JUDGMENT OF THE COURT (Fifth Chamber)
10 October 1996 *

In Case C-78/95,

REFERENCE to the Court pursuant to 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 by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

Bernardus Hendrikman

and

Maria Feyen

and

Magenta Druck & Verlag GmbH,

on the interpretation of Article 27(1) and (2) and Article 29 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 relating to the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and, for the amended text, p. 77),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, C. Gulmann, D. A. O. Edward, P. Jann (Rapporteur), and M. Wathelet, Judges,

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— B. Hendrikman and M. Feyen, by W. Heemskerk, of The Hague Bar;

— the Government of the Hellenic Republic, by V. Kondolaimos, Assistant Legal Adviser to the State Legal Service, and S. Chala, specialist assistant in the Special Legal Service for the European Communities in the Ministry of Foreign Affairs, acting as Agents; and

— the Commission of the European Communities, by P. van Nuffel, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, represented by J. Pirrung, Ministerialrat at the Federal Ministry of Justice, acting as Agent, the Government of the Hellenic Republic, represented by V. Kondolaimos and S. Chala, and the Commission, represented by P. van Nuffel, at the hearing on 23 May 1996,

after hearing the Opinion of the Advocate General at the sitting on 4 July 1996,

gives the following

Judgment

1 By judgment of 10 March 1995, which was received at the Court on 16 March 1995, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling pursuant to 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 three questions on the interpretation of Article 27(1) and (2) and Article 29 of that Convention (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 relating to the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and, for the amended text, p. 77; hereinafter 'the Convention').

2 Those questions arose in proceedings between Bernardus Hendrikman and Maria Feyen (hereinafter 'Mr and Mrs Hendrikman'), residing at The Hague, and Magenta Druck & Verlag GmbH (hereinafter 'Magenta'), a German company whose seat is in Krefeld, Germany. Those proceedings concern the enforcement in the Netherlands of a judgment delivered on 2 April 1991 by the Landgericht (Regional Court), Krefeld, and of an order on taxation of costs made on 12 July 1991 by the Amtsgericht (Local Court) Nettetal (Germany) against Mr and Mrs Hendrikman. That judgment and that order were both served on Mr and Mrs Hendrikman on 17 September 1991.

3 By order of 14 January 1992, the acting President of the Arrondissementsrechtbank (District Court), The Hague, gave leave for the enforcement of the German

judgment and order in the Netherlands. In their appeal against that order for leave, Mr and Mrs Hendrikman relied on Article 27(1) and (2) of the Convention, contending that they had never received the documents instituting the proceedings and had not been validly represented before the German courts.

4 Article 27 of the Convention provides that:

'A judgment shall not be recognized:

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

2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

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

...'

5 According to Mr and Mrs Hendrikman, the proceedings leading to the German judgment and order had been instituted by Magenta in Germany without their knowledge. They concerned an unpaid invoice for stationery which had been

ordered on behalf of Mr and Mrs Hendrikman by two persons who had no authority to do so. The same two persons also instructed lawyers in the name of Mr and Mrs Hendrikman, but again without their authority, to represent the couple in the proceedings.

6 By judgment of 2 February 1994, the Arrondissementsrechtbank, The Hague, dismissed the appeal as unfounded. It held that Article 29 of the Convention, which provides that 'under no circumstances may a foreign judgment be reviewed as to its substance', precluded it from judging whether the German courts were entitled to assume that the conduct of the proceedings by the lawyers in question amounted to valid representation.

7 The Arrondissementsrechtbank also took the view that Article 27(1) could only apply where, under the law of the country in which the judgment was given, no remedy was available to a party who was unaware of the proceedings initiated against him and who was not validly represented, or where that party could not in practice exercise that remedy. In the present case, Paragraphs 579(4) and 586 of the Zivilprozeßordnung (German Code of Civil Procedure) would have allowed Mr and Mrs Hendrikman to apply for annulment of the German judgment and order on the ground of lack of representation within one month of service. However, they did not avail themselves of that remedy.

8 Lastly, according to the Arrondissementsrechtbank, Mr and Mrs Hendrikman could not rely on Article 27(2) of the Convention because their case did not concern a judgment delivered against a defendant in default of appearance.

9 Mr and Mrs Hendrikman appealed in cassation to the Hoge Raad der Nederlanden against the Arrondissementsrechtbank's decision.

10 The Hoge Raad decided to stay proceedings and request a preliminary ruling from this Court on the following questions:

'(1) Must Article 29 of the Brussels Convention be interpreted as meaning that the court of the State in which recognition is sought must refrain from making any inquiry into the question whether the defendant to the proceedings conducted in the State in which judgment was given was validly represented, even if the court of the State in which judgment was given made no ruling in that regard?

(2) (a) Must Article 27(1) of the Brussels Convention be interpreted as precluding recognition of a judgment given in another Contracting State where the defendant in the relevant proceedings was not validly represented and had no knowledge of the proceedings, even if he later had cognizance of the judgment which was given and availed himself in that regard of none of the legal remedies afforded by the procedural law of the State in which judgment was given?

(2) (b) Is it relevant in that connection that the time within which the legal remedy must be exercised is one month from the day on which the defendant has cognizance of the judgment which has been given?

(3) Must Article 27(2) of the Brussels Convention be interpreted as meaning that that provision is also applicable in a case in which, although the defendant was not declared to be in default of appearance, the document instituting the proceedings or an equivalent document was not duly served on, or notified to, him in sufficient time and the defendant was not validly represented in the proceedings?'

11 Since the court making the reference has not described the facts found in any great detail, the answers given by this Court will be apposite only in so far as the description of the circumstances on which the appellants in the main case rely corresponds to the facts.

12 The third question should be addressed first.

The third question

13 By this question, the national court is essentially asking whether Article 27(2) of the Convention applies to judgments delivered against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance, because someone purporting to represent the defendant appeared before the court first seised.

14 Under Article 27(2), a court from which recognition is sought may decline to recognize a judgment only if certain conditions are satisfied: the document instituting proceedings was not duly served on, or notified to, the defendant in sufficient time and he failed to appear in the proceedings conducted before the court first seised. The national court inquires only about the second condition.

15 According to settled case-law, the purpose of Article 27(2) of the Convention is to ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised (see Case 166/80 *Klomps* v *Michel* [1981] ECR 1593, paragraph 9, and Case C-172/91 *Sonntag* v *Waidmann* [1993] ECR I-1963, paragraph 38).

16 The German Government submits that the rights of the defence are observed even if a lawyer who is not authorized to act appears for the defendants because the court must rely on what is stated by that lawyer until such time as he is shown to have no authority.

17 That argument cannot be accepted.

18 Where proceedings are initiated against a person without his knowledge and a lawyer appears before the court first seised on his behalf but without his authority, such a person is quite powerless to defend himself. That person must therefore be regarded as a defendant in default of appearance, within the meaning of Article 27(2), even if the proceedings before the court first seised became, in point of form, proceedings *inter partes*. It is for the court from whom recognition is sought to ascertain whether those exceptional circumstances exist.

19 That conclusion is not affected by the fact that, under Paragraphs 579(4) and 586 of the German Code of Civil Procedure, Mr and Mrs Hendrikman were entitled to apply, within one month of service of the judgment and order, for their annulment on the ground of lack of representation.

20 The proper time for a defendant to have an opportunity to defend himself is the time at which proceedings are commenced. The possibility of having recourse, at a later stage, to a legal remedy against a judgment given in default of appearance, which has already become enforceable, cannot constitute an equally effective alternative to defending proceedings before judgment is given (see Case C-123/91 *Minalmet* v *Brandeis* [1992] ECR I-5661, paragraph 19).

21 The answer to the third question must therefore be that Article 27(2) of the Convention applies to judgments given against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance because someone purporting to represent the defendant appeared before the court first seised.

The first and second questions

22 In view of the reply given to the third question, there is no need to answer the first question.

23 As regards the second question, it should be noted that the public-policy clause in Article 27(1) of the Convention 'ought to operate only in exceptional cases' (see the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1979 C 59, p. 1, at p. 44). Recourse to it is in any event precluded when the issue must be resolved on the basis of a specific provision such as Article 27(2) (see, in connection with Article 27(3), Case 145/86 *Hoffmann* v *Krieg* [1988] ECR 645, paragraph 21).

24 In view of the foregoing considerations, there is no need to reply to the second question.

Costs

25 The costs incurred by the German Government, the Government of the Hellenic Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by judgment of 10 March 1995, hereby rules:

Article 27(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of 9 October 1978 relating to the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, applies to judgments given against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance because someone purporting to represent the defendant appeared before the court first seised.

Moitinho de Almeida Gulmann Edward

Jann Wathelet

Delivered in open court in Luxembourg on 10 October 1996.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber