# OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 9 July 1987 *

*Mr President,*
*Members of the Court,*

1. In the questions which it has referred to the Court for a preliminary ruling, the Hoge Raad of the Netherlands seeks an interpretation of a number of provisions of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. I shall begin by setting out the background to the main proceedings.

2. In 1978, after 28 years of marriage, a German national, Mr Hoffmann (hereinafter referred to as 'the husband'), went to live in the Netherlands. His wife, Mrs Krieg (hereinafter referred to as 'the wife'), also a German national, remained in the Federal Republic of Germany, where, by a judgment of the Amtsgericht (Local Court), Heidelberg of 21 August 1979, she obtained a maintenance order as a separated spouse.

3. An order for the enforcement of that judgment was granted pursuant to the Convention on 29 July 1981 by the President of the Arrondissementsrechtbank (District Court), Almelo (Netherlands), and was served on the husband on 29 April 1982. He did not appeal against that order.

4. On 1 May 1980, the Arrondissementsrechtbank, Maastricht, dissolved the marriage on application by the husband, the wife not having entered an appearance. The decree of divorce was entered in the Civil Register in The Hague on 19 August 1980. The divorce, which does not fall within the scope of application of the Convention, has not yet been recognized by the German authorities. [1]

5. Relying on the decree of divorce, the husband instituted proceedings before the Amtsgericht, Heidelberg in order to terminate the maintenance order. His application was refused by a judgment of 25 January 1983 on the ground that the divorce had not been recognized in the Federal Republic of Germany but the amount of maintenance was reduced.

6. On 28 February 1983 the wife served an attachment of earnings order on the husband's employer in the Netherlands, pursuant to the German judgment, in respect of which an order for enforcement had been granted. The husband brought interlocutory proceedings and the attachment of earnings order was discharged by the President of the Arrondissementsrechtbank, Almelo, by an order of 7 July 1983. On an appeal brought against that decision by the wife, the Gerechtshof (Regional Court of Appeal), Arnhem, quashed it by a judgment of 24 September 1984, which was the subject of an appeal in cassation.

7. It is in those proceedings that the Hoge Raad has submitted five questions to this Court. In examining them I shall be following a slightly different order from that chosen by the Netherlands court. It has asked the Court, first, two questions relating to the effects of a judgment which has been recognized, then a question on whether it is possible to plead grounds for refusing recognition or enforcement, and lastly two questions on the remedies available in proceedings subsequent to the order for enforcement. The procedural order, however, is the following:

(a) recognition, which takes place automatically under the terms of the Convention;

* Translated from the French.

1 — In fact, it appears from the statements of the parties at the hearing that the divorce was recognized at some time in 1985.

(b) the order for enforcement, granted according to the rules laid down in the Convention;

(c) execution proper, which is governed by the rules of national law as the Court confirmed in its judgment in *Deutsche Genossenschaftsbank*. [2]

I shall therefore be examining first the circumstances in which it is possible to plead grounds for refusing recognition or an order for enforcement (I) before going on to try to ascertain the effect of a judgment which has been recognized (II). Lastly I shall be considering Questions 4 and 5 which deal with the issues which may be raised in proceedings relating to execution (III).

## I — Article 27 of the Convention (Question 3 submitted by the Hoge Raad)

8. I should first of all point out that the second paragraph of Article 34, which deals with the refusal of enforcement, refers expressly to the five grounds for non-recognition provided for in Article 27. The Hoge Raad is asking the Court to determine whether two of them, namely irreconcilability (subheading A below) and public policy (subheading B), are applicable in the main proceedings. For the time being, let me simply say that in this instance those grounds were raised at a procedural stage where an order for enforcement had already been granted and the appeal provided for by the Convention had not been exercised.

### A — *Irreconcilable judgments*

9. Article 27 (3) provides that a judgment is not to be recognized if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought. That definition is clearly wider than the concept of *res judicata*. Should there be any possible doubt on that point it would be sufficient to compare paragraph (3) of Article 27 with paragraph (5), which requires recognition to be refused where the judgment is irreconcilable with a judgment given in a non-Contracting State involving the same cause of action and between the same parties, which are the traditional criteria for *res judicata*. What, then, are the characteristic elements of irreconcilability for the purposes of Article 27 (3)?

10. Any approach based on the substantive content of judgments runs the risk of leading to an unduly restrictive result. For example, two judgments may be based on divergent reasoning without their effects being irreconcilable. For an example, I need only refer to the case where an appellate court upholds the judgment at first instance on different grounds, that is, on the basis of a different or even diametrically opposed legal reasoning.

11. In my view irreconcilability should therefore be sought at the level of the legal effects which recognition of the judgment would produce in the State of enforcement. More specifically, the question to be determined is whether the combined effects of the two judgments would lead to a contradiction incompatible with the logical consistency of the legal order of the State in which enforcement is sought.

12. A few examples, some fictitious and some taken from the judgments of national courts, will serve as illustrations of the solution which I am proposing. Thus a judgment ordering performance of a contract is clearly irreconcilable with a judgment declaring the contract invalid. [3] Similarly it would seem that a judgment granting a divorce and containing a maintenance order in favour of the ex-wife would be irreconcilable with a judgment refusing recognition of that judgment. [4] The

2 — Judgment of 2 July 1985 in Case 148/84 *Deutsche Genossenschaftsbank* v *Brasserie du Pêcheur* ((1985)) ECR 1981, at paragraph 18.

3 — See Jenard Report, Official Journal 1979, C 59, 5 March 1979, at p. 45.

4 — Oberlandesgericht, Hamm, judgment of 29 July 1981, *Digest of case-law relating to the European Communities*, D Series, I-27 — B 3.

same is not the case, however, with a judgment ordering a purchaser to pay the purchase price and a judgment ordering the vendor to pay compensation for hidden defects, because the two judgments are not contradictory and the amounts may be set off. [5]

13. I therefore think that it is for the court before which enforcement is sought to evaluate each individual case in the light of its own legal system.

14. In this instance the German maintenance order logically presupposed that the parties were married and that legal situation was terminated by the subsequent Netherlands judgment. The dissolution of the marriage takes effect only for the future and cannot call into question the automatic recognition enjoyed by the German order in the Netherlands as soon as it has become effective in the Federal Republic of Germany. The fact that that order was prior to the decree of divorce establishes that there was indeed a period during which the husband was liable to pay maintenance. In that regard the situation is no different from that under national law where a husband is ordered to pay maintenance and then obtains a divorce. The ex-husband clearly cannot rely on the decree of divorce as a ground for refusing the payment of maintenance for the period separating the two judgments.

15. I shall therefore take it to be an essential factor in favour of reconcilability that there was a period prior to the divorce when the maintenance could be enforced; as a result the ground set out in Article 27 (3) can be held inapplicable and an order for enforcement granted. The abstract approach suggested by the Commission, which is to say that the decisions are reconcilable in themselves without considering what would be their combined effects within a given legal sytem, is not consistent in my view with Article 27 (3). The irreconcilability of judgments for the purposes of that provision must be assessed in the specific context according to the criterion of legal consistency in the State in which enforcement is sought.

B — *Public policy*

16. Under the terms of Article 27 (1), a judgment is not to be recognized if it is contrary to public policy. I do not think it necessary to suggest a reply on the application of that provision to this case; clearly it is for the national courts alone to define the scope of public policy.

17. Thus I shall confine myself to making two general remarks with regard to Article 27 (1):

(a) within the scheme of the Convention, that clause is intended to apply only in exceptional cases, [6] which will be all the rarer in that from a statistical point of view judgments in property matters are unlikely to raise issues of public policy;

(b) it should be specified that the meaning of that provision is that the question is not whether a judgment is itself contrary to public policy but whether its recognition or an order for its enforcement would have that effect. That is an application of the doctrine known as the 'diluted effect of public policy', [7] according to which a national

5 — French Cour de cassation, judgment of 3 November 1977 *Sofraco* v *Pluimvee*, Digest, D Series, I-27.3 — B 1.

6 — See Jenard Report, ibid, at p. 44; M. Weser, *Convention communautaire sur la compétence judiciaire d'exécution des décisions*, Centre international de droit comparé, Brussels, 1975, p. 330.

7 — Gothot and Holleaux, *La Convention de Bruxelles du 27 septembre 1968*, Paris, 1985, No 256, p. 146.

court may order the enforcement of a judgment which it could not have delivered itself.

## II — The effects of a judgment which has been recognized (Questions 1 and 2 submitted by the Hoge Raad)

18. In so far as they ask for a ruling on the scope of a judgment which has been recognized, I shall be examining the first two questions jointly.

19. In the main proceedings there is a fundamental difference between the German and Netherlands legal systems as to the existence of the divorce and the correlative extinction of the duty to pay maintenance. It is therefore essential to ascertain whether the effects of a judgment which has been recognized are to be determined by the law of the State of origin or the law of the State in which enforcement is sought.

20. As G. A. L. Droz points out,[8] the Convention is silent on that point. The Jenard Report explains:[9] 'Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given'; it further states:[10] 'Article 31 does not purport to determine whether it is the judgment given in the State of origin, or the decision authorizing the issue of the enforcement order, which is enforceable in the State in which enforcement is sought'. I agree with G. A. L. Droz[11] that a dual limit should be imposed: the judgment cannot have greater effects in the State in which enforcement is sought than it would have in the State in which it was delivered, nor can it produce greater effects than similar local judgments would. That second limitation is founded on the need to harmonize interpretations and the desirability of preventing excessive recourse to the public policy exception.

21. I shall now try to ascertain the consequences of the approach which has been advocated in situations analogous to that in the main proceedings. First of all, it cannot be for the court before which enforcement is sought to determine the practical effects of a judgment which has been recognized; it must confine itself to authorizing or refusing its enforcement. The power to order partial enforcement is restricted to the two cases set out in Article 42 of the Convention: where enforcement is limited to certain heads of the application, which logically requires that they may be separated,[12] or where the applicant requests partial enforcement. If, however, it is sought, as in this case, to determine the period during which the judgment which has been recognized is applicable, I think that it is then for the court dealing with execution to spell out the practical consequences of the authorization of enforcement previously granted in the court where enforcement was sought. In my view that approach is dictated by the need to avoid extensive application of Article 42, which would present the obvious risk of a review of the substance, contrary to the express wording of Article 29.

22. On the other hand it does not seem to me in any way contrary to the Convention for the court dealing with execution to seek to discover, applying its own national law — in accordance with the principles laid down by the Court in *Deutsche Genossenschaftsbank*[13] — how the effects of the judgment which has been recognized can best be combined or reconciled with the effects of another measure of enforcement granted in the State in which execution is

8 — *Compétence judiciaire et effets des jugements dans le marché commun*; No 440, p. 276.

9 — Official Journal 1979, C 59, 5 March 1979, at p. 43.

10 — Ibid., p. 49.

11 — Op. cit., No 448, p. 280.

12 — Droz, op. cit., No 584, p. 373.

13 — Cited above.

sought, as it would in the case of two national judgments. At all events, the Convention cannot lead to the result that a court in the State in which execution is sought is precluded from giving effect to a national judgment on the ground that it has not been recognized in the State in which the judgment to be executed was given.

23. According to the scheme of the Convention, recognition and the order for enforcement of a judgment have the effect of transposing the effects of that judgment into the legal system of other Contracting States. This does not of itself enable the legal system of the State of origin to take precedence over that of the State of execution by subjecting the execution of judgments given in the latter State within its own territory to the requirement of prior recognition in the legal system of the former. In the circumstances of this case such a requirement would effectively subordinate if not negate the Netherlands legal system. The Convention requires Contracting States to ensure the 'free movement' and execution of judgments in property matters but cannot on that account call into question the effect of national judicial decisions.

24. I am therefore unable to share the approach taken by the Commission, which would in practice make the legal effectiveness of a Netherlands decree of divorce in the Netherlands dependent on its recognition in the Federal Republic of Germany. It is not a question of recognizing the divorce in that State but simply of drawing the necessary conclusions in the Netherlands where it was granted. Accordingly, the maintenance order must, like an analogous Netherlands judgment, be taken in conjunction in the State where execution is sought with the effects following from the divorce.

25. The solution which I am proposing would seem consistent with the logic of the Convention. The Convention provides that recognition or an order for enforcement is to be refused if the judgment given in another Contracting State is irreconcilable with a judgment given in the State where its enforcement is sought. Where that is not the case, the foreign judgment, being 'naturalized' by the order for enforcement — to use the terminology adopted by Premier Président Bellet [14] — is incorporated into the national legal system in which it is to be executed, taking effect in conjunction with any national judgment. It would be no different in the case of two national enforceable instruments. If I may use a metaphor: where the Convention is intended to ensure the 'free movement of judgments', my analysis, *mutatis mutandis*, is the expression of the rule of 'national treatment'.

## III — Objection to execution (Questions 4 and 5 submitted by the Hoge Raad)

26. The Hoge Raad has asked in essence the following question. Can the party against whom the order for enforcement was granted rely, in proceedings relating to execution, on grounds which would have been sufficient to prevent its being granted but which that party failed to put forward in proceedings relating to the order for enforcement within the period laid down by Article 36 of the Convention?

27. The appeal provided for by Article 36 must be brought, according to the circumstances, within one or two months from service of the order authorizing enforcement. The appeal must be lodged with a court specified in Article 37 for each Contracting State. The judgment given on the appeal may be contested only by the procedure laid down for each State by the second paragraph of Article 37. Lastly, in any event it is only the grounds set out in Article 27 that may be adduced. Indeed the issue in this case is precisely whether it is possible to rely on one of those grounds outside the procedural system laid down by the Convention.

14 — *Revue trimestrielle de droit européen*, 1975, p. 41.

28. I should say at once that such a possibility, which would amount to allowing a defence to execution by means of an objection of non-recognition, would seem contrary to the scheme of the Convention as interpreted in the judgments of the Court. In its judgments in *Brennero*[15] and *Deutsche Genossenschaftsbank*, the Court made it clear that the rights of appeal provided for by the Convention, which constitutes an autonomous and complete system, cannot be given effect outside the terms of its provisions or 'complemented' by the provisions of national law.

29. In its judgment in *Brennero*, the Court stated:

'The second paragraph of Article 37 provides that the judgment given on the appeal may be contested only by an appeal in cassation . . . Under the general scheme of the Convention, and in the light of one of its principal objectives which is to simplify procedures in the State in which enforcement is sought, that provision cannot be extended so as to enable an appeal in cassation to be lodged against a judgment other than that given on the appeal.'[16]

That passage makes it clear that since the Convention is intended to facilitate the procedure for recognition and enforcement, the rights of appeal for which it provides cannot be exercised outside the framework expressly laid down by Article 36 and those immediately following. It would be to disregard that rule to rely on grounds contained in the Convention in proceedings subsequent to the order for enforcement. Merely to hold a submission based on the grounds for non-recognition admissible in proceedings relating to execution would be to accept that it is possible to challenge the order for enforcement even though it had become definitive on the expiry of the period laid down by Article 36.

30. Furthermore, the Court expressed itself in particularly clear terms in its judgment in *Deutsche Genossenschaftsbank* when it said:

'The Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is sought . . . '.[17]

31. In my view that principle is the logical corollary of the previous one in the sense that it creates a watertight partition between the Convention and national law. The former deals with recognition and orders for enforcement by laying down an exhaustive list of the rights of appeal which are available. Execution is governed solely by the latter. The logic of that framework precludes the possibility of lifting a particular ground of appeal out of the Convention and using it outside the scheme of its provisions. The system of the Convention necessarily means that any such 'transplant' would be rejected.

32. I should, however, define carefully the extent of that rule. The expiry of the period for appealing does indeed remove the right to rely on the grounds provided for by the Convention. Nevertheless it does not negate the underlying factual situation, namely the situation which, from a legal point of view, corresponds to the provisions in question. After all, that is merely a logical consequence of the classical distinction between the legal rule and the operative event.

33. Thus the irreconcilability of judgments can no longer be argued under Article 27 (1) before the court dealing with execution. However, the situation which might have been characterized by that provision — in this instance the existence of a divorce — is not thereby affected. The decree of divorce is an established fact in the Netherlands

15 — Case 258/83 *Brennero* v *Wendel* [1984] ECR 3971.

16 — At paragraph 15 of the decision.

17 — Cited above, at paragraph 18 of the decision.

legal system. For that reason there is nothing to prevent it from being relied upon in support of any objection which national law makes available against execution. Indeed, the Court stated as much in its judgment in *Deutsche Genossenschaftsbank* when, after pointing out that the Convention did not touch on execution proper, it went on:

'... interested third parties may contest execution by means of the procedures available to them under the law of the State in which execution is levied' [17].

34. This does not necessarily make irrelevant the last question submitted by the Hoge Raad, which asks whether the court of the State in which execution is sought is required to apply of its own motion the rule that a submission pleading grounds contained in the Convention is inadmissible in proceedings against execution. The commentators [18] point out that, until the final stage in the negotiations, the application of the Convention of a court's own motion was provided for in Article 1 and that its absence from the final text was the result of translation difficulties in one of the Contracting States. The Jenard Report, which refers to the binding nature of the Convention, [19] states:

'[The Convention] applies automatically ... It was decided by the committee of experts that the Convention should apply automatically'.

35. In its judgment in *De Wolf*, [20] the Court did not fail to point out that the system instituted by the Convention precluded recourse to any other procedure and hence did not permit a request for a new judgment on the substance in the State in which execution was sought.

36. Reliance on one of the grounds contained in Article 27 outside the framework laid down by Articles 36 *et seq.* would seriously prejudice the autonomous and complete character of the provisions of the Convention. The inadmissibility which must operate as a bar to such a practice constitutes a sanction guaranteeing the balance of the mechanism instituted by the Convention. By the same token, its application by a national court of its own motion would appear to be the logical and necessary corollary of the rule requiring recourse to the Convention wherever it is sought to obtain recognition or an order for enforcement of a judgment. As is stated in the Jenard Report,

'The courts [of the Contracting States] must apply the rules of the Convention whether or not they are pleaded by the parties'. [21]

37. Even though I have thought it necessary to examine all the questions submitted to the Court, I propose that in its reply to the Hoge Raad the Court address only the issues of law relevant to the determination of the main proceedings. In view of the fact that the proceedings before the Hoge Raad relate to execution, the questions of recognition and enforcement already being definitively settled, I propose that the Court rule as follows:

17 — Cited above, at paragraph 18 of the decision.

18 — See in particular Droz, op. cit., Nos 426 *et seq.*, p. 264.

19 — Cited above, at p. 656, Official Journal [1979] C 59.

20 — Case 42/76 *de Wolf* v *Cox* [1976] ECR 1759.

21 — Cited above, at p. 656.

'The effects of a judgment recognized by virtue of the Convention of 27 September 1968 cannot go beyond those which a similar national judgment would have in the State in which execution is sought. Where necessary it is solely for the court dealing with execution to define those effects, if need be by combining the effects of the judgment which has been recognized with those of a national judgment. Grounds for non-recognition based on Article 27 of the Convention cannot be pleaded outside the framework defined by Articles 36 *et seq.* The inadmissibility of a submission based on such grounds, which must be declared by the court of the State in which execution is sought of its own motion even if its national law does not provide for such a possibility, does not preclude a party from relying on the facts or the situation which might have been covered by such grounds in exercising any other right of appeal against execution provided for by national law'.