JUDGMENT OF THE COURT
14 JULY 1977 [1]

Bavaria Fluggesellschaft Schwabe & Co. KG and Germanair Bedarfsluftfahrt GmbH & Co. KG v Eurocontrol (preliminary ruling requested by the Bundesgerichtshof)

Joined cases 9 and 10/77

1. *Convention of 27 September 1968 — Concepts and legal classifications laid down by the Court — Uniform application in the Member States*

2. *Convention of 27 September 1968 — Judgments excluded from the scope of the latter — Bilateral agreements — Application — Exclusive jurisdiction of national court*

(Convention of 27 September 1968, Article 55, first paragraph of Article 56, Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968, Article 1)

1. The principle of legal certainty in the Community legal system and the objectives of the Brussels Convention in accordance with Article 220 of the EEC Treaty, which is at its origin, require in all Member States a uniform application of the legal concepts and legal classifications developed by the Court in the context of the Brussels Convention.
2. A national court must not apply the Brussels Convention so as to recognize or enforce judgments which are excluded from its scope as determined by the Court of Justice. On the other hand, it is not prevented from applying to the same judgments one of the special agreements referred to in Article 55 of the Brussels Convention, which may contain rules for the recognition and enforcement of such judgments. As the first paragraph of Article 56 of the Brussels Convention recognizes, these agreements continue to have effect in relation to judgments to which the Brussels Convention does not apply. Since Article 1 of the Protocol of 3 June 1971 gives the Court jurisdiction to interpret only the Brussels Convention and the Protocol, it is solely for the national courts to judge the scope of the abovementioned agreements in relation to judgments to which the Brussels Convention does not apply. This may lead to the same expression in the Brussels Convention and in a bilateral agreement being interpreted differently.

In Joined Cases 9/77 and 10/77

Reference to the Court under Article 3 of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September

1 — Language of the Case: German.

1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the VIIIth Senate of the Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the action pending before that court between

1. BAVARIA FLUGGESELLSCHAFT SCHWABE & CO., KG, Munich (Case 9/77),

2. GERMANAIR BEDARFSLUFTFAHRT GMBH & CO., KG, Frankfurt am Main (Case 10/77),

v

THE EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION ('EUROCONTROL'), Brussels,

on the interpretation of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts, procedure and written observations submitted under Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. By judgments of 7 March 1974 the Tribunal de Commerce of Brussels

ordered the Bavaria Fluggesellschaft Schwabe & Co. KG, having its registered office in Munich, and Germanair Bedarfsluftfahrt GmbH & Co. KG, having its registered office in Frankfurt am Main, (hereinafter referred to as 'Bavaria' and 'Germanair') to pay to Eurocontrol charges due for air traffic control and declared both judgments provisionally enforceable. These judgments were served on Bavaria and Germanair and became in Belgium *res judicata* after the rights of appeal were exhausted.

Eurocontrol applied to the Landgericht München (Munich Regional Court) and the Landgericht Frankfurt for enforcement of the two judgments on the basis of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Brussels Convention'). The Munich court acceded to this application whilst the Frankfurt court dismissed it.

The Oberlandesgericht München (Munich Higher Regional Court), to which Bavaria appealed, and the Oberlandesgericht Frankfurt, to which Eurocontrol appealed, both decided that the Belgian judgments should be enforced on the basis of the Brussels Convention.

Germanair and Bavaria thereupon brought appeals before the Bundesgerichtshof which by orders dated 22 December 1976 in both cases stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling under Article 3 of the Protocol of 3 June 1971 on the Interpretation of the Brussels Convention:

'Under Article 56 of the Convention do the Treaty and Conventions referred to in Article 55 continue to have effect in relation to decisions which do not fall under Article 1 (2) of the Convention but are excluded from the scope of the Convention?'

2. The provisions of the Convention referred to in this question are as follows:

Article 1

'This Convention shall apply in civil and commercial matters ...

The Convention shall not apply to:
(1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
(2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
(3) social security;
(4) arbitration.'

Article 55

'Subject to the provisions ... of Article 56, this Convention shall, for the States which are parties to it, supersede the following conventions concluded between two or more of them:

.....

The Convention between the Federal Republic of Germany and the Kingdom of Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters signed at Bonn on 30 June 1958;'

First paragraph of Article 56

'The Treaty and the conventions referred to in Article 55 shall continue to have effect in relation to matters to which this Convention does not apply.'

3. In its judgment of 14 October 1976 in Case 29/76, *LTU* v *Eurocontrol*, the Court ruled *inter alia* as follows:

'A judgment given in an action between a public authority and a person governed by private law, in which the public

authority has acted in the exercise of its powers, is excluded from the area of application of the Convention'. ([1976] ECR at p. 1553).

'Such is the case in a dispute which, like that between the parties to the main action, concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by such body, in particular where such use is obligatory and exclusive.' *(ibid.* at p. 1551)

4. A copy of each order for reference was received at the Court on 25 January 1977.

Bavaria and Germanair, represented by Günther B. Krause-Ablass, Rechtsanwalt, Eurocontrol, represented by Hans Erich Brandner, Rechtsanwalt, the Government of the Federal Republic of Germany, represented by Walter Holtgrave, and the Commission of the European Communities, represented by its Legal Adviser, Peter Karpenstein, submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court by order dated 4 May 1977 in accordance with Article 43 of the Rules of Procedure ordered that the two cases should be joined for the purposes of the oral procedure and judgment. It further resolved to open the oral procedure without any preparatory inquiry.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. *Bavaria and Germanair* refer first of all to the judgment of the Court of 14 October 1976 in Case 29/76, *LTU* v *Eurocontrol* [1976] ECR 1541, and explain why the bilateral German-Belgian Convention referred to in Article 55 of the Brussels Convention can no longer apply under the first paragraph of Article 56 thereof in a case such as the present.

Since according to that judgment the Brussels Convention concerns only civil and commercial matters, the first paragraph of Article 56 of the Convention also can concern only that legal sphere. According to that article therefore the bilateral conventions referred to in Article 55 continue to have effect only in so far as they relate to civil and commercial matters listed in the second paragraph of Article 1 of the Brussels Convention, to which it does not apply.

The German-Belgian Convention, according to Article 1 thereof, applies likewise only to civil and commercial matters and not to matters of public law. According to the first paragraph of Article 56 of the Brussels Convention and likewise in respect of the German-Belgian Convention the concept of 'civil and commercial matters' can have no other interpretation than that contained in the first paragraph of Article 1 of the Brussels Convention. Accordingly the German-Belgian Convention does not apply mainly because the present case is not concerned with a civil or commercial matter but with a matter governed by public law.

Since the German court considers itself bound by the judgment in Case 29/76 and has not again put the question of classification to the Court the question does not have to be considered again in the present case: in the absence of a further reference the classification given in the aforementioned judgment is binding.

After these observations Bavaria and Germanair reply *ex abundanti cautela*

to the criticisms made by Schlosser (Neue Juristische Wochenschrift, 1977, p. 457) against the judgment of the Court in Case 29/76.

Finally they observe that the question raised should be answered in the negative.

2. *Eurocontrol* also refers first of all to the judgment of the Court in Case 29/76 which reaches a different conclusion from that of the Bundesgerichtshof in respect of the same problem; it observes that according to that judgment the present cases must be considered as being excluded from the field of application of the Brussels Convention. Then however the German-Belgian Convention of 1958 may be applicable to the present case. This is for the German courts to consider. It is not contested that as far as that Convention is concerned the applicable law for the purpose of establishing whether it is a civil or commercial matter is that of the State in which judgment is given. The judgment of the Belgian court, which is thus the sole criterion, has decided in the present case that it is a civil and commercial matter. This must be respected under the terms of the bilateral German-Belgian Convention. The interpretation of Community law which the Court adopted in Case 29/76 cannot be extended to the German-Belgian Convention.

The first paragraph of Article 56 of the Brussels Convention moreover provides that the German-Belgian Convention of 1958 shall continue 'to have effect' in relation to matters to which the Brussels Convention does not apply. The matters to which the Brussels Convention does not apply are not only such as are listed in the second paragraph of Article 1. They are all those matters which are in any case excluded from its application. A multilateral convention such as the Brussels Convention cannot lay down what is 'inapplicable' to matters which *a priori* simply do not come within its scope.

The correctness of this view appears from the official reports on the Brussels Convention according to which the Treaty States preferred not to define the scope of the Convention in a positive manner since the law of conflict of laws was not yet unified; they preferred to exclude certain matters from the field of application, namely those referred to in the second paragraph of Article 1, to which, since they are civil and commercial matters, the Brussels Convention would have applied had this provision not excluded them from its scope.

The present case concerns a matter which is *a priori* excluded from the field of application of the Brussels Convention and not one which is simply excluded by the second paragraph of Article 1.

For cases where the Brussels Convention *a priori* does not apply the Brussels Convention has not 'replaced' the German-Belgian Convention, which to this extent continues to apply. It is right that this should be so; this is in accord with Articles 55 and 56 of the Brussels Convention and with its objectives of facilitating and not reducing opportunities for the enforcement of judgments as compared with the position existing before it entered into force. Eurocontrol therefore proposes that the question put should be answered as follows:

'The treaty and conventions referred to in Article 55 of the Brussels Convention continue to have effect in respect of judgments which do not fall under the second paragraph of Article 1 of the Convention but are excluded from its scope.'

3. The *German Government* takes the view that the question referred to the Court for a preliminary ruling should be answered in the affirmative. The first paragraph of Article 56 of the Brussels Convention which determines the substantive scope of the international

agreements referred to in Article 55 in relation to the Brussels Convention, is based upon the principle that the Brussels Convention does not affect the agreements existing between the various Member States in so far as they go beyond the scope of the Brussels Convention.

According to this provision therefore all matters which do not fall within Article 1 of the Brussels Convention are to be regarded as matters to which the Convention does not apply. A limitation to the matters listed in the second paragraph of Article 1 is not intended. It accords with the interests of the parties and the meaning of the said first paragraph of Article 56 always to apply bilateral agreements where the Brussels Convention, according to its terms, does not apply to the matters in question. Judgments which have been given in cases which do not concern civil and commercial matters within the meaning of the Brussels Convention, as interpreted by the Court, can therefore be recognized and enforced under the bilateral agreements for enforcement if they come within their scope.

The German Government proposes that the question referred to the Court for a preliminary ruling should be answered as follows:

'The treaty and conventions referred to in Article 55 continue to have effect in respect of judgments in relation to all matters to which the Brussels Convention does not apply even if they do not fall under the second paragraph of Article 1 of that Convention.'

4. The *Commission of the European Communities* which likewise refers first of all to the judgment of the Court in Case 29/76 takes the view that having regard to this judgment the question referred to the Court for a preliminary ruling should be answered in the affirmative. The matter however is not quite so simple.

The court making the reference does not simply wish to know in general whether, in a case where the Brussels Convention does not apply on the basis of Article 56 thereof, it may have recourse to a bilateral agreement concluded previously. It is concerned with whether recourse to the agreements referred to in Article 55 of the Brussels Convention is also possible where the inapplicability of the Brussels Convention arises as a result of an earlier classification by the Court of the legal nature of the case in question. It is a question of the scope of that judgment of the Court and whether such a judgment prevents recourse to other agreements on enforcement.

Even considered in this light nevertheless Article 56 of the Brussels Convention must be interpreted as allowing recourse in circumstances such as those in the present case to the agreements referred to in Article 55.

According to the terms of its preamble the object of the Brussels Convention is to facilitate the recognition of judgments within the Community. It seeks to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals in the Member States and thus to strengthen in the Community the legal protection of persons therein established. From this it is clear that where there is doubt the Brussels Convention should not be interpreted restrictively: it is true that Articles 55 and 56 of the Brussels Convention exclude other agreements where the Convention applies. The basic objective of the Convention is nevertheless to simplify 'legal transactions between the Member States' and not to create additional difficulties; therefore in cases where the Brussels Convention does not apply, the applicant must have the opportunity of choosing the procedure most appropriate for him.

There is no need to fear that the judgment of the Court in Case 29/76 will

be circumvented or simply not followed, since:

— The court making the reference says expressly that it accepts the judgment of the Court given in respect of the first paragraph of Article 1 of the Brussels Convention; it merely seeks to verify whether the Belgian judgment can be declared enforceable under the German-Belgian Convention.

— The application of the German-Belgian Convention does not conflict with the judgment in Case 29/76 because the Court limited itself in that judgment to an interpretation of the concept 'civil and commercial matters' used in the first paragraph of Article 1 of the Brussels Convention. To ensure that the Brussels Convention should be applied uniformly in all Member States, the Court does not interpret this concept as a mere reference to national law but as an independent concept of Community law. This does not preclude the concept 'civil and commercial matters' in bilateral agreements which are not subject to the jurisdiction of the Court from being interpreted differently, as regards its substance, by national courts or at least as binding the court of execution to the classification given by the court where judgment was given.

It is moreover apparent from Article 57 that the Brussels Convention is exclusive in nature only in relation to cases which come within its field of application. Article 57 provides that not only existing agreements but also future ones are unaffected in so far as, in relation to particular matters, they govern jurisdiction and the recognition and enforcement of judgments. The Brussels Convention seeks to prevent neither the application nor the introduction of rules giving a party within the Community more extensive protection in matters to which it does not apply.

The Commission proposes that the question referred to the Court for a preliminary ruling should be answered as follows:

'Article 56 of the Brussels Convention must be interpreted as meaning that the treaty and conventions referred to in Article 55 continue to have effect in relation to the recognition and enforcement of judgments even when the inapplicability of the Convention to particular matters results from a substantive classification by the Court on the basis of the first paragraph of Article 1 of the Convention.

III — Oral procedure

The parties to the main action and the Commission of the European Communities submitted oral observations at the hearing on 26 May 1977.

The Advocate-General delivered his opinion at the hearing on 16 June 1977.

Decision

1 By orders dated 22 December 1976, received at the Court on 25 January 1977, the Bundesgerichtshof referred to the Court pursuant to 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 (hereinafter referred to as 'the Brussels Convention') the question whether under Article 56 of the Brussels Convention the treaty and conventions referred to in Article 55 continue to have effect in relation to judgments which do not fall under the second paragraph of Article 1 of the Brussels Convention but are excluded from its scope.

2 The question has arisen in two actions concerned with the enforcement in the Federal Republic of Germany of two judgments by the Tribunal de Commerce, Brussels; the judgments concern claims by Eurocontrol against Bavaria and Germanair for charges due for the use of the equipment and services of Eurocontrol. In its judgment of 14 October 1976 in Case 29/76, *Lufttransportunternehmen GmbH & Co. KG* v *Eurocontrol* [1976] ECR 1541, the Court on a reference by the Oberlandesgericht Düsseldorf in an action pending before that court in relation to charges of a similar nature to those in the present case ruled as follows:

'1. In the interpretation of the concept "civil and commercial matters" for the purposes of the application of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, in particular Title III thereof, reference must not be made to the law of one of the States concerned but, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems;

2. A judgment given in an action between a public authority and a person governed by private law, in which the public authority has acted in the exercise of its powers, is excluded from the area of application of the Convention.'

The Bundesgerichtshof referred its question to the Court with particular regard to that judgment and to the Convention between the Federal Republic of Germany and the Kingdom of Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 30 June 1958. A ruling is sought whether and how far the legal concepts laid down by the Court in relation to the Brussels Convention are binding on national courts in respect of the application of a bilateral agreement such as the one mentioned above in matters excluded from the scope of the Brussels Convention. It appears from the orders for reference that in German law the question whether a case concerns a civil or commercial matter has for purposes of the recognition and enforcement of a foreign judgment traditionally been decided according to the law of the State in which the judgment was given.

3 Article 55 of the Brussels Convention provides '... this Convention shall, for the States which are parties to it, supersede the following conventions concluded between two or more of them ...'. The fifth convention to be listed is the said German-Belgian Convention of 30 June 1958. The first paragraph of Article 56 of the Brussels Convention however makes clear that these conventions 'shall continue to have effect in relation to matters to which this Convention does not apply'. The first paragraph of Article 1 of the Brussels Convention provides that it shall apply 'in civil and commercial matters'; on the other hand the German-Belgian Convention of 30 June 1958, as shown by the first paragraph of Article 1 thereof, covers the recognition of 'judgments given in civil and commercial matters' according to the criteria laid down by that convention itself.

4 The Court in the abovementioned judgment of 14 October 1976 has determined the scope of the Brussels Convention in relation to a judgment of the present kind by interpreting 'civil and commercial matters' as an independent concept and not as a reference to the internal law of one or other of the States concerned. This interpretation is based on the desire to ensure in relation to Community law that the Contracting States and parties concerned have equal and uniform rights and duties under the Brussels Convention. The principle of legal certainty in the Community legal system and the objectives of the Brussels Convention in accordance with Article 220 of the EEC Treaty, which is at its origin, require in all Member States a uniform application of the legal concepts and legal classifications developed by the Court in the context of the Brussels Convention.

5 For this reason a national court must not apply the Brussels Convention so as to recognize or enforce judgments which are excluded from its scope as determined by the Court of Justice. On the other hand it is not prevented from applying to the same judgments one of the special agreements referred to in Article 55 of the Brussels Convention, which may contain rules for the recognition and enforcement of such judgments. As the first paragraph of Article 56 of the Brussels Convention recognizes, these agreements continue to have effect in relation to judgments to which the Brussels Convention does not apply. Since Article 1 of the Protocol of 3 June 1971 gives the Court jurisdiction to interpret only the Brussels Convention and the Protocol, it is solely for the national courts to judge the scope of the abovementioned agreements in relation to judgments to which the Brussels Convention does not apply. The jurisdiction thus left to the national courts is the more readily justifiable in so far as the supplementary application of these bilateral agreements contributes to the objective pursued by the Brussels Convention

of facilitating the recognition and enforcement of judgments between Member States.

6 The answer must therefore be that the first paragraph of Article 56 of the Brussels Convention does not prevent a bilateral agreement such as the German-Belgian Convention, which is the fifth to be listed in Article 55, from continuing to have effect in relation to judgments which do not fall under the second paragraph of Article 1 of the Brussels Convention, but to which nevertheless that Convention does not apply.

7 Although this result may lead to the same expression in the Brussels Convention and in a bilateral agreement being interpreted differently, this is due to the different systems in which the concept 'civil and commercial matters' is used. In relation to a bilateral agreement the acceptance of a classification, made by the court first giving judgment, by the courts of another State could lead to an appropriate result having regard to the fact that the courts of the various States are independent one of another. On the other hand if this occurred in a system such as the Brussels Convention, the interpretation of which is entrusted to a court common to all parties, it would lead to undesirable divergencies.

Costs

8 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the court making the reference, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Bundesgerichtshof by orders dated 22 December 1976, hereby rules:

The first paragraph of Article 56 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and

Commercial Matters does not prevent a bilateral agreement such as the German-Belgian Convention, which is the fifth to be listed in Article 55, from continuing to have effect in relation to judgments which do not fall under the second paragraph of Article 1 of the Convention first abovementioned, but to which nevertheless that Convention does not apply.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 14 July 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 16 JUNE 1977 [1]

Mr President,
Members of the Court,

On 14 October 1976 in Case 29/76 referred to the Court for a preliminary ruling by the Oberlandesgericht Düsseldorf in an action between Eurocontrol and Lufttransportunternehmen GmbH & Co. KG in relation to the recovery of route charges claimed by Eurocontrol the Court considered ([1976] ECR at p. 1551) that the words 'in civil and commercial matters' used in Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters did not depend on the classification given by the court which delivered the judgment to be enforced but must be regarded as an independent concept.

On this basis the Court decided that 'although certain judgments given in actions between a *public authority* and a person governed by private law may fall within the area of application of the Convention, this is not so where the *public authority* acts in the exercise of *its powers*'. 'Such is the case', the Court added, 'in a dispute which, *like that between the parties to the main action,* concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment

1 — Translated from the French.