may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State.

Kutscher Donner Pescatore

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 30 November 1976.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 9 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

The dispute between Joseph de Wolf, a customs agent at Turnhout (Belgium) and the Harry Cox undertaking, whose registered office is at Boxmeer (the Netherlands) was a very small one. It concerned the recovery of a bill for Fl 8·30, which, the agent claimed, was owed to him by the Netherlands undertaking. But that does not matter. This tiny case is at the origin of a reference for a preliminary ruling made by the Hoge Raad of the Netherlands on the interpretation of the provisions of the Convention of Brussels of 27 September 1968 on the recognition and enforcement of judgments; in examining them you will decide an important point of Community law.

Mr de Wolf began by suing his debtor before the juge de paix of the First Canton of Turnhout, the court of his own domicile. That court, considering itself to have jurisdiction, gave judgment by default ordering the defendant to pay the said bill, damages assessed by way of penalty at FB 500 together with the costs of service of formal notice to pay, fixed at 15 guilders, and to pay legal interest and costs, assessed at a total of FB 913.

It may be supposed that notice of this judgment was served on the defendant, but the latter did not react. A comparison of its date, the date on which notice thereof was served on the defendant and the time-limit for bringing an appeal should enable it to be stated that it had the force of *res judicata* and had become enforceable in Belgium.

However, whether it was possible to enforce it is another matter. It is necessary to beware of confusing the effects of a judgment and the practical

1 — Translated from the French.

measures or the means to be used in order for its enforcement to become a reality. The latter depend, as regards both form and substance, on the legislation of the country where enforcement must take place, on the place where the goods on which execution is to be levied are situated, and, most of all, on the very existence of goods against which execution may be levied. It is probable that the Netherlands undertaking offered no opportunity for enforcement in Belgium. This is why the plaintiff had to apply to the courts of the Netherlands.

Instead, however, of contenting himself with applying for the enforcement of that judgment in that country pursuant to the procedure laid down by Article 31 *et seq.* of the Convention, Mr de Wolf preferred to take up the case *ab ovo* and to sue his opponent before the Kantonrechter of Boxmeer, the court of the domicile of the latter (first paragraph of Article 2 of the Convention). He relied on the Belgian judgment delivered in his favour, and claimed that the said court should deliver judgment as to substance, that is, once more order the Harry Cox undertaking to pay the principal sums due and interest. For this purpose he relied on Article 431 of the Netherlands Code of Civil Procedure, which permits such an action when it is not possible to enforce the judgment of the foreign court.

This time, the defendant appeared. But the Netherlands court doubted whether the plaintiff had an interest in obtaining a decision as to substance from itself, since he was entitled, in its opinion, to rely on Articles 11 and 12 of the Convention between Belgium and the Netherlands on Enforcement of 28 March 1925, which make it possible to obtain the enforcement in the Netherlands of judgments delivered in Belgium. It decided, by interlocutory judgment of 7 February 1975, to hear the plaintiff again on the reasons which induced him to obtain a judgment from the Netherlands court, for him a foreign court, in addition to the judgment of the Belgian court.

In its final judgment of 8 July 1975, the court at Boxmeer began by rectifying an obvious mistake which it had made in its judgment of 7 January: it was not the Convention between Belgium and the Netherlands on which the applicant could rely, but the Community Convention of 27 September 1968, which, by virtue of Article 55 thereof, supersedes the bilateral Convention, and the Netherlands Law on Enforcement of 4 May 1972, which entered into force on 1 February 1973.

Next, the Court found that 'there is nothing to say that the Belgian decision must not be recognized in the Netherlands without any special procedure being required within the meaning of the first paragraph of Article 26 of the Convention'. However, since the provisions of the Convention and of the Netherlands law of 4 May 1972 were applicable, if Mr de Wolf requested, in accordance with the procedure laid down by those provisions, that an order for the enforcement of the Belgian judgment be issued and that it be enforced, the cost thereof, as the plaintiff explained, would be at least 340 guilders, to be borne by the *defendant.*

This is why, the court continued, the plaintiff was right not to apply for the issue of an order for the enforcement of the Belgian judgment. He was entitled to request the Netherlands court to *deliver judgment afresh as to substance* by virtue of Article 431 (2) of the Netherlands Code of Civil Procedure, because enforcement by this means would be less costly *for the defendant.* Therefore it was in the interests of *both parties* to obtain a judgment of the Netherlands court in addition to the judgment of the Belgian court.

Next, the Netherlands court went on formally to 'recognize' the judgment of the Belgian court. The court stressed that

since the defendant had not alleged that the recognition of that judgment would be contrary to public order in the Netherlands (Article 27 of the Convention), given that the rules relating to the jurisdiction of the court of the State in which the judgment was given did not concern public policy (last paragraph of Article 28), and since the defendant had not produced evidence that it had duly paid its debt, the plaintiff had a legitimate interest in having the existence of his claim recognized. The Court found that the Belgian judgment had to be 'recognized', and from this it immediately deduced that the claim was well founded. It ordered the defendant to pay the plaintiff the amount settled by the Belgian court. However, as the plaintiff had, during the proceedings, reduced his debt, made up of the principal and interest, to the sum of Fl 1 500, the Court limited the sum that the defendant was to pay to that amount, ordered that its judgment was to be enforceable provisionally even in the event of appeal, and, finally, ordered the defendant to bear the costs. The costs incurred by the plaintiff were assessed at Fl 105·30, of which Fl 30 represented the fees of his representative *ad litem.*

Previously, basing himself on another judgment of the same court at Turnhout delivered on that same 28 May 1974, Mr de Wolf had attempted to use the same procedure by applying to the Kantonrechter of Tilburg for the recovery of a debt of the same sort from another Netherlands undertaking. But that court found that *in fact* the plaintiff was asking for the enforcement in the Netherlands of a judgment delivered in Belgium while ostensibly claiming recognition of that judgment. The said court took the view that for such purpose the plaintiff could *only* lodge an application for enforcement in accordance with Title III of the Convention. It held that the common law provisions in Article 431 (2) of the Netherlands Code of Civil Procedure, which enable Netherlands courts to deliver judgment afresh on the substance of a dispute upon which judgment has already been given by a foreign court, could not apply, because the Netherlands courts had jurisdiction by virtue of the Convention to issue an order for the enforcement of a judgment delivered by a court of a Contracting State. Accordingly, the court at Tilburg had declared that the plaintiff's claim was not admissible.

Alerted by the court officer who had represented Mr de Wolf's interests before the court at Tilburg, the Procureur Generaal of the Hoge Raad of the Netherlands, acting as *amicus curiae,* brought an appeal before the Hoge Raad against the judgment, which had become definitive, of the court at Boxmeer, which was manifestly in conflict with the judgment delivered by the court at Tilburg.

Thus the highest court of the Netherlands requests you to rule whether Article 31 of the Brussels Convention, by itself or in conjunction with other provisions of that Convention, prevents a plaintiff who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement within the meaning of Article 31 may issue in another Contracting State, from making an application to a court in that other State, in accordance with Article 26 of the Convention, for a fresh judgment as to substance against the other party on the same terms as the judgment delivered in the first State, assuming, of course, that under the provisions of the Convention that court has jurisdiction to hear the application.

Put like that, the problem seems to me to concern Article 26 of the Convention much more than Article 31. I shall therefore interpret that provision.

The so called 'second limb' of the Convention to which we must direct our attention, concerns the *enforcement* of

judgments in civil and commercial matters. However, as Mr Droz has written: 'the provisions of the Convention as to *recognition* are fundamental. For it is those provisions which make it possible to achieve the "circulation of judgments" within the Community, which is one of the foremost objectives of the Convention. Although the rules of procedure with regard to enforcement laid down in the Convention spring from the same intention, they are entirely subordinate to the rules of substance laid down with regard to recognition. Recognition can occur without enforcement, whereas enforcement can never be obtained without recognition.' 'The Convention,' and I am still quoting Mr Droz, 'establishes the distinction between recognition and enforcement. Recognition gives the foreign judgment the force of *res judicata*. Enforcement consists in giving the foreign judgment enforceability in addition.'

The authors of the Convention directed their minds first to simplifying, accelerating and standardizing the ways and means necessary for obtaining recognition. They have attempted to make the conditions governing recognition of judgments independent of the concept of territoriality and to make the recognition involved uniform throughout the Community by laying down the procedure to be followed to obtain recognition.

According to both the report of Mr Jenard and the opinions of the commentators who have had access to the preparatory drafts, up to the last stage prior to the signing of the Convention, Article 1 thereof was worded as follows:

'This Convention shall apply *directly* in civil and commercial matters whatever the nature of the court or tribunal.'

The word 'directly' was omitted at the last minute at the request of the German delegation because of problems of translation. Anyhow, in the present case I do not think that it is the 'direct' applicability of the Convention that matters, but rather whether Article 26 must be said to be *exclusive*.

However that may be, the system laid down by the Convention as regards recognition appears to me to be as follows:

The first paragraph of Article 26 provides that a judgment given in a Contracting State *shall be* recognized in the other Contracting States 'without any special procedure being required'. Thus the intention of the authors of the Convention was to state most categorically that judgments given in the six States automatically have the force of *res judicata* throughout the territory of the Community, with effect from the date on which judgment was given in the first State.

However this principle of automatic recognition is immediately moderated and amended by the remainder of Article 26. In fact recognition only takes effect automatically in so far as it is not contested.

The remainder of that article therefore deals with the recognition of judgments the authority of which may be contested.

First of all I shall leave aside the case where recognition is only raised as an *incidental question* before the court of a Contracting State or, as the German text says, the case where the decision of that court *depends* ('abhängt') on recognition: in such a case the third paragraph of Article 26 provides that that court shall have jurisdiction over that question.

Where recognition of a judgment is sought *as the principal issue* and the authority of that judgment is contested, the second paragraph of Article 26 implies that the party in whose favour judgment has been given in the first State is left with a choice. He *may* either apply for the *enforcement* of the decision

pursuant to Sections 2 and 3 of Title III, or apply for a decision that the judgment be recognized, but again in accordance with the procedures provided for in Sections 2 and 3 of Title III. In any event, the authority of the foreign judgment prevents a *fresh* application concerning the *same* subject-matter being brought by the *same* parties before the courts of another Contracting State.

For a party to have an interest in applying for recognition as the principal issue, it is necessary to assume that the judgment concerned is not capable of enforcement properly so called, that is to say, that it is not possible to enforce it on the territory of the Contracting State in which it was given. Such appears to me to be indeed the case with regard to the judgment given by the Belgian court.

This is the situation which the second paragraph of Article 26 expressly covers. The authors of the Convention did not wish to leave this case outside the Treaty. Indeed, their silence on this point would undoubtedly have obliged the six States, or their national courts, as before, either to maintain or to introduce national procedures which would necessarily have differed from one State to another.

If the Convention had not settled this case and if no 'action for recognition as the principal issue' existed under the law of a Contracting State, the courts of that State would have had to 'widen' the rules of that Convention to include a judgment given in another Contracting State to enable it to take effect in their State. In certain States, it seems that it is possible to bring what is called a 'direct action on the foreign judgment'. A foreign judgment is invoked in support of an application concerning the same subject-matter as that upon which judgment has been given abroad. The plaintiff, instead of applying for the enforcement or recognition of the foreign judgment, prefers to submit a fresh application relying on the foreign judgment.

In order to avoid these doubts the second paragraph of Article 26 of the Convention provides that any interested party who raises the recognition of a judgment as the principal issue *may,* in accordance with the procedures provided for in Sections 2 and 3 of Title III, apply for a decision that the judgment be recognized, unless he prefers to use the procedure for enforcement of a foreign judgment.

The word 'may' used in the second paragraph of Article 26 must not be misconstrued. Admittedly, any interested party is free to use or not to use that procedure. But if his intention is simply to have a foreign judgment recognized, and not merely to plead its conclusive force, which after all may be taken into consideration regardless of any 'recognition', and if that judgment is contested as the principal issue ('as such' says the German version of the second paragraph of Article 26), he *may* only obtain recognition thereof by using the procedure laid down by the Convention.

Seen thus, the use of the word 'may' does not, therefore, leave the option of a third method. Again, no conclusions should be drawn from the use of this term ('kunnen') in the Dutch version of Article 31, whereas in the other versions, enforcement is presented as automatic, provided of course that the conditions laid down by the Convention are complied with. Similarly, in the German version of the last paragraph of Article 26, the word 'kann', that is to say 'may', is used as meaning that if the outcome of proceedings in a court of a Contracting State depends on the determination of an incidental question of recognition that court is empowered to deal with that question. The other versions, however, make such jurisdiction mandatory. Nobody would therefore consider arguing that the court concerned has discretion as to whether to accept jurisdiction or not.

As for the reasons why Mr de Wolf acted as he did, he stated that the said

procedure was less expensive than the procedure under Sections 2 and 3 of Title III. Since this ground was considered decisive by the court at Boxmeer and as it is causing the Hoge Raad doubts, I should explain my views on it.

Firstly, for whom was the procedure less expensive?

It should be noted that while the procedure before the Kantonrechter cost the plaintiff Fl 105·30, that sum was finally borne by the *defendant,* who was the unsuccessful party.

Similarly, while the costs of an application for the issue of an order for enforcement (or of obtaining recognition) pursuant to the procedure under Sections 2 and 3 of Title III and those of enforcement come to at least Fl 340, this sum would have finally been borne by the *defendant.*

It is touching to see the plaintiff becoming the champion of the defendant's interests, unless he considers that in following the procedure under the Convention, he caused his opponent needless and unreasonable costs which he might well have been ordered to bear. If the plaintiff was really so concerned to save his opponent costs there was a very simple course open to him, which was to bring an action against it before the court of the place of the defendant's domicile in the Netherlands from the first. It was open to him to do so even if there had been an agreement between the parties that the Belgian courts should have jurisdiction. The defendant, for its part, had a very simple means for avoiding needless costs, which was to pay its bill, at the latest when the Belgian judgment had been given.

The authors of the Convention, for their part, have done their utmost to reduce the costs involved in the procedure for enforcement to a minimum compatible with the speed, certainty and effectiveness of that procedure. Article III of the Protocol annexed to the Convention provides:

'In proceedings for the issue of an order for enforcement, no charge, duty or fee calculated by reference to the value of the matter in issue may be levied in the State in which enforcement is sought'.

Nevertheless, by virtue of Article 7 (3) of the Netherlands Law on Enforcement, Article 56 to 58 of the Code of Civil Procedure are applicable to the Community procedure for enforcement of a foreign judgment. Those provisions govern, in a general way, the scale of costs relating to the enforcement of foreign judgments.

Furthermore under Article 2 of the Law on Enforcement it remains compulsory to be represented by an advocate before the Arrondissementsrechtbank. Since it seems to have been shown that the effect of these provisions in to render the procedure for enforcement relatively expensive, at least as regards the recovery of small debts, it would be desirable to make amendments to them in the future in order to make the said procedure more accessible.

It seems to me in fact that the Contracting States are under a duty to take all measures necessary to facilitate the practical implementation of the Convention.

But even supposing that the use of the *ad hoc* procedure laid down by the Convention is more expensive *for the plaintiff,* that consideration cannot be an impediment.

The conclusion of the Convention between the Contracting States connotes *a priori,* at least so it may be supposed, the organization of a system which is on the whole *better* than the previous bilateral or multilateral systems. Admittedly, the Convention fits into the national systems of procedure with which

it must coordinate. Although, as a whole, the provisions of the Convention bring about a system more favourable than the system under the common law of the Netherlands, it is possible, as I freely admit, that on certain particular points the latter contained more liberal provisions.

As the Commission points out, the provisions of a Convention on enforcement are however indivisible. In order to prevent recognition from coming into conflict with decisions varying with the state of national law, the Convention has established a system of automatic recognition. The only documents which need be produced are those mentioned in Article 46, that is to say, an authentic copy of the judgment relied upon and a document which proves that the party in default was duly served with the document instituting the proceedings. It is not even necessary to prove that the judgment is enforceable. However, the *quid pro quo* for these facilities and for the obvious advantage of the fact that there is no right of review (Article 29), or review of the rules of conflict of laws and jurisdiction (Article 28), is that the procedure under Sections 2 and 3 of Title III must be strictly complied with and that this procedure is exclusive.

The balance achieved by the Convention would be upset if a party could, at his own convenience, use both the system laid down by the Convention and the common law on enforcement of foreign judgments in the State concerned.

To accept that it is possible to use, as the plaintiff has done, this form of 'simplified recognition' under the private international law of the Netherlands would imply that it would also be necessary to apply the ordinary rules of such law as regards the grounds for refusing recognition and not the simplified rules of the Convention. As Mr Droz says, 'it seems that concern for good administration of the justice requires that the rules of common law must not be intermingled in any way with those of the Convention' such that the latter would be 'applied à la carte'. Thus nobody is entitled to invoke the principles of common law on the subject as a means of escaping the system laid down by the Convention, with which all the Contracting States must comply. The effect of the Convention cannot vary according to the Member States, for otherwise its effectiveness and the uniformity of its application, which are essential, would be seriously jeopardized.

In one of the States where the bringing of a 'direct action on a foreign judgment' appears to be accepted, the legislature has expressly excluded the possibility of bringing such an action in respect of mutual relationships with countries to which that State is bound by a convention on execution. I have in mind the Foreign Judgments Act, 1933, which is still applicable as regards the relationship arising under the Convention on Enforcement made in 1967 between the United Kingdom and the Netherlands.

It appears from Article 6 of that law that judgments ordering payment which are capable of recognition cannot be made enforceable in the United Kingdom except by way of the procedure of registration, which, in that State, is applied instead of issuing an order for enforcement and which constitutes, in the present state of the law in force in the United Kingdom, the counterpart of the Community procedure on enforcement.

Therefore under the guise of a fresh main action Mr de Wolf obtained by means of nothing other than an abuse of procedure a judgment in which the principal issue was the recognition of a judgment given in his favour by a Belgian court.

If the court at Boxmeer meant to consider the application before it as an application for a fresh judgment, it

should have kept outside the scope of application of the Convention and have admitted the Belgian judgment only as a piece of evidence in coming to its own decision.

But in reality the said court expressly applied Article 26, considering first, that it was bound to recognize the foreign judgment as the principal issue. In accepting that the said judgment had the force of *res judicata,* it placed itself within the field of Title III of the Convention. In so doing, it ought simply to have acted in accordance with Article 31 and to have issued an order for enforcement, assuming that it had the power to do so, which in fact it did not.

That court adopted the judgment of the Belgian court unaltered. Not only was the influence of the latter judgment overwhelming in deciding the case, but it constituted the only argument for the plaintiff. Admittedly, it amended the operative words of the foreign judgment by limiting the sum awarded and by converting it into national currency, but it is not really a fresh judgment upon an application genuinely distinguishable from the first.

Moreover the said court *also partially* applied the Convention. In accordance with Article 27 of the Convention, it examined whether the recognition sought was contrary to public policy in the Netherlands. It noted that the defendant had not even argued that there was any such incompatibility and it found that in the case in question no such incompatibility existed. Yet although a foreign judgment may not under any circumstances be reviewed as to its substance (Article 29), the Netherlands court heard the observations of the defendant, which is prohibited by the first paragraph of Article 34. Although in this case that review led to the upholding of the foreign judgment, that new examination as to substance might have led to a conflicting or partially conflicting result apart, of course, from the possibility that the debt might have been paid meanwhile which would have brought about a result incompatible with the first judgment.

Naturally enough, I am only giving my opinion on the judgment against which an appeal has been brought, and it will be for the Hoge Raad to decide the matter.

For my part, I am of the opinion that this Court should rule that:

Where the recognition of a judgment is raised as the principal issue within the meaning of Article 26 of the Convention of 27 September 1968, that judgment may only be recognized by following the procedure laid down in Sections 2 and 3 of Title III of the same Convention.