JUDGMENT OF THE COURT (SECOND CHAMBER)
12 JULY 1984 [1]

# Firma P. v Firma K.
# (reference for a preliminary ruling from the Oberlandesgericht Frankfurt am Main)

(Brussels Convention of 27 September 1968
Issue of an order for enforcement)

**Case 178/83**

*Convention on Jurisdiction and the Enforcement of Judgments — Enforcement — Appeal against dismissal of an application for enforcement — Obligation to hear the party against whom enforcement is sought — Scope*

*(Convention of 27 September 1968, Article 40, second paragraph)*

The Court hearing an appeal by the party seeking enforcement is required to hear the party against whom enforcement is sought, pursuant to the first sentence of the second paragraph of Article 40 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, even though (a) the application for an enforcement order was dismissed simply because documents were not produced at the appropriate time and (b) the enforcement order is applied for in a State which is not the State of residence of the party against whom enforcement is sought.

In Case 178/83

REFERENCE to the Court, under Article 1 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, from the Oberlandesgericht [Higher Regional Court] Frankfurt am Main for a preliminary ruling in the proceedings pending before that court between

1 — Language of the Case: German.

FIRMA P.

and

FIRMA K.

on the interpretation of Article 40 of the Convention of 27 September 1968,

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of chamber, P. Pescatore and O. Due, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

gives the following

# JUDGMENT

## Facts and Issues

The facts of the case, the course of the procedure and the observations submitted by the parties may be summarized as follows:

### I — Facts and procedure

By judgment in default given by the Arrondissementsrechtbank [District Court], Rotterdam, on 20 January 1982, Firma K., the defendant in the main proceedings, was ordered to pay the sum of 678 095 Saudi riyals to Firma P.

By letter of 28 May 1982, Firma P. requested the Landgericht [Regional Court] Frankfurt am Main to issue an order for the enforcement in the Federal Republic of Germany of that judgment in default, so that execution could be levied against the defendant's bank account in Frankfurt am Main.

By judgment of 10 January 1983, the Landgericht Frankfurt am Main dismissed that application on the ground that the documents required by Articles 46 (2) and 47 (1) of the Brussels Convention of 1968 had not been

produced. The Landgericht observed that, under the abovementioned provisions, it is necessary, in the case of a judgment given in default, to produce documents proving that the writ was served and that the judgment is enforceable according to Netherlands law and has been served on the party in default. The court held that the documents produced by the applicant in the main proceedings did not meet those requirements.

The applicant lodged an appeal against the judgment before the Oberlandesgericht Frankfurt am Main, in support of which it produced additional documents which, in its view, established that the writ and judgment in default had been served in the proper manner.

Considering that the outcome of the proceedings depended upon the interpretation to be given to Article 40 of the Brussels Convention of 27 September 1968, the Oberlandesgericht stayed the proceedings and referred the following question to the Court of Justice:

"Is the appellate court required to hear the party against whom enforcement is sought under the first sentence of the second paragraph of Article 40 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters if (a) the application for an enforcement order was dismissed simply because documents were not produced at the appropriate time and (b) the enforcement order is applied for in a State which is not the State of residence of the party against whom enforcement is sought, so that the latter person will normally be able to establish against which asset (in the present case: a claim against a bank) enforcement is to take place in that State and thus be in a position to dispose of that asset before execution is levied?"

In the grounds of its decision, the national court states that, so far as service is concerned, it must suffice that service was effected according to the rules of the State in which judgment was given or according to any other rules applying between that State and the State in which the judgment debtor is resident. Next, analysing the system introduced by Articles 34 and 40 of the Brussels Convention, it considers that the purpose of the rule contained in Article 34 is to ensure the element of surprise which is vital for the efficacy of an application for enforcement. As for the second paragraph of Article 40, which provides that the party against whom enforcement is sought must be summoned to appear before the appellate court, it lays down a rule which appears acceptable when enforcement is to take place in the State in which the judgment debtor is resident, since he is then unable to identify the asset against which enforcement will take place and will as a rule be unable to act in good time to remove all his assets and prevent execution. However, according to the national court, the position is different where execution is to be levied in the State in which the garnishee is resident. For that reason it considers it necessary, in the interests of the efficacy of the proposed measure, to refrain from giving the judgment debtor a prior opportunity to be heard, at least where the application for an enforcement order failed only because the necessary documents were not all produced at the appropriate time. That approach seems to the Oberlandesgericht to be legally justifiable as a result of the combined provisions of Articles 34 and 40 of the Brussels Convention. Thus the enforcement order would be granted but the defendant would retain the right to object to enforcement within a specified period in subsequent proceedings before the same court.

The order of the Oberlandesgericht Frankfurt am Main was lodged at the Court Registry on 18 August 1983.

In accordance with Article 5 (1) of the Protocol of 3 June 1971 and Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 3 October 1983 by the applicant in the main proceedings, represented by Messrs Metz and Bandisch, Rechtsanwälte, Bremen, on 24 October 1983 by the Commission of the European Communities, represented by E. Zimmermann, its Legal Adviser, acting as Agent, assisted by W. D. Krause-Ablass, Rechtsanwalt, Düsseldorf, and on 9 November 1983 by the Government of the Federal Republic of Germany, represented by C. Böhmer, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and to assign the case to the Second Chamber. However, it asked the applicant in the main proceedings to reply in writing by 1 March 1984 to the following questions:

1. Did the Landgericht specify (under Article 48 of the Convention) a time for the production by the applicant of the documents referred to in Articles 46 (2) and 47 (1) of the Convention?

2. Has the applicant at this stage of the proceedings produced equivalent documents?

3. What are the additional documents which were produced by the applicant in support of its appeal and which, in its view, show that the writ and judgment in default were served in the proper manner?

## II — Summary of the written observations submitted to the Court

*The applicant in the main proceedings* states that it wholly endorses the view taken by the Oberlandesgericht and therefore submits that the Court should give a ruling to the same effect.

Contrary to the view taken by the Oberlandesgericht, the *Government of the Federal Republic of Germany* considers that the particular circumstances of the main proceedings do not make it unnecessary to summon the judgment debtor to appear, under the first sentence of the second paragraph of Article 40 of the Brussels Convention, as follows from the clear and unequivocal wording of that provision.

Indeed, Articles 31 *et seq.*, especially the first paragraph of Article 34, of the Brussels Convention, which permit a creditor to obtain an order for the enforcement of a judgment given in his favour in another Member State without the judgment debtor's being entitled to make any submisisons, constitute an exception to the general principle in the international sphere that a court must not give judgment without having heard the opposite party. Such an exception is justified by the fact that the judgment debtor has benefited sufficiently from the adversarial nature of the previous proceedings and ought at the end of those proceedings, to expect the enforcement procedure to ensue. The only condition imposed is that the documents specified in Article 47 of the Convention must be produced.

On the other hand, where those documents are not annexed to the application by the party applying the enforcement, doubts can arise as to the regularity of the procedure leading to the judgment. Under those circumstances, the hearing of the party against whom enforcement is sought no longer constitutes an unnecessary formality but serves to remove the uncertainty. Thus

the interpretation of the first sentence of the second paragraph of Article 40 of the Brussels Convention cannot, on grounds of legal certainty, depend upon the degree of doubt as to the regularity of the procedure leading to the judgment in this case.

It might admittedly be unncessarily formalistic to deprive the applicant in the main proceedings of the element of surprise provided for by the procedure laid down in Article 34 of the Convention. However, the fact that the court may authorize the party applying for enforcement to produce the missing documents at a later date makes it possible to avoid inequitable consequences of that nature. Moreover, it is also open to the party applying for enforcement to obtain a protective attachment order pursuant to paragraphs 916 *et seq.* of the Zivilprozeßordnung [Code of Civil Procedure].

There is no good reason for making a distinction according to whether the judgment debtor is normally resident or has its registered office in the State in which enforcement is sought or in another State.

Consequently, the German Government concludes that the question submitted by the national court should be answered as follows:

"The appellate court is required to hear the party against whom enforcement is sought under the first sentence of the second paragraph of Article 40 of the Convention, even if the application for an enforcement order was dismissed simply because documents were not produced at the appropriate time. The answer is the same where the enforcement order is applied for in a State which is not the State of residence of the party against whom enforcement is sought."

The *Commission* asks first whether a preliminary question not containing the name or address of the parties to the dispute complies with the rules of procedure of the Court of Justice. Indeed, in its view, it follows from Article 20 of the Protocol on the Statute of the Court of Justice that the preliminary question is to be notified by the Registrar "to the parties". For that purpose, it is necessary that the name and address of the parties should be known to the Court of Justice; at present, only Firma P., the applicant, is a party. And as the order for reference states the name of his counsel, notice could have been sent to him, so that the provisions of Article 20 of the Statute have been complied with in that respect.

As regards the question whether the defendant in the main proceedings must also take part in the proceedings from now on, the Commission considers that, since that is the very question covered by the order for reference, the latter may be regarded as admissible in its present form.

In relation to the question asked by the Oberlandesgericht Frankfurt am Main, the Commission points out first that, according to the second paragraph of Article 40 of the Brussels Convention, the party against whom enforcement is sought must be summoned to appear before the appellate court; if he fails to appear, the provisions of the second and third paragraphs of Article 20 are to apply. According to the second paragraph of Article 20, the court in which the action is brought "shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end." The position is similar where, in accordance with the third paragraph of Article 20, the foregoing provisions are to be replaced by those of Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extra-judicial documents in civil or commercial matters.

The Commission concludes that it is clear from those provisions that there is to be no restriction on the defendant's participation in the appeal procedure. In its view, the appeal must therefore not be considered until it has been established that the defendant's right to be heard has been protected.

Pointing out that, at first instance, in order to preserve the element of surprise, proceedings for an enforcement order take place without the participation of the party against whom enforcement is sought, the Commission submits that by contrast the participation of that party is of special importance in the appeal procedure provided for in Article 40. The Jenard Report states that "upon appeal the proceedings are contentious, since the party against whom enforcement is sought is summoned to appear". That is justified by the fact that "the inter-party procedure is necessary in order to avoid numerous appeals" and "the dismissal of the application reserves the presumption of validity of the foreign judgment".

According to the Commission, it follows from the observations set out in the Jenard Report that it is essential that in the procedure on appeal the party against whom enforcement is sought should be summoned to appear, since it is the final appeal as regards questions of fact. There can be no restriction on the defendant's right to be heard.

The Commission also submits that it is clear from the Jenard Report that the dismissal of the application at first instance on the ground that the necessary documents were not produced was considered in the discussions concerning the drafting of Article 40; however, the Contracting States did not think it necessary, in order to ensure the element of surprise, to provide for any restriction of the participation of the party against whom enforcement is sought in the procedure on appeal.

Finally, according to the Commission, such restrictions on the defendant's right to a fair hearing, in order to ensure the element of surprise, also seem unnecessary on the following practical grounds:

First, in the event of failure to produce the necessary documents, the court can specify a time-limit in order to avoid the problems referred to in the order for reference; if the application were nevertheless to be dismissed on the ground that the necessary documents had not been produced, the applicant could in general preserve the element of surprise by obtaining provisional or protective measures, which do not require the appearance of the judgment debtor. Thus the German rules of procedure provide for a protective attachment order without an oral hearing under paragraphs 917 and 922 of the Code of Civil Procedure, where there is reason to fear that, in the absence of such an order, the enforcement of a judgment will be impossible or at least very difficult.

Consequently, the Commission suggests that the question referred to the Court should be answered as follows:

"In proceedings on an appeal under Article 40 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the provisions of the second paragraph of Article 40 on the summoning of the party against whom enforcement is sought must be applied even where the application for an enforcement order was dismissed simply because documents were not produced at the appropriate time and the enforcement order is applied for in a State which

is not the State of residence of the party against whom enforcement is sought."

III — Written replies of Firma P. to the questions put by the Court

*1. First question*

The Landgericht gave Firma P. one month to produce the documents, referred to in Articles 46 (2) and 47 (1) of the Convention.

*2. Second question*

Firma P. produced the originals and German translations of the following documents:

(a) letter of 21 April 1982 from the Ministry of Foreign Affairs at The Hague,

(b) letter of 08.07. 1402 H from the Central Post Office of the Kingdom of Saudi Arabia,

(c) letter of 6 July 1982 from the Public Prosecutor's Office, Rotterdam,

(d) letter of 18 May 1982 from the Public Prosecutor's Office, Rotterdam.

Firma P. also sent to the Landgericht a letter from Mr Osse, a lawyer in the Netherlands, certifying that, together with the judgment and the statement of claim, those were the only items in the case file of the Arrondissementsrechtbank, Rotterdam.

*3. Third question*

In support of its appeal the plaintiff produced the following further documents:

(a) the statement of claim together with a German translation,

(b) a certified copy of the judgment given by the Arrondissementsrechtbank, Rotterdam, on 20 January 1982, together with translations in German and Arabic,

(c) the letters of 18 May 1982 and 6 June 1982 from the Public Prosecutor's Office at Rotterdam, which had already been produced to the Landgericht, and the certificate of registration from the Post Office of Saudi Arabia, together with German translations of all three,

(d) the letter of 6 October 1981 from the Ministry of Foreign Affairs at The Hague, with a German translation,

(e) the letter of 17 September 1981 from the Netherlands Embassy in Jeddah, together with a translation.

IV — Oral procedure

At the sitting on 22 March 1984, Mr Krause-Ablass, for the Commission, presented oral argument and replied to questions put by the Court and the Advocate General.

The Advocate General delivered his opinion on 30 May 1984.

## Decision

1 By an order of 12 August 1983, which was received at the Court Registry on 18 August 1983, the Oberlandesgericht [Higher Regional Court] Frankfurt am Main referred to the Court of Justice for a preliminary ruling under Articles 2 (2) and 3 (2) 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 Convention") a question on the interpretation of the first sentence of the second paragraph of Article 40 of the Convention.

2 That question was raised in the course of litigation between Firma P. (hereinafter referred to as "the plaintiff") and Firma K. (hereinafter referred to as "the defendant"); it concerns the necessity or otherwise of summoning the defendant to appear before the Oberlandesgericht in proceedings for the enforcement of a default judgment given on 20 January 1982 by the Arrondissementsrechtbank, Rotterdam.

3 By that judgment the defendant was ordered to pay to the plaintiff the sum of 678 095 Saudi riyals or the equivalent of that sum in US dollars, together with interest as required by law. On the ground that the defendant had a bank account in Frankfurt am Main, the plaintiff applied to the Landgericht [Regional Court] Frankfurt am Main for an order for the enforcement of the judgment.

4 By an order made on 10 January 1983 without the defendant's having been summoned to appear, the President of the Third Civil Division of that court dismissed the application on the ground that the plaintiff had failed to produce the documents required by Article 46 (2), namely:

"The original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings,"

and by Article 47 (1) of the Convention, namely:

"Documents which establish that, according to the law of State in which it has been given, the judgment is enforceable and has been served."

5 The plaintiff appealed against that order to the Oberlandesgericht; in support of its appeal it produced supplementary documents which, in its view, showed that the statement of claim and the default judgment had been properly served.

6 Considering that the result of the proceedings before it depended on the interpretation of Article 40 of the Convention, the Oberlandesgericht stayed the proceedings and referred the following question to the Court of Justice:

"Is the appellate court required to hear the party against whom enforcement is sought under the first sentence of the second paragraph of Article 40 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters if (a) the application for an enforcement order was dismissed simply because documents were not produced at the appropriate time and (b) the enforcement order is applied for in a State which is not the State of residence of the party against whom enforcement is sought, so that the latter person will normally be able to establish against which asset (in the present case: a claim against a bank) enforcement is to take place in that State and thus be in a position to dispose of that asset before execution is levied?"

7 Article 40 of the Convention provides that:

"The party against whom enforcement is sought shall be summoned to appear before the appellate court. If he fails to appear, the provisions of the second and third paragraphs of Article 20 shall apply even where he is not domiciled in any of the Contracting States."

8 It should be noted that the wording of that article does not provide for any exception.

9 The Oberlandesgericht none the less asks whether such an exception should be acknowledged to exist by reason of the fact that, on the one hand, the Landgericht dismissed the application for an enforcement order for the sole reason that the documents were not produced by the plaintiff at the proper time and, on the other hand, the system postulated by Article 40 is unsuited to this case since enforcement is to take place in a State which is not the State of domicile of the party against whom it is sought.

10 In the context of this case, the position taken by the Oberlandesgericht may be explained by the fact that, in order to fully safeguard the surprise effect of the enforcement proceedings at that level, the Landgericht could have gone further in its examination of the case and sought to obtain the information which was lacking in order to arrive at a decision on the substance of the case.

11 It is nonetheless true that the Convention formally requires that both parties should be given a hearing at the appellate level, without regard to the scope of the decision in the lower court. That provision is in accordance with the spirit of the Convention, which seeks to reconcile the necessary surprise effect in proceedings of this nature with respect for the defendant's right to a fair hearing (see the judgment of the Court of 21. 5. 1980, Case 125/79, *Denilauler* v *Couchet Frères*, [1980] ECR 1553). That is why the defendant is not entitled to be heard in the lower court, whereas on appeal he must be given a hearing. There can be no exception to that rule in a situation where, for reasons which may be ascribed to the plaintiff, the lower court has dismissed an application for enforcement on purely formal grounds. There is no ground for approaching this matter differently according to whether the defendant's habitual residence or registered office is in the State where enforcement is sought or in another State.

12 As a result, the reply to the question referred by the national court should be that the court hearing an appeal by a party seeking enforcement is required to hear the party against whom enforcement is sought, pursuant to the first sentence of the second paragraph of Article 40 of the Convention, even though the application for an enforcement order was dismissed simply because documents were not produced at the appropriate time and the enforcement order is applied for in a State which is not the State of residence of the party against whom enforcement is sought.

## Costs

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

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the Oberlandesgericht Frankfurt am Main by order of 12 August 1983, hereby rules:

**The court hearing an appeal by the party seeking enforcement is required to hear the party against whom enforcement is sought, pursuant to the first sentence of the second paragraph of Article 40 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, even though the application for an enforcement order was dismissed simply because documents were not produced at the appropriate time and the enforcement order is applied for in a State which is not the State of residence of the party against whom enforcement is sought.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 12 July 1984.

For the Registrar

H. A. Rühl

Principal Administrator

K. Bahlmann

President of the Second Chamber

## OPINION OF MR ADVOCATE GENERAL DARMON DELIVERED ON 30 MAY 1984 [1]

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

1. The preliminary question which has been referred to you concerns the interpretation of the first sentence of the second paragraph of Article 40 of the Brussels Convention of 27 September 1968, hereinafter referred to as "the Convention".

Let us recall the facts and the course of the procedure.

On 20 January 1982 the Netherlands firm P. obtained a default judgment from the Arrondissementsrechtbank, Rotterdam, ordering the firm K., whose registered office is in Jeddah, Saudi Arabia, to pay it the sum of 678 095 Saudi riyals or the equivalent of that sum

1 — Translated from the French.