OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 28 January 1997 *

I — Introduction

1. In these proceedings the Court is called upon once again [1] to rule on the compatibility with the Community legal order of German provisions relating to civil procedure according to which plaintiffs not having German nationality are obliged to furnish security for costs.

II — Facts and relevant legislation

2. Mr and Mrs Hayes brought an action against the Kronenberger company in the Landgericht (Regional Court) Saarbrücken for payment of the outstanding amount of a claim relating to the supply of equipment for purification and recycling plant. For its part, the defendant asked the plaintiffs to furnish security for costs within the meaning of Paragraph 110 of the Zivilprozeßordnung (German Code of Civil Procedure, 'ZPO').

3. Paragraph 110 of the ZPO provides that foreign plaintiffs have to give security for costs in proceedings brought before German courts.

Security for costs does not have to be furnished, however, where there is reciprocity, that is to say, where the country of which the plaintiff is a national does not require German nationals to give such security when they sue its nationals.

4. By judgment of 4 July 1994, the Landgericht, Saarbrücken, declared that the question of furnishing security under Paragraph 110 of the ZPO was irrelevant on the ground that the requirement for reciprocity was satisfied by membership of the European Union.

The plaintiffs appealed against the judgment of the Landgericht to the Saarländisches

* Original language: Italian.

1 — The German procedural rule requiring security for costs to be furnished was considered by the Court in the judgment of 1 July 1993 in Case C-20/92 *Hubbard* [1993] ECR I-3777. That provision was held to be incompatible with the principle of equal treatment enshrined in Articles 59 and 60 of the Treaty, hence in relation to freedom to supply services, on the ground that in the case in question it constituted a barrier to the exercise of professional activities by nationals of other Member States in Germany.

Oberlandesgericht (Saarland Higher Regional Court), which decided to refer the following question to the Court for a preliminary ruling:

'Where British nationals possessing no residence or assets in Germany have brought proceedings before a German civil court against a limited liability company established in Germany for payment of the purchase price of goods supplied, and are required by the competent German court, on application by the defendant, to furnish security for costs pursuant to Paragraph 110 of the German Zivilprozeßordnung (Code of Civil Procedure), does that constitute discrimination on grounds of nationality contrary to the first paragraph of Article 7 of the EEC Treaty?'

III — Analysis of the dispute

5. At the time when it was formulated, the question put to the Court raised an interesting and tricky issue in regard to the intermeshing of the Community legal order, especially as regards the prohibition of discrimination on grounds of nationality now enshrined in Article 6 of the Treaty, with a number of procedural rules of the Member States, in so far as those rules treat foreigners differently than nationals as regards access to the courts. Under those rules, it is provided that where a foreigner brings civil proceedings against a national, he must furnish appropriate security for judicial costs. The national court has framed the question now before the Court having particular regard to the circumstances of the case; as the case is framed, the German procedural provision at issue is posited as infringing the general prohibition of discrimination on ground of nationality enshrined in Article 6, rather than other specific provisions of the Treaty.

6. The Community Court's activity in interpreting the law has, in the meantime, deprived the preliminary question as it is formulated of practical relevance. In a recent judgment, [2] the Court declared that 'a rule of domestic civil procedure, such as the one at issue in the main proceedings, falls within the scope of the Treaty within the meaning of the first paragraph of Article 6 and is subject to the general principle of non-discrimination laid down by that article in so far as it has an effect, even though indirect, on trade in goods and services between Member States. Such an effect is liable to arise in particular where security for costs is required where proceedings are brought to recover payment for the supply of goods.'

The Court essentially equated the procedural situation in which a Community national finds himself when he is plaintiff in civil proceedings coming within the ambit of the exercise of freedoms conferred by Community law with that of nationals of the State in whose courts the proceedings are brought.

2 — Case C-43/95 *Data Delecta* [1996] ECR I-4661. The national provision at issue in that case provided, just as in this case, for security for judicial costs to be furnished by foreign plaintiffs, whereas Swedish plaintiffs were exempt from that requirement irrespective as to whether they were resident in Sweden or, at any event, had assets in that country from which any claim on the part of the defendant arising out of procedural costs might be met.

This holds good, the Court held, irrespective of the existence of international agreements between the plaintiff's State and the defendant's State in regard to the recognition and enforcement of foreign judgments, which are expressly designed to remove any obstacles to what may be described as 'the free movement of judgments'. [3]

7. In this case, just as in *Data Delecta*, the dispute relates to an activity directly connected with the exercise of a right stemming from the EC Treaty: free movement of goods. This is how it presents itself. The non-payment for the supply of equipment, the claim asserted in the proceedings, is important for present purposes precisely because it is directly connected with the exercise of the aforementioned freedom which the Treaty confers on Community nationals and undertakings. The possibility of asserting one's own claims in legal proceedings before the court having jurisdiction is, moreover, the essential corollary of the rights laid down in the Treaty. The judicial protection afforded by the courts of the individual Member States in safeguarding the rights and interests arising under the legal order of the Union thus also takes on a Community character in so far as it contributes towards the full achievement of the objectives laid down by the Treaty. The Court has stated in other cases that that obligation derives from Article 5 of the Treaty and that the Member States must 'ensure the legal protection which individuals derive from the direct effect of Community law'. [4]

8. The Court's pronouncement is clear. Where a Community national asks the national court having jurisdiction to recognize a claim which he has arising out of the exercise of a right conferred upon him by the Treaty, the exercise of the civil action is inseparably linked with the very freedom enshrined in the Community legal order. The procedural law of the Member States governing the bringing of such actions falls within the ambit of the Community precisely because it becomes an instrument for achieving the objectives laid down by the Treaty.

Although Community law generally takes no interest in aspects relating to the Member States' procedural rules, [5] the connection between the exercise of Community freedoms and their judicial protection means therefore that even rules laid down in order to regulate the course of the trial must secure Community nationals' right to judicial protection in accordance with the principle of non-discrimination enshrined in the Treaty. [6]

9. In the present case, the difference in treatment laid down in Paragraph 110 of the

3 — For this point, see my Opinion in *Data Delecta*, in particular at section 17.

4 — See, most recently, Case C-312/93 *Peterbroeck* [1995] ECR I-4599.

5 — Although the Court has had occasion to state that procedural rules may conflict with the Community legal order. See *Peterbroeck*, paragraph 12.

6 — Case 186/87 *Cowan* [1989] ECR 195 and Joined Cases C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5145.

ZPO is moreover based *only* on the criterion of nationality. For this very reason, what is involved is a difference in the rules which is neither intended or in a position to avoid presumed or possible difficulties, as mentioned by the defendant, arising from the fact that the plaintiff is resident in another State or from the fact that he has no assets in the State of the court seised, that is to say, assets which the defendant might, where appropriate, go after directly in enforcement proceedings without having first to go through the procedure of having the judgment recognized in another State.

This case is essentially completely analogous to the one which the Court considered in *Data Delecta*. Accordingly, the solution adopted there should be applied to this case as well.

10. It is also worth mentioning, *in limine litis* — as the United Kingdom Government pointed out in its observations — that the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments [7] applies to the relationship at issue, given that it is in force between the two Member States in question, the Federal Republic of Germany and the United Kingdom. Hence, the argument relating to the difficulties in recognizing and enforcing foreign judgments, which has been raised by the defendant and the Swedish Government in order to justify the obligation laid down by Paragraph 110 of the ZPO also as regards Community law, does not hold good. That justification is essentially based on the claim that, in the absence of an appropriate framework laid down by an international agreement, the provision of the security in question is useful, or even necessary, in order to remedy the distortions arising in the sphere of judicial protection as a result of the difficulties in enforcing judgments abroad. [8] In the situation involved in this case, however, the existence of the Brussels Convention renders this type of argument irrelevant. [9]

7 — The Convention entered into force on 1 February 1973 and was published [in English] in OJ 1988 L 319, at p. 9.

8 — That justification was, however, broadly echoed both in Advocate General Tesauro's Opinion of 3 October 1996 in Case C-29/95 *Pastoors* [1997] ECR I-285, I-287 and in the judgment in that case, which was given on 23 January 1997. However, the situation in that case resembled the present case only in some respects. What was in issue there was the legality under Community law of a provision of criminal law relating to road traffic offences under which non-residents had to pay a substantially higher sum of money in order for proceedings to be extinguished. In its judgment, the Court started by observing that neither the Brussels Convention nor any similar agreements were applicable. It therefore reached the conclusion that the difference in treatment could be justified in principle (although it considered that the rules relating to the sanction at issue and its magnitude were contrary to the principle of proportionality). As far the present proceedings are concerned, I do not consider that the argument based on difficulties in enforcing judgments in another Member State in the absence of an appropriate convention is at all convincing for the purposes of the application of Article 6 of the Treaty. Lastly, it should be pointed out that some time ago already the Court clearly held that 'the right to equal treatment laid down in Community law may not be made dependent on the existence of reciprocal agreements concluded by the Member States' (*Cowan* and *Hubbard*, at paragraph 17). Moreover, it is in the very nature of the right at issue (the right to judicial protection of rights arising under the Community legal order) that, in a manner of speaking, it sprouts wings and flies higher (and the right is at times accused of taking on angelic connotations). That right, which belongs to the limited class of fundamental Community rights, does not tolerate limitations or conditions and consequently cannot legitimize any erosion of its effectiveness brought about by particular situations existing in particular Member States which in any event detract from the principle of non-discrimination.

9 — In this regard, moreover, the situation involved in this case is similar to that considered by the Court in Case C-398/92 *Mund & Fester* [1994] ECR I-467, in which the Court held that the national provision at issue was incompatible with Article 6 of the Treaty.

IV — Conclusion

11. In view of the foregoing considerations, I propose that the Court should answer the question referred by the Saarländisches Oberlandesgericht as follows:

'Community law, in particular Article 6 of the Treaty, precludes security for judicial costs, as provided for in Paragraph 110 of the German Code of Civil Procedure, from being required to be given by Community nationals in relation to proceedings connected with the exercise of rights deriving from the Community legal order.'