JUDGMENT OF THE COURT (Second Chamber)
4 July 1985 *

In Case 220/84

REFERENCE to the Court by the Bundesgerichtshof [Federal Court of Justice], under Article 3 of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, for a preliminary ruling in the case pending before that court between

AS-Autoteile Service GmbH, a company incorporated under German law, whose registered office is in Bühl (Federal Republic of Germany),

and

Pierre Malhé, a businessman, who resides at Saleux (France),

on the interpretation of Article 16 (5) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT (Second Chamber)

composed of:

O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: C. O. Lenz
Registrar: D. Louterman, Administrator

after considering the observations submitted in accordance with Article 20 of the Protocol on the Statute on the Court of Justice of the European Communities on behalf of

AS-Autoteile GmbH, the plaintiff in the main proceedings, by Ernst Jan Rassek, Rechtsanwalt, Karlsruhe,

* Language of the Case: German.

the Government of the United Kingdom, by S. J. Hay, of the Treasury Solicitor's Department,

the Commission of the European Communities, by its Legal Adviser, Friedrich Wilhelm Albrecht, assisted by Silvio Pieri, an Italian civil servant on secondment to the Commission;

after hearing the Opinion of the Advocate General, delivered at the sitting on 6 June 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 9 July 1984, which was received at the Court on 28 August 1984, the Bundesgerichtshof requested a preliminary ruling, under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention'), on three questions concerning the interpretation of Article 16 (5) of the Convention.

2 According to the documents before the Court, the plaintiff in the main proceedings, AS-Autoteile, whose registered office is in Bühl, is in the business of reconditioning used motor-vehicle parts; in the course of its business it had dealings with PAT GmbH, whose registered office was in Meckenheim, near Bonn, and one of whose shareholders was the defendant in the main proceedings, Pierre Malhé, who resides in Saleux (France) and is the owner of Société de Récupération de Pièces Automobiles. On 5 April 1978 AS-Autoteile obtained a default judgment in the Landgericht [Regional Court] Bonn against PAT in the amount of DM 1 001 476.95, plus interest, for the supply of defective goods.

3 When AS-Autoteile tried to enforce that judgment it discovered that PAT was insolvent. AS-Autoteile considers that the insolvency is due to the fact that PAT's assets were unlawfully transferred to Mr Malhé, in the form of fictitious profits. AS-Autoteile therefore obtained from the Amtsgericht [Local Court] Rheinbach, on 6 March 1980, an order for the attachment and transfer to it of the claim for unjust enrichment which, in its view, PAT could make against Mr Malhé.

4 On the basis of that order AS-Autoteile brought an action for payment against Mr Malhé before the Landgericht [Regional Court] Baden-Baden. The documents before the Court do not reveal on what basis the proceedings were brought before that court. In any event, the Landgericht Baden-Baden held that it had jurisdiction, and by a judgment dated 17 November 1981 it ordered Mr Malhé to pay to AS-Autoteile a sum representing his unjust enrichment at the expense of PAT, in an amount not exceeding the debt owed by PAT to AS-Autoteile.

5 Mr Malhé appealed against that judgment to the Oberlandesgericht [Higher Regional Court] Karlsruhe, which held on 15 October 1982 that under Article 2 of the Convention it had no jurisdiction, since the alleged debtor was domiciled in France. According to the Oberlandesgericht, the French courts have jurisdiction in such a case. AS-Autoteile's appeal to the Bundesgerichtshof against that judgment was dismissed by an order of 7 November 1983. The question of jurisdiction over the substance of the case has therefore been settled.

6 On 17 December 1982, while the proceedings were still pending, the Landgericht Baden-Baden made an order for costs against AS-Autoteile. Since that order was immediately enforceable, AS-Autoteile gave Mr Malhé a bank guarantee in the amount of DM 40 000, in order to avoid enforcement proceedings; Mr Malhé is still in possession of the instrument of guarantee.

7 AS-Autoteile thereupon lodged an application to oppose enforcement before the same court, under Paragraph 767 of the German *Zivilprozessordnung* [Code of Civil Procedure], which provides as follows:

(1) Objections against the judgment debt itself must be raised by the debtor before the court which heard the matter at first instance.

(2) Such objections are only admissible in so far as the grounds on which they are based arise after the close of the oral procedure in which, under this statute, objections should at the latest have been made and in so far as such matters may no longer be raised by way of appeal.

(3) In his application the debtor must make all the objections which he was in a position to make at the time of the application.

8 In its application AS-Autoteile seeks to set off against the order for costs the claim resulting from Mr Malhé's unjust enrichment at the expense of PAT, which had been transferred to it for the purpose of recovery. In the alternative, AS-Autoteile seeks the return of the instrument of guarantee.

9 By a judgment of 4 April 1983 the Landgericht Baden-Baden declared that it had no jurisdiction, since the action concerned a claim which had already been declared non-justiciable in Germany for want of jurisdiction.

10 AS-Autoteile brought a direct appeal to the Bundesgerichtshof against the Landgericht's decision that the German courts lacked jurisdiction. In the course of the proceedings on that appeal the Bundesgerichtshof referred the following three questions to the Court:

(1) Do applications to oppose enforcement within the meaning of Paragraph 767 of the German Code of Civil Procedure fall within the jurisdiction provision contained in Article 16 (5) of the Convention?

(2) Pursuant to Article 16 (5) of the Convention, in an application to oppose enforcement before the courts of the Contracting State in which enforcement is to take place, is it possible to resist enforcement by pleading a set-off in respect of a claim over which the courts of that State would have no jurisdiction if it were raised independently?

(3) Does the jurisdiction recognized by Article 16 (5) of the Convention cover proceedings in which the debtor, relying on a submission that the creditor's claim cannot be enforced, demands the return of the instrument of guarantee which he provided as security to avoid enforcement?

11 Article 16 (5) of the Convention provides that 'in proceedings concerned with the enforcement of judgments, the courts of the Contracting State in which the judgment has been or is to be enforced' shall have exclusive jurisdiction, regardless of domicile.

12 In reply to the first question it must be held that proceedings such as those provided for under Paragraph 767 of the German Code of Civil Procedure fall, as such, within the jurisdiction provision contained in Article 16 (5) by virtue of their close link with the enforcement procedure. However, that finding does not resolve the question of what objections a party may raise in such proceedings without going beyond the limits of Article 16 (5). That is the problem addressed by the second question referred by the Bundesgerichtshof.

13 That question concerns the point whether, in enforcement proceedings, a party may raise an objection based on a debt over which the courts of the Contracting State in which enforcement is to take place would have no jurisdiction if an independent action were brought on that debt.

14 In order to resolve that question it is necessary to have regard to the general scheme of the Convention, paying particular attention to the relationship between Article 2 and Article 16.

15 According to Article 2, persons domiciled in a Contracting State are to be sued in the courts of that State. That provision is intended to protect the rights of the defendant; it serves as a counterpoise to the facilities provided by the Convention with regard to the recognition and enforcement of foreign judgments. In this case the German courts have already held that since the defendant in the main proceedings is domiciled in France the debt raised by the plaintiff in the main proceedings is a matter for the French courts.

16 Article 16 of the Convention makes a number of exceptions to that general rule by granting exclusive jurisdiction to the courts of a Contracting State other than that specified under Article 2 in proceedings which have a particular connection with that other State, on the basis of the location of immovable property, the seat of a company, an entry in a public register or, in the case of paragraph (5), the place where a judgment is to be enforced.

17 It follows from the specificity of the connection required by Article 16 that a party cannot make use of the jurisdiction conferred by Article 16 (5) on the courts of the place of enforcement in order to bring before those courts a dispute which falls within the jurisdiction of the courts of another Contracting State under Article 2. The use for such a purpose of the application to oppose enforcement is contrary to the division of jurisdiction which the Convention intended to establish between the court of the defendant's domicile and the court of the place of enforcement.

18 In this case, since the German courts have already held that they have no jurisdiction over the claim relied on as a set-off, the use of that claim in order to oppose the enforcement of an order for the costs incurred in the same proceedings amounts to a clear abuse of the process on the part of the plaintiff for the purpose of obtaining indirectly from the German courts a decision regarding a claim over which those courts have no jurisdiction under the Convention.

19 The answer to the first two questions raised by the Bundesgerichtshof must therefore be that applications to oppose enforcement, as provided for under Paragraph 767 of the German Code of Civil Procedure, fall, as such, within the jurisdiction provision contained in Article 16 (5) of the Convention, but that that provision does not make it possible, in an application to oppose enforcement made to the courts of the Contracting State in which enforcement is to take place, to plead a set-off between the right whose enforcement is being sought and a claim over which the courts of that State would have no jurisdiction if it were raised independently.

20 As a result of those replies, the third question has become otiose.

Costs

21 The costs incurred by the Government of the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 9 July 1984, hereby rules:

Applications to oppose enforcement, as provided for under Paragraph 767 of the German Code of Civil Procedure, fall, as such, within the jurisdiction provision contained in Article 16 (5) of the Convention; that provision does not however make it possible, in an application to oppose enforcement made to the courts of the Contracting State in which enforcement is to take place, to plead a set-off between the right whose enforcement is being sought and a claim over which the courts of that State would have no jurisdiction if it were raised independently.

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 4 July 1985.

P. Heim
Registrar

O. Due
President of the Second Chamber