote mutual confidence in the administration of justice within the European Union, to enable the rapid recognition and enforcement of court judgments, to ensure predictability as to the courts having jurisdiction and therefore legal certainty for litigants, to guarantee the sound administration of justice, and to minimise the risk of concurrent proceedings.

71. In my opinion, those objectives preclude the court before which the recognition of a foreign judgment is pleaded from being acknowledged as having power to reconsider the scope and validity of a term conferring jurisdiction on the basis of which the court of the Member State of origin declined jurisdiction.

72. The principle of mutual trust between the courts of the Member States, which justifies inter alia the automatic nature of the recognition of foreign judgments, the restriction of the grounds for non-recognition, the exclusion of review of the jurisdiction of the court of origin, and the lack of review as to the substance, means that every court of a Member State regards the judgments delivered

35 — *Hoffmann.*

36 — Points 10 and 11.

by the courts of the other Member States as equivalent to its own. It follows that, since, among those courts of equal standing, one has had to rule on the validity and scope of an agreement on jurisdiction as a preliminary to considering its own jurisdiction, the court of another Member State before which recognition of that judgment is pleaded ought not to proceed to make a fresh assessment.

73. A high degree of mutual trust is all the more necessary where the courts of the Member States are called on to apply common rules of direct jurisdiction.

74. It should be noted here that the rules on jurisdiction laid down in Chapter II of Regulation No 44/2001 and those on the recognition and enforcement of judgments in Chapter III of that regulation do not constitute distinct and autonomous systems but are closely linked. [37]

75. The Court has drawn attention to this by repeatedly holding, in *lis pendens* situations, that where jurisdiction is determined directly by the rules of the Brussels Convention, which are common to both courts, those rules can be interpreted and applied with the same authority by each of them, the court of the Member State addressed never being in a better position than the court of the State of origin to give a ruling. [38] In my opinion, the equality of the courts in the European Union before the rules on jurisdiction postulates the uniformity of the effects of the judgments they deliver when applying those rules.

76. While in circumstances such as those of the main proceedings Article 23 of Regulation No 44/2001 on contractual prorogation of jurisdiction does not apply, since the term at issue confers jurisdiction on a court of a State which is not a member of the European Union, it must be pointed out that the Lugano Convention, to which the Republic of Iceland is a party, contains a corresponding provision in Article 23.

77. In those circumstances, to leave it to the law of the court of the Member State of origin or the court of the Member State addressed to determine the extent of the effects of the judgment declining jurisdiction would lead, in the case in which that law did not regard the ruling on the validity and scope of the agreement on jurisdiction as *res judicata*, to allowing a re-examination of the question by the court addressed, such as to affect the predictability of the rules of jurisdiction laid down both by Regulation No 44/2001 and by the Lugano Convention, and consequently to infringe the principle of legal certainty.

78. To accept that the court of the Member State addressed could regard as void the term conferring jurisdiction which the court of the Member State of origin had accepted as valid would run directly counter to the principle of the prohibition of review of the foreign judgment as to its substance, which prohibits the former from refusing recognition or enforcement of the judgment given by the latter on the ground that it would have come to a different decision.

79. Furthermore, it must be observed that determining the quality of *res judicata* attached by each national law to the grounds of a judgment is an exercise which may prove to be difficult. [39] In the – frequent – case in which, as in the main proceedings, the question of jurisdiction depends on a question of substance, leaving it to national law to determine the effects to be attached to the reasons for the decision on the substance thus creates uncertainty for the parties as to the allocation of jurisdiction among the national courts which could be seised, and complicates the task of the national court before which recognition is pleaded.

37 — Case C-514/00 *Wolf Naturprodukte* [2012] ECR, paragraph 25 and the case-law cited.

38 — *Turner*, paragraph 25 and the case-law cited, and *TNT Express Nederland*, paragraph 55.

39 — I note as an example that the assertion in the Commission's observations that in France binding effect 'is not limited to the operative part of the judgment but extends to all the elements in the reasoning that are inseparably linked thereto' is not correct, in view of the recent case-law of the Court of Cassation, which, in a judgment of the plenary court of 13 March 2009, abandoned the theory of decisive reasons and held that *res judicata* applies only with respect to what was decided in the operative part.

80. In short, I consider that the objectives of Regulation No 44/2001 mean that the reasons for deciding the question of substance on which jurisdiction depended must be taken into account. An additional argument in favour of that conclusion may be found in the scheme of the procedural rules in that regulation, which should now be examined.

2. The general scheme of the procedural provisions of Regulation No 44/2001 concerning jurisdiction

81. One of the most striking signs of the preference given by Regulation No 44/2001 to the free movement of judgments within the European Union is the principle that lack of jurisdiction of the court of the Member State of origin is not a ground for refusal of recognition of its judgment, except in the cases exhaustively listed in Articles 34 and 35 of the regulation. [40] It follows from that principle that a judgment on the substance may be recognised even if it was delivered in breach of the common rules of direct jurisdiction set out in Chapter II of the regulation and the question of jurisdiction was not even argued between the parties.

82. The exclusion of review of the jurisdiction of the court of the Member State of origin implies, as a correlation, a restriction of the power of the court of the Member State addressed to verify its own jurisdiction. While the national court can decide on its own jurisdiction only, since Regulation No 44/2001 does not allow the jurisdiction of a court to be reviewed by a court of another Member State, [41] it is nevertheless the case that the judgment given by the court ruling on its own jurisdiction necessarily has the – indirect – consequence of affecting the jurisdiction of the other courts in the European Union. In other words, the exercise by one court in the European Union of its duty to ascertain its own international jurisdiction entails a restriction of the power of the other courts to ascertain their own jurisdiction. The fundamental requirement of the uniform application of European Union law means that the extent of that restriction must be defined in uniform fashion, without it being able to vary according to the national rules on the delimitation of *res judicata*.

83. An argument to that effect may, in my view, be found in Article 35(2) of Regulation No 44/2001, which, in the cases in which the court before which recognition is pleaded may – exceptionally – review the jurisdiction of the court of the Member State of origin, none the less provides that the court addressed is bound by the findings of fact on which the court of the Member State of origin based its jurisdiction. That rule thus determines in advance the trust to be put in the foreign court's findings of fact, regardless of whether or not those findings are given the quality of *res judicata* by the procedural law of the Member State of origin or the Member State addressed.

84. The analysis I propose also appears, in my view, to follow from the principle of effective judicial protection.

3. The principle of effective judicial protection

85. The principle of effective judicial protection is a general principle of European Union law which derives from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. [42]

40 — Only in certain especially sensitive matters may the court of the Member State addressed review the jurisdiction of the court which gave the judgment. It can refuse to give effect to the foreign judgment only if there has been a breach of the rules of jurisdiction which protect insured persons or consumers, or of the rules of 'exclusive' jurisdiction in Section 6 of Chapter II of Regulation No 44/2001 in certain matters such as rights in rem in immovable property or tenancies of immovable property.

41 — See, to that effect, with reference to the Brussels Convention, *Turner*, paragraph 26.

42 — See, inter alia, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 29 and the case-law cited.

86. That principle was restated in Article 47 of the Charter of Fundamental Rights of the European Union, which since the entry into force of the Treaty of Lisbon has 'the same legal value as the Treaties', in accordance with the first subparagraph of Article 6(1) TEU.

87. It involves in particular everyone's right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

88. To deny the binding effect of the judgment of the court of origin which, before considering the question of its jurisdiction, has decided the question of the validity and scope of a term conferring jurisdiction would contravene that principle by creating a serious risk of a negative conflict of jurisdiction leading to a complete lack of judicial protection. For example, if a court declined jurisdiction because of the existence of a term conferring jurisdiction on another court, the latter court could also decline jurisdiction if it regarded the term as void. The theory put forward by Krones AG and Gothaer and Others, namely that the effect of the first judgment is only to prohibit the court second seised from declining international jurisdiction 'on the ground that the court of the State first seised had jurisdiction' appears to me, moreover, to contain an internal contradiction, in that it requires the reasons for which the court has declined jurisdiction to be taken into account, while at the same time denying those reasons any binding effect.

89. In short, I consider that the objectives of Regulation No 44/2001, the general scheme of the procedural provisions of that regulation, and the right to effective judicial protection mean that the assessment of the validity and scope of the agreement on jurisdiction is concentrated on a single court in the European Union, with the court of the Member State addressed retaining the right to carry out an examination only in the – exhaustively listed – cases in which it is entitled to review the jurisdiction of the court of the Member State of origin. It follows that the court of the Member State addressed must be bound by the findings of the court of the Member State of origin, even if they appear in the grounds of the decision, regardless of whether national laws regard those grounds as *res judicata*.

90. The answer I propose does not seem to me to be contrary to the case-law of the Court, which has not yet ruled on the subject of judgments on jurisdiction.

91. In answer to a question referred for a preliminary ruling on the effects in the Netherlands legal order of a judgment ordering the payment of maintenance, delivered by a German court and provided with an enforcement order in the Netherlands, the Court ruled in *Hoffmann* that 'a foreign judgment which has been recognised … must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given',[43] while qualifying that rule of principle by stating that 'a foreign judgment whose enforcement has been ordered in a Contracting State … and which remains enforceable in the State in which it was given must not continue to be enforced in the State where enforcement is sought when, under the law of the latter State, it ceases to be enforceable for reasons which lie outside the scope of the [Brussels] Convention'.[44]

92. More recently, in *Apostolides*, the Court held that 'although recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were given … there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the Member State of origin … or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have'.[45]

43 — Paragraph 11.

44 — Paragraph 18.

45 — Paragraph 66. See also Case C-139/10 *Prism Investments* [2011] ECR I-9511, paragraph 38, and Case C-92/12 PPU *Health Service Executive* [2012] ECR, paragraph 142.

93. However, I consider that that case-law, which concerns the enforcement of judgments on the substance which have to be translated in each of the national legal systems in which they are sought to be recognised, cannot be applied to judgments ruling on international jurisdiction. While the heterogeneity of national legal systems justifies account being taken of the effects produced by the judgment in the Member State of origin, subject to correcting the result by taking account, where the judgment produces effects that are unknown in the Member State addressed, of the effects which would be produced by a similar judgment given in that State, judgments of courts ruling on their international jurisdiction under Regulation No 44/2001 and the Lugano Convention are characterised by their homogeneity, and must therefore follow a system of their own. For the reasons I have set out above, those instruments, which establish rules of jurisdiction that are valid for the courts of all the Member States, whose aim is that in a given dispute a single judgment with international scope is to be delivered, mean that an identical, uniform binding effect must be attributed to judgments ruling on jurisdiction, regardless of whether those judgments are regarded as *res judicata* in the Member States.

94. I am not convinced by the objections put forward by Krones AG and Gothaer and Others against that binding effect.

95. The first objection is that Article 26(1) of Regulation No 44/2001 and Article 20(1) of the Lugano Convention impose on each court seised the duty of verifying of its own motion that it has international jurisdiction. To attribute binding effect to the finding of the court of the Member State of origin on the validity and scope of an agreement on jurisdiction would have the effect of preventing the court of the Member State addressed from carrying out that verification.

96. While that statement appears to me to be correct, I do not draw the same conclusions from it as Krones AG and Gothaer and Others. Article 26(1) of Regulation No 44/2001 is considered to be a provision for the protection of a defendant domiciled in the European Union who is entitled to the rules of jurisdiction under European Union law. However, the intervention of a first court which has the task of applying the rules in question ensures that his right is observed and renders superfluous the intervention of another court in the European Union. It should be observed, moreover, that if the finding of the court of origin on the validity and scope of the agreement on jurisdiction had been set out in the operative part of the judgment, it would have been binding on the court before which recognition of the judgment is pleaded.

97. The second objection, namely that refusal of recognition pursuant to Articles 34 and 35 of Regulation No 44/2001 is meaningless for a judgment declining jurisdiction, does not convince me either. It seems to me that from the time at which the effect attributed to judgments declining jurisdiction is not exclusively negative, refusal of recognition is not devoid of legal consequences. Thus if, for example, a Belgian court seised of proceedings for payment of rent by the lessor of immovable property in Germany had declined jurisdiction after deciding that a term in the lease conferring jurisdiction on the courts of Iceland was valid, the German court which had to decide as an incidental question on recognition of the Belgian judgment would have to refuse to recognise that judgment pursuant to Article 35(3) in conjunction with Article 22(1) of Regulation No 44/2001.

98. Those are the reasons why the answer I propose to Question 3 is that Articles 32 and 33 of Regulation No 44/2001 must be interpreted as meaning that, where the court of the Member State of origin has declined jurisdiction after first ruling, in the grounds of its decision, on the validity and scope of an agreement on jurisdiction, the court of the Member State addressed is bound by that finding, regardless of whether it is regarded as *res judicata* by the law of the Member State of origin or the Member State addressed, except in the cases in which Article 35(3) of that regulation authorises that court to review the jurisdiction of the court of the Member State of origin.

V – Conclusion

99. In the light of the foregoing, I propose the following answer to the questions referred for a preliminary ruling by the Landgericht Bremen:

Articles 32 and 33 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that:

— a judgment by which a court of a Member State rules on its international jurisdiction, whether it accepts or declines jurisdiction, falls within the concept of 'judgment' within the meaning of Regulation No 44/2001, regardless of the fact that the judgment is classified as a 'procedural judgment' by the law of the Member State addressed; and

— where the court of the Member State of origin has declined jurisdiction after first ruling, in the grounds of its decision, on the validity and scope of an agreement on jurisdiction, the court of the Member State addressed is bound by that finding, regardless of whether it is regarded as *res judicata* by the law of the Member State of origin or the Member State addressed, except in the cases in which Article 35(3) of Regulation No 44/2001 authorises that court to review the jurisdiction of the court of the Member State of origin.