European Court of Justice, 9 December 2003, Gasser v Misat

LITIGATION

Lis pendens

• **Article 21 is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom**

That Article 21 of the Brussels Convention, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention, which is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. In those circumstances, in view of the disputes which could arise as to the very existence of a genuine agree-ment between the parties, expressed in accordance with the strict formal conditions laid down in Article 17 of the Brussels Convention, it is conducive to the legal certainty sought by the Convention that, in cases of lis pendens, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention. It is clear from the wording of Article 21 of the Conven-tion that it is for the court first seised to pronounce as to its jurisdiction.

Delaying tactics

• **Delaying tactics do not justify interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose.**

The difficulties stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose.

Excessive delays

• **Excessive delays would be mani-festly contrary both to the letter and spirit and to the aim of the Convention.**

An interpretation of Article 21 of the Brussels Convention whereby the application of that article should be set aside where the court first seised belongs to a Member State in whose courts there are, in general, excessive delays in dealing with cases would be mani-festly contrary both to the letter and spirit and to the aim of the Convention.

Based on trust

• **Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions.**

It must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corol-lary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.

Source: curia.europa.eu

European Court of Justice, 9 December 2003

(V. Skouris, P. Jann, C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues, A. Rosas, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen, F. Macken, N. Colneric and S. von Bahr)

JUDGMENT OF THE COURT (Full Court)

9 December 2003 (1)

(Brussels Convention - Article 21 - Lis pendens - Article 17 - Agreement conferring jurisdiction - Obligation to stay proceedings of court second seised designated in an agreement conferring jurisdiction - Excessive duration of proceedings before courts in the Member State of the court first seised)

In Case C-116/02,

REFERENCE to the Court under 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 Oberlandesgericht Innsbruck (Austria) for a preliminary ruling in the proceedings pending before that court between

Erich Gasser GmbH

and

MISAT Srl,

on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968, as amended by the Convention of 9 October 1978 on 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 - amended text - p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 Novem-

ber 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1),

THE COURT (Full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas (Presidents of Chambers), D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen (Rapporteur), F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: P. Léger,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- Erich Gasser GmbH, by K. Schelling, Rechtsanwalt,
- MISAT Srl, by U.C. Walter, Rechtsanwältin,
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by O. Fiumara, Vice Avvocato Generale dello Stato,
- the United Kingdom Government, by K. Manji, acting as Agent, and by D. Lloyd Jones QC,
- the Commission of the European Communities, by A.-M. Rouchaud-Joët and S. Grünheid, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Erich Gasser GmbH, the Italian Government, the United Kingdom Government and the Commission at the hearing on 13 May 2003,

after hearing the **Opinion of the Advocate General** at the sitting on 9 September 2003,

gives the following

Judgment

1. By judgment of 25 March 2002, received at the Court on 2 April 2002, the Oberlandesgericht (Higher Regional Court) Innsbruck referred to the Court for a preliminary ruling under 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 (the Protocol), a number of questions on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968, as amended by the Convention of 9 October 1978 on 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 - amended text - p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) (the Brussels Convention or 'the Convention').

2. Those questions were raised in proceedings between Erich Gasser GmbH ('Gasser'), a company incorporated under Austrian law, and MISAT Srl ('MISAT'), a company incorporated under Italian law, following a breakdown in their business relations.

Legal background

3. The aim of the Convention, according to its preamble, is to facilitate the reciprocal recognition and enforcement of judgments in accordance with Article 293 EC and to strengthen the legal protection of persons established in the Community. The preamble also states that it is necessary for that purpose to determine the international jurisdiction of the courts of the Contracting States.

4. The provisions on jurisdiction are contained in Title II of the Brussels Convention. Article 2 of the Convention lays down the general rule that the courts in the State in which the defendant is domiciled are to have jurisdiction. Article 5 of the Convention provides, however, that in matters relating to a contract the defendant may be sued in the courts for the place where the obligation which the action seeks to enforce was or should have been performed.

5. Article 16 of the Convention lays down rules governing exclusive jurisdiction. In particular, pursuant to Article 16(1)(a), in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated are to have exclusive jurisdiction.

6. Articles 17 and 18 of the Convention deal with the attribution of jurisdiction.

Article 17 is worded as follows:

'If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

...

Agreements ... conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15 [insurance and consumer contracts], or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

...'

7. Article 18 provides:

'Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16.'

8. The Brussels Convention also seeks to obviate conflicting decisions. Thus, under Article 21, concerning lis pendens:

'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

9. Finally, in relation to recognition, Article 27 of the Convention provides:

'A judgment shall not be recognised:

...

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.'

10. According to the first paragraph of Article 28 of the Convention, '[m]oreover, a judgment shall not be recognised if it conflicts with the provisions ... [concerning insurance and consumer contracts and the matters referred to in Article 16]'.

The main proceedings and the questions referred to the Court

11. The registered office of Gasser is in Dornbirn, Austria. For several years it sold children's clothing to MISAT, of Rome, Italy.

12. On 19 April 2000 MISAT brought proceedings against Gasser before the Tribunale Civile e Penale (Civil and Criminal District Court) di Roma seeking a ruling that the contract between them had terminated ipso jure or, in the alternative, that the contract had been terminated following a disagreement between the two companies. MISAT also asked the court to find that it had not failed to perform the contract and to order Gasser to pay it damages for failure to fulfil the obligations of fairness, diligence and good faith and to reimburse certain costs.

13. On 4 December 2000 Gasser brought an action against MISAT before the Landesgericht (Regional Court) Feldkirch, Austria, to obtain payment of outstanding invoices. In support of the jurisdiction of that court, the claimant submitted that it was not only the court for the place of performance of the contract, within the meaning of Article 5(1) of the Convention but was also the court designated by a choice-of-court clause which had appeared on all invoices sent by Gasser to MISAT, without the latter having raised any objection in that regard. According to Gasser, that showed that, in accordance with their practice and the usage prevailing in trade between Austria and Italy, the parties had concluded an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

14. MISAT contended that the Landesgericht Feldkirch had no jurisdiction, on the ground that the court of competent jurisdiction was the court for the place where it was established, under the general rule laid down in Article 2 of the Brussels Convention. It also contested the very existence of an agreement conferring jurisdiction and stated that, before the action was brought by Gasser before the Landesgericht Feldkirch, it had commenced proceedings before the Tribunale Civile e Penale di Roma in respect of the same business relationship.

15. On 21 December 2001, the Landesgericht Feldkirch decided of its own motion to stay proceedings, pursuant to Article 21 of the Brussels Convention, until the jurisdiction of the Tribunale Civile e Penale di Roma had been established. It confirmed its own jurisdiction as the court for the place of performance of the contract, but did not rule on the existence or otherwise of an agreement conferring jurisdiction, observing that although the invoices issued by the claimant systematically included a reference to the courts of Dornbirn under the heading 'Competent Courts', the orders, on the other hand, did not record any choice of court.

16. Gasser appealed against that decision to the Oberlandesgericht Innsbruck, contending that the Landesgericht Feldkirch should be declared to have jurisdiction and that proceedings should not be stayed.

17. The national court considers, first, that this is a case of lis pendens since the parties are the same and the claims made before the Austrian and Italian courts have the same cause of action within the meaning of Article 21 of the Brussels Convention, as interpreted by the Court of Justice (see, to that effect, Case 144/86 Gubisch Maschinenfabrik [1987] ECR 4861).

18. After noting that the Landesgericht Feldkirch had not ruled as to the existence of an agreement conferring jurisdiction, the national court raises the question whether the fact that one of the parties repeatedly and without objection settled invoices sent by the other even though those invoices contained a jurisdiction clause can be seen as acceptance of that clause, in accordance with Article 17(1)(c) of the Brussels Convention. The national court states that such conduct by the parties reflects a usage in international trade and commerce which is applicable to the parties and of which they are aware or are deemed to be aware. In the event of the existence of an agreement conferring jurisdiction being established, then, according to the national court, the Landesgericht Feldkirch alone has jurisdiction to deal with the dispute under Article 17 of the Convention. In those circumstances, the question arises whether the obligation to stay proceedings, provided for in Article 21 of the Convention, should nevertheless apply.

19. In addition, the national court asks to what extent the excessive and generalised slowness of legal proceedings in the Contracting State where the court first seised is established is liable to affect the application of Article 21 of the Brussels Convention.

20. It was in those circumstances that the Oberlandesgericht Innsbruck stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. May a court which refers questions to the Court of Justice for a preliminary ruling do so purely on the basis of a party's (unrefuted) submissions, whether they

have been contested or not contested (on good grounds), or is it first required to clarify those questions as regards the facts by the taking of appropriate evidence (and if so, to what extent)?

2. May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ["the Brussels Convention"], review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?

3. Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?

4. Do the legal consequences provided for by Italian Law No 89 of 24 March 2001 justify the application of Article 21 of the Brussels Convention even if a party is at risk of detriment as a consequence of the possible excessive length of proceedings before the Italian court and therefore, as suggested in Question 3, it would not actually be appropriate to proceed in accordance with Article 21?

5. Under what conditions must the court other than the court first seised refrain from applying Article 21 of the Brussels Convention?

6. What course of action must the court follow if, in the circumstances described in Question 3, it is not allowed to apply Article 21 of the Brussels Convention?

Should it be necessary in any event, even in the circumstances described in Question 3, to proceed in accordance with Article 21 of the Brussels Convention, there is no need to answer Questions 4, 5 and 6.'

The first question

21. By its first question, the national court seeks in essence to ascertain whether a national court may, under the Protocol, seek an interpretation of the Brussels Convention from the Court of Justice even where the national court is relying on the submissions of a party to the main proceedings, the merits of which it has not yet assessed.

22. In this case, the national court refers to the fact that the second question is based on the premiss, not yet confirmed by the trial judge, that an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention designates the court within whose jurisdiction Dornbirn is located as the court having jurisdiction to settle the dispute in the main proceedings.

23. It must be borne in mind in that connection that, in the light of the division of responsibilities in the preliminary-ruling procedure laid down by the Protocol, it is for the national court alone to define the subject-matter of the questions which it proposes to refer to the Court. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-220/95 Van den Boogaard [1997] ECR I-1147, paragraph 16; Case C-295/95 Farrell [1997] ECR I-1683, paragraph 11; Case C-159/97 Castelletti [1999] ECR I-1597, paragraph 14, and Case C-111/01 Gantner Electronic [2003] ECR I-4207, paragraphs 34 and 38).

24. However, the spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. In order to enable the Court to provide a useful interpretation of Community law, it is appropriate that the national court should define the legal and factual context of the interpretation sought and it is essential for it to explain why it considers that a reply to its questions is necessary to enable it to give judgment (see to that effect Gantner Electronic, cited above, paragraphs 35, 37 and 38).

25. According to the account of the facts given by the national court, the proposition that there may be an agreement conferring jurisdiction is not purely hypothetical.

26. Moreover, as has been emphasised both by the Commission and by the Advocate General in points 38 to 41 of his Opinion, the national court, before verifying the existence of a clause conferring jurisdiction within the meaning of Article 17 of the Brussels Convention and the existence of usage in international trade and commerce in that connection - a process which may necessitate delicate and costly investigations - considered it necessary to refer to the Court the second question, to establish whether the existence of an agreement conferring jurisdiction allows non-application of Article 21 of the Brussels Convention. If that question is answered in the affirmative, the national court will have to rule as to the existence of such an agreement conferring jurisdiction and, if the existence thereof is established, it will have to consider itself to have exclusive jurisdiction to give judgment in the main proceedings. Conversely, if the answer is in the negative, Article 21 of the Brussels Convention will have to apply, so that the question whether there is an agreement conferring jurisdiction will no longer be an issue with which the national court is concerned.

27. Consequently, the answer to the first question must be that a national court may, under the Protocol, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it

seeks a ruling from the Court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the Convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

The second question

28. By its second question, the national court seeks in essence to establish whether Article 21 of the Brussels Convention must be interpreted as meaning that, where a court is the second court seised and has exclusive jurisdiction under an agreement conferring jurisdiction, it may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction.

Observations submitted to the Court

29. According to Gasser and the United Kingdom Government, this question should be answered in the affirmative. In support of their interpretation, they rely on the judgment in **Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317**, in which it was held that it is 'without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof' that the Court held that Article 21 of the Brussels Convention was to be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised. According to Gasser and the United Kingdom Government, there is no reason to treat Articles 16 and 17 of the Convention differently in relation to the lis pendens rule.

30. The United Kingdom Government states that, whilst Article 17 comes below Article 16 in the hierarchy of the bases of jurisdiction provided for in the Brussels Convention, it nevertheless prevails over the other bases of jurisdiction, such as Article 2 and the special rules on jurisdiction contained in Articles 5 and 6 of the Convention. The national courts are thus required to consider of their own motion whether Article 17 is applicable and requires them, if appropriate, to decline jurisdiction.

31. The United Kingdom Government adds that it is necessary to examine the relationship between Articles 17 and 21 of the Brussels Convention taking account of the needs of international trade. The commercial practice of agreeing which courts are to have jurisdiction in the event of disputes should be supported and encouraged. Such clauses contribute to legal certainty in commercial relationships, since they enable the parties, in the event of a dispute, easily to determine which courts will have jurisdiction to deal with it.

32. Admittedly, the United Kingdom Government observes that, to justify the general rule embodied in Article 21 of the Brussels Convention, the Court held, in paragraph 23 of Overseas Union Insurance, that in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction. However, that reasoning is not applicable to cases in which the court second seised has exclusive jurisdiction under Article 17 of the Brussels Convention. In such cases, the court designated by the agreement conferring jurisdiction will, in general, be in a better position to rule as to the effect of such an agreement since it will be necessary to apply the substantive law of the Member State in whose territory the designated court is situated.

33. Finally, the United Kingdom Government concedes that the thesis which it defends might give rise to a risk of irreconcilable judgments. To avoid that risk, it proposes that the Court hold that a court first seised whose jurisdiction is contested in reliance on an agreement conferring jurisdiction must stay proceedings until the court which is designated by that agreement, and is the court second seised, has given a decision on its own jurisdiction.

34. MISAT, the Italian Government and the Commission, on the other hand, favour the application of Article 21 of the Brussels Convention and therefore consider that the court second seised is required to stay proceedings.

35. The Commission, like the Italian Government, considers that the derogation under which the court second seised has jurisdiction, on the ground that it enjoys exclusive jurisdiction under Article 16 of the Brussels Convention, cannot be extended to a court designated under a choice-of-court clause.

36. The Commission justifies the derogation from the rule laid down in Article 21, in the event of recourse to Article 16, by reference to the first paragraph of Article 28 of the Brussels Convention, according to which decisions given in the State of the court first seised in disregard of the exclusive jurisdiction of the court second seised, based on Article 16 of the Convention, cannot be recognised in any Contracting State. It would therefore be inconsistent to require, under Article 21 of the Convention, that the second court, which alone has jurisdiction, should stay proceedings and decline jurisdiction in favour of a court which has no jurisdiction. Such a course of action would result in parties obtaining a decision from a court lacking jurisdiction, which could not take effect in the Contracting State where it was given. In such circumstances, the aim of the Brussels Convention, which is to improve legal protection and for that purpose to ensure the cross-border recognition and enforcement of judgments in civil matters would not be attained.

37. The foregoing considerations do not apply, however, in the event of jurisdiction being conferred on the court second seised under Article 17 of the Brussels Convention. Article 28 of the Convention does not apply to the infringement of Article 17, which forms part of Section 6 of Title II of the Convention. A decision given in breach of the exclusive jurisdiction which the court second seised derives from a choice-of-court clause should be recognised and enforced in all the Contracting States.

38. The Commission also states that Article 21 of the Brussels Convention seeks not only to obviate irreconcilable decisions which, under Article 27(3) of the

Convention, are not recognised, but also to uphold economy of procedure, the court second seised being required initially to stay proceedings, and then to decline jurisdiction as soon as the jurisdiction of the Court first seised is established. That clear rule is conducive to legal certainty.

39. Referring to paragraph 23 of Overseas Union Insurance, the Commission considers that the court second seised is not in any circumstances in a better position than the court first seised to determine whether the latter has jurisdiction. In this case, the Italian Court is in as good a position as the Austrian Court to establish whether it has jurisdiction under Article 17 of the Brussels Convention, because, by virtue of commercial usage between Austria and Italy, the parties conferred exclusive jurisdiction upon the court in whose jurisdiction the registered office of the claimant in the main proceedings is located.

40. Finally, the Commission and the Italian Government observe that the jurisdiction referred to in Article 17 of the Brussels Convention is distinguished from that referred to in Article 16 thereof in that, within the scope of the latter article, the parties cannot conclude agreements conferring jurisdiction contrary to Article 16 (Article 17(3)). Moreover, the parties are entitled at any time to cancel or amend a jurisdiction clause of the kind referred to in Article 17. Such a case would arise, for example, where, under Article 18 of the Convention, a party brought an action in a State other than that to the courts of which jurisdiction has been attributed and the other party enters an appearance before the court seised without contesting its jurisdiction (see to that effect Case 150/80 Elefanten Schuh [1981] ECR 1671, paragraphs 10 and 11).

Findings of the Court

41. It must be borne in mind at the outset that Article 21 of the Brussels Convention, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention, which is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3) of the Convention, that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought (see Gubisch Maschinenfabrik, cited above, paragraph 8). It follows that, in order to achieve those aims, Article 21 must be interpreted broadly so as to cover, in principle, all situations of lis pendens before courts in Contracting States, irrespective of the parties' domicile (Overseas Union Insurance, cited above, paragraph 16).

42. From the clear terms of Article 21 it is apparent that, in a situation of lis pendens, the court second seised must stay proceedings of its own motion until the jurisdiction of the court first seised has been established and, where it is so established, must decline jurisdiction in favour of the latter.

43. In that regard, as the Court also observed in paragraph 13 of Overseas Union Insurance, Article 21 does not draw any distinction between the various heads of jurisdiction provided for in the Brussels Convention.

44. It is true that, in paragraph 26 of Overseas Union Insurance, before holding that Article 21 of the Brussels Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay proceedings and may not itself examine the jurisdiction of the court first seised, the Court stated that its ruling was without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof.

45. However, it is clear from paragraph 20 of the same judgment that, in the absence of any claim that the court second seised had exclusive jurisdiction in the main proceedings, the Court of Justice simply declined to prejudge the interpretation of Article 21 of the Convention in the hypothetical situation which it specifically excluded from its judgment.

46. In this case, it is claimed that the court second seised has jurisdiction under Article 17 of the Convention.

47. However, that fact is not such as to call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

48. Moreover, the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. That jurisdiction is determined directly by the rules of the Brussels Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them (see, to that effect, Overseas Union Insurance, paragraph 23).

49. Thus, where there is an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention, not only, as observed by the Commission, do the parties always have the option of declining to invoke it and, in particular, the defendant has the option of entering an appearance before the court first seised without alleging that it lacks jurisdiction on the basis of a choice-of-court clause, in accordance with Article 18 of the Convention, but, moreover, in circumstances other than those just described, it is incumbent on the court first seised to verify the existence of the agreement and to decline jurisdiction if it is established, in accordance with Article 17, that the parties actually agreed to designate the court second seised as having exclusive jurisdiction.

50. The fact nevertheless remains that, despite the reference to usage in international trade or commerce contained in Article 17 of the Brussels Convention, real consent by the parties is always one of the objectives of that provision, justified by the concern to protect the weaker contracting party by ensuring that jurisdiction

clauses incorporated in a contract by one party alone do not go unnoticed (Case C-106/95 MSG [1997] ECR I-911, paragraph 17 and Castelletti, paragraph 19).

51. In those circumstances, in view of the disputes which could arise as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down in Article 17 of the Brussels Convention, it is conducive to the legal certainty sought by the Convention that, in cases of lis pendens, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention. It is clear from the wording of Article 21 of the Convention that it is for the court first seised to pronounce as to its jurisdiction, in this case in the light of a jurisdiction clause relied on before it, which must be regarded as an independent concept to be appraised solely in relation to the requirements of Article 17 (see, to that effect, Case C-214/89 Powell Duffryn [1992] ECR I-1745, paragraph 14).

52. Moreover, the interpretation of Article 21 of the Brussels Convention flowing from the foregoing considerations is confirmed by Article 19 of the Convention which requires a court of a Contracting State to declare of its own motion that it has no jurisdiction only where it is 'seised of a claim which is principally concerned with a matter over which the courts of another contracting State have exclusive jurisdiction by virtue of Article 16'. Article 17 of the Brussels Convention is not affected by Article 19.

53. Finally, the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose.

54. In view of the foregoing, the answer to the second question must be that Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

The third question

55. By its third question, the national court seeks in essence to ascertain whether Article 21 of the Brussels Convention must be interpreted as meaning that it may be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

Admissibility

56. The Commission raises doubts as to the admissibility of this question and, therefore, of the questions which follow it and are related to it, on the ground that the national court has not provided concrete information such as to allow the inference that the Tribunale Civile e Penale di Roma has failed to fulfil its obligation to give judgment within a reasonable time and thereby infringed Article 6 of the European Convention for the safeguard of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereinafter 'the ECHR').

57. That view cannot be accepted. As observed by the Advocate General in point 87 of his Opinion, it was indeed in relation to the fact that the average duration of proceedings before courts in the Member State in which the court first seised is established is excessively long that the national court submitted the question whether the court second seised may validly decline to apply Article 21 of the Brussels Convention. To answer that question, which the latter court considered relevant for the decision to be given in the main proceedings, it is not necessary for it to provide information as to the conduct of procedure before the Tribunale Civile e Penale di Roma.

58. It is therefore necessary to answer the third question.

Substance

Observations submitted to the Court

59. According to Gasser, Article 21 of the Brussels Convention must be interpreted in any event as excluding excessively protracted proceedings (that is to say of a duration exceeding three years), which are contrary to Article 6 of the ECHR and would entail restrictions on freedom of movement as guaranteed by Articles 28 EC, 39 EC, 48 EC and 49 EC. It is the responsibility of the European Union authorities or the national courts to identify those States in which it is well known that legal proceedings are excessively protracted.

60. Therefore, in a case where no decision on jurisdiction has been given within six months following the commencement of proceedings before the court first seised or no final decision on jurisdiction has been given within one year following the commencement of those proceedings, it is appropriate, in Gasser's view, to decline to apply Article 21 of the Brussels Convention. In any event, the courts of the State where the court second seised is established are entitled themselves to rule both on the question of jurisdiction and, after slightly longer periods, on the substance of the case.

61. The United Kingdom Government also considers that Article 21 of the Brussels Convention must be interpreted in conformity with Article 6 of the ECHR. It observes in that connection that a potential debtor in a commercial case will often bring, before a court of his choice, an action seeking a judgment exonerating him from all liability, in the knowledge that those proceedings will go on for a particularly long time and with the aim of delaying a judgment against him for several years.

62. The automatic application of Article 21 in such a case would grant the potential debtor a substantial and unfair advantage which would enable him to control the procedure, or indeed dissuade the creditor from enforcing his rights by legal proceedings.

63. In those circumstances, the United Kingdom Government suggests that the Court should recognise an exception to Article 21 whereby the court second seised

would be entitled to examine the jurisdiction of the court first seised where

(1) the claimant has brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another Contracting State which enjoy jurisdiction under the Brussels Convention and

(2) the court first seised has not decided the question of its jurisdiction within a reasonable time.

64. The United Kingdom Government adds that those conditions should be appraised by the national courts, in the light of all the relevant circumstances.

65. MISAT, the Italian Government and the Commission, on the contrary, advocate the full applicability of Article 21 of the Brussels Convention, notwithstanding the excessive duration of court proceedings in one of the States concerned.

66. According to MISAT, the effect of an affirmative answer to the third question would be to create legal uncertainty and increase the financial burden for litigants, who would be required to pursue proceedings at the same time in two different States and to appear before the two courts seised, without being in a position to foresee which court would give judgment before the other. The already abundant litigation on the jurisdiction of courts would thereby be pointlessly increased, contributing to paralysis of the legal system.

67. The Commission states that the Brussels Convention is based on mutual trust and on the equivalence of the courts of the Contracting States and establishes a binding system of jurisdiction which all the courts within the purview of the Convention are required to observe. The Contracting States can therefore be obliged to ensure mutual recognition and enforcement of judgments by means of simple procedures. This compulsory system of jurisdiction is at the same time conducive to legal certainty since, by virtue of the rules of the Brussels Convention, the parties and the courts can properly and easily determine international jurisdiction. Within this system, Section 8 of Title II of the Convention is designed to prevent conflicts of jurisdiction and conflicting decisions.

68. It is not compatible with the philosophy and the objectives of the Brussels Convention for national courts to be under an obligation to respect rules on lis pendens only if they consider that the court first seised will give judgment within a reasonable period. Nowhere does the Convention provide that courts may use the pretext of delays in procedure in other contracting States to excuse themselves from applying its provisions.

69. Moreover, the point from which the duration of proceedings becomes excessively long, to such an extent that the interests of a party may be seriously affected, can be determined only on the basis of an appraisal taking account of all the circumstances of the case. That is an issue which cannot be settled in the context of the Brussels Convention. It is for the European Court of Human Rights to examine the issue and the national courts cannot substitute themselves for it by recourse to Article 21 of the Convention.

Findings of the Court

70. As has been observed by the Commission and by the Advocate General in points 88 and 89 of his Opinion, an interpretation of Article 21 of the Brussels Convention whereby the application of that article should be set aside where the court first seised belongs to a Member State in whose courts there are, in general, excessive delays in dealing with cases would be manifestly contrary both to the letter and spirit and to the aim of the Convention.

71. First, the Convention contains no provision under which its articles, and in particular Article 21, cease to apply because of the length of proceedings before the courts of the Contracting State concerned.

72. Second, it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.

73. In view of the foregoing, the answer to the third question must be that Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

The fourth, fifth and sixth questions

74. In view of the answer given to the third question, it is unnecessary to answer the fourth, fifth and sixth questions, which were submitted by the national court only in the event of the third question being answered in the affirmative.

Costs

75. The costs incurred by the Italian and United Kingdom Governments and by the Commission, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Full Court),

in answer to the questions referred to it by the Oberlandesgericht Innsbruck by judgment of 25 March 2002, hereby rules:

1. A national court may, under 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, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of

Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the Court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the Convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

2. Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

3. Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

OPINION OF ADVOCATE GENERAL LÉGER

delivered on 9 September 2003 (1)
Case C-116/02
Erich Gasser GmbH
v
MISAT Srl
(Reference for a preliminary ruling from the Oberlandesgericht Innsbruck (Austria))
(Brussels Convention - Article 21 - Lis pendens - Proceedings having the same object and the same cause of action - Article 17 - Agreement conferring jurisdiction - Obligation to decline jurisdiction incumbent on a court second seised which is designated in an agreement conferring jurisdiction - No obligation - Conditions - Excessive duration of proceedings before the courts of the State in which the court first seised is established - Irrelevant criterion)

1. This case concerns the interpretation of Article 21 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. (2) That article, which deals with lis pendens, provides that, where identical proceedings are brought before two courts in different Member States, the court second seised must stay proceedings and refer the matter to the court first seised as soon as the latter has established its jurisdiction.

2. In this case, the Oberlandesgericht (Higher Regional Court) Innsbruck (Austria) has asked the Court to give its first ruling on whether the court second seised must comply with Article 21 of the Brussels Convention where that court has exclusive jurisdiction to hear the case under an agreement conferring jurisdiction. It also asks whether that court may derogate from the requirements of that article where proceedings before the courts of the Member State in which the court first seised is established are, in general, excessively long.

I - Law

3. The aim of the Brussels Convention, according to its preamble, is to facilitate the recognition and enforcement of judgments in accordance with Article 293 EC, and to strengthen in the European Community the legal protection of persons therein established. According to the relevant recital in that preamble, it is necessary for that purpose to determine the international jurisdiction of the courts of the Contracting States.

4. The relevant provisions concern, on the one hand, jurisdiction and, on the other, the recognition in a Contracting State of judgments delivered by the courts of another Contracting State.

5. The provisions relating to jurisdiction are contained in Title II of the Brussels Convention.

6. Article 2 lays down the general rule that the courts of the State in which the defendant is domiciled are to have jurisdiction. Articles 5 and 6 provide the claimant with several options in the form of a number of special heads of jurisdiction. In particular, Article 5 provides that, in matters relating to a contract, the defendant may be sued in the courts for the place where the obligation which the action seeks to enforce was or should have been performed.

7. The Brussels Convention also lays down, in Sections 3 and 4 of Title II, mandatory rules of jurisdiction in matters relating to insurance and consumer contracts.

8. Furthermore, Article 16 of the Convention lays down rules governing exclusive jurisdiction. That article provides, for example, that, in proceedings which have as their object rights in rem in immovable property, the courts of the Contracting State in which the property is situated are to have exclusive jurisdiction, regardless of domicile.

9. Articles 17 and 18 relate to prorogation of jurisdiction. Article 17 concerns agreements conferring jurisdiction. It is worded as follows:

'If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:
(1) in writing or evidenced in writing;
or
(2) in a form which accords with practices which the parties have established between themselves;

or
(3) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
...
Agreements ... conferring jurisdiction shall have no legal force if they are contrary to the provisions ... [laid down in matters relating to insurance and consumer contracts], or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.
...'
10. Article 18 provides that:
'Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16.'
11. The Brussels Convention is also intended to prevent irreconcilable judgments from being given. To that effect, Article 21 is worded as follows:
'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'
2. The provisions concerning recognition and enforcement appear under Title III of the Brussels Convention. Article 27 provides that:
'A judgment shall not be recognised:
...
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 ...'.
13. In accordance with the first paragraph of Article 28, '[m]oreover, a judgment shall not be recognised if it conflicts with the provisions ... [in matters relating to insurance and consumer contracts or with those referred to in Article 16] ...'.

II - Facts and procedure

14. Erich Gasser GmbH (3) is a company whose registered office is in Dornbirn, Austria. For several years, it sold children's clothing to MISAT Srl, (4) a company established in Rome (Italy). Early in the year 2000, contractual relations between the parties were broken off.
15. By application of 14 April 2000, MISAT brought an action against Gasser before the Tribunale civile e penale di Roma (Civil and Criminal District Court, Rome) seeking a ruling that the contract between them had terminated ipso jure. In the alternative, it sought from that court a declaration that the contract had been terminated following a disagreement, that no failure to perform the contract could be attributed to MISAT and that Gasser's conduct had been unlawful, and an order requiring Gasser to pay MISAT damages for the losses sustained and to reimburse certain costs.
16. By application of 4 December 2000, Gasser brought an action against MISAT before the Landesgericht (Regional Court) Feldkirch, Austria, for payment of outstanding invoices. Gasser contended that that court had jurisdiction on the ground that it was the court for the place of performance of the contract. Gasser also contended that that court had jurisdiction under an agreement conferring jurisdiction. In support of that contention, it argued that all the invoices issued to MISAT stated that the court with jurisdiction in the event of a dispute would be the court in whose jurisdiction Dornbirn is located, and that MISAT had accepted those invoices without disputing them. According to Gasser, this showed that, in accordance with their practice and the usage prevailing in trade and commerce between Austria and Italy, the parties had concluded an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.
17. MISAT pleaded that the Austrian court had no jurisdiction. It argued that the court of competent jurisdiction was that where the defendant was established, under the general rule laid down in Article 2 of the Brussels Convention. It disputed the existence of an agreement conferring jurisdiction and stated that it had previously brought an action before the Tribunale civile e penale di Roma on the basis of the same business relationship.
18. The Landesgericht Feldkirch decided to stay proceedings, pursuant to Article 21 of the Brussels Convention, until such time as the jurisdiction of the Tribunale civile e penale di Roma, the court first seised, had been established. It confirmed its own jurisdiction as the court for the place of performance of the contract, but it did not rule on the existence of an agreement conferring jurisdiction.
19. Gasser appealed against that decision to the Oberlandesgericht Innsbruck, contending that the Landesgericht Feldkirch should be declared to have jurisdiction and that the proceedings should not be stayed.
20. The Oberlandesgericht Innsbruck stated, first, that the proceedings before the Landesgericht Feldkirch and the Tribunale civile e penale di Roma had been brought by the same parties and must be regarded as having the same cause of action within the meaning of the Court's case-law, with the result that this was indeed a case of lis pendens.
21. It stated, next, that while the Landesgericht Feldkirch had pointed out that the invoices issued by Gasser to MISAT designated it as the court of competent jurisdiction, it had not ruled on the other evidence put forward by Gasser as proof of the existence of an agreement conferring jurisdiction.
22. In that regard, the Oberlandesgericht Innsbruck noted that, under subparagraphs (a), (b), and (c) of the first paragraph of Article 17 of the Brussels Conven-

tion, an agreement conferring jurisdiction must be either in writing or evidenced in writing, or in a form which accords with the practices between the parties, or, in international trade or commerce, in a form which accords with a usage of which the parties were or ought to have been aware and which is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. It took the view that the first two formal conditions relating to an agreement conferring jurisdiction were not fulfilled. It stated that the question none the less arose whether the conditions laid down in subparagraph (c) of the first paragraph of Article 17 were satisfied. It pointed out that, in its judgment in MSG, (5) the Court held that the fact that one of the parties repeatedly paid without objection invoices issued by the other party containing a jurisdiction clause may be deemed to constitute agreement to that clause, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice.

23. It stated that, if the existence of such an agreement were established, the Landesgericht Feldkirch would have exclusive jurisdiction to deal with the dispute under Article 17 of the Brussels Convention. The question would then arise whether that court may review the jurisdiction of the Tribunale civile e penale di Roma.

24. Lastly, the Oberlandesgericht Innsbruck noted Gasser's contention that its rights had been adversely affected by the excessive length of proceedings in Latin countries.

III - The questions referred to the Court of Justice

25. It was in those circumstances that the Oberlandesgericht Innsbruck decided to refer the following questions to the Court for a preliminary ruling:

‘1. May a court which refers questions to the Court of Justice for a preliminary ruling do so purely on the basis of a party's (unrefuted) submissions, whether they have been contested or not contested (on good grounds), or is it first required to clarify those questions as regards the facts by the taking of appropriate evidence (and if so, to what extent)?

2. May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [“the Brussels Convention”], review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?

3. Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?

4. Do the legal consequences provided for by Italian Law No 89 of 24 March 2001 justify the application of Article 21 of the Brussels Convention even if a party is at risk of detriment as a consequence of the possible excessive length of proceedings before the Italian court and therefore, as suggested in Question 3, it would not actually be appropriate to proceed in accordance with Article 21?

5. Under what conditions must the court other than the court first seised refrain from applying Article 21 of the Brussels Convention?

6. What course of action must the court follow if, in the circumstances described in Question 3, it is not allowed to apply Article 21 of the Brussels Convention?

Should it be necessary in any event, even in the circumstances described in Question 3, to proceed in accordance with Article 21 of the Brussels Convention, there is no need to answer Questions 4, 5 and 6.’

IV - Analysis

A - The first question

26. By its first question, the referring court seeks to ascertain whether a national court may ask the Court of Justice to interpret the Brussels Convention on the basis of the submissions of a party the merits of which that national court has not assessed. The national court is thus referring to the fact that the second question is based on the premiss that the court in whose jurisdiction Dornbirn is located has jurisdiction to give judgment in the main proceedings under an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention, even though the existence of such an agreement conferring jurisdiction has not been confirmed by the court hearing the substance of the case.

27. I consider that the answer to the first question referred can be inferred from the Court's case-law on the admissibility of questions referred for a preliminary ruling both under the Protocol of 3 June 1971 concerning the interpretation by the Court of Justice (6) of the Brussels Convention, and under Article 234 EC.

28. Article 3 of the Protocol of 3 June 1971 provides that, where a question relating to the interpretation of the Convention is raised in a case pending, the court seised may or must request the Court of Justice to give a ruling on that question if it considers that a decision on the matter is necessary to enable it to give judgment. Article 3 of the Protocol therefore follows the same logic as Article 234 EC. In both cases, the reference for a preliminary ruling is intended to enable the Court of Justice to provide the national court with the interpretation it needs to give a judgment applying the provision whose interpretation is sought. (7) The Court, logically, inferred from this that its case-law concerning its jurisdiction to give preliminary rulings under Article 234 EC can be transposed to requests for interpretation of the Brussels Convention. (8)

29. According to settled case-law, the procedure laid down in Article 234 EC constitutes an instrument of cooperation between the Court of Justice and the national courts. Within the context of this cooperation, it

is for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. Consequently, since the questions referred concern the interpretation of Community law, the Court is, in principle, obliged to give a ruling. (9)
30. The Court has consistently inferred from the fact that jurisdiction lies in principle with the national court that it is for that court, which alone has a direct knowledge of the facts of the main proceedings and of the arguments of the parties, to decide, in the light of considerations of procedural economy and expediency, at what stage in the proceedings it is necessary to submit a question to the Court for a preliminary ruling. (10)
31. However, the determinations made by the national court in exercising that jurisdiction may be subject to review by the Court of Justice. The latter has thus held that, in exceptional circumstances, it should examine the conditions in which the case was referred to it by the national court in order to determine whether it has jurisdiction. (11) It has held that the spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general and hypothetical questions. (12)
32. In this respect, it has pointed out that, in order to enable it to provide the national court with an interpretation of Community law which will be of use to it in giving judgment in the main proceedings, the national court must define the legal context in which the interpretation requested should be placed. With that in mind, the Court has taken the view that it might be convenient, depending on the circumstances and without calling into question the principle that the referring court has exclusive jurisdiction to determine at what stage of the proceedings the reference for a preliminary ruling should be made, for the facts in the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice, so as to enable the latter to take cognisance of all the features of fact and of law which may be relevant to the interpretation which it is called upon to give. (13) Furthermore, it is essential for the national court to explain why it considers that an answer to its questions is necessary. (14)
33. The Court has already had occasion to determine whether the abovementioned conditions are satisfied and to consider itself to have jurisdiction in the case of a question referred to it for a preliminary ruling on the basis of a premiss the well-foundedness of which is a precondition for applying the provision whose interpretation has been sought, for the purpose of giving judgment in the main proceedings.
34. Thus, in Enderby, (15) the Court of Appeal (England & Wales) asked the Court of Justice whether the principle of equal pay for male and female workers for equal work or work of equal value, laid down in Article 141 EC, required an employer to justify objectively a difference in pay between the job of principal speech therapist and that of principal pharmacist. The Court of Appeal had proceeded on the premiss that those two different jobs were of equal value.
35. In its observations to the Court, the German Government submitted that the Court could not rule on the question referred to it without first determining whether the two jobs at issue were equivalent. Since, in its view, they were not, there could be no infringement of Article 141 EC.
36. The Court rejected that argument. It stated that the Court of Appeal had decided in accordance with the British legislation and with the agreement of the parties to examine the question of the objective justification of the difference in pay before that of the equivalence of the jobs in issue, which might require more complex investigation. It was for that reason that the questions referred were based on the assumption that those jobs were of equal value. (16) It went on to say that, where the Court, as in that case, receives a request for interpretation of Community law which is not manifestly unrelated to the reality or the subject-matter of the main proceedings, it must reply to that request and is not required to consider the validity of a hypothesis which it is for the referring court to review subsequently if that should prove to be necessary. (17)
37. The Court adopted the same position in its judgment in JämO, cited above, in a similar context. (18) It held, in particular, that it is for the national court, which alone has a direct knowledge of the facts of the case and of the arguments of the parties and which must assume responsibility for giving judgment in the case, to decide at what stage in the proceedings it requires a preliminary ruling and to determine the relevance of the questions it refers to the Court. (19) In that case, it was also argued that determining whether the work was of equal value would require complex and costly investigations. (20)
38. Like the Commission, I consider that that case-law can be transposed to the present case. First, although it is regrettable that the referring court has not provided a detailed explanation in this regard, I share the Commission's view that determining the existence in the particular trade or commerce concerned of a usage in international trade or commerce which is widely known to, and regularly observed by, parties to contracts of the type involved may indeed necessitate long and costly investigations.

39. Second, it is clear from the order for reference that the way in which the dispute in the main proceedings is dealt with by the Oberlandesgericht Innsbruck will be completely different depending on whether the Court's answer to the question whether the court second seised may derogate from the requirements of Article 21 of the Brussels Convention where that court has jurisdiction pursuant to an agreement conferring jurisdiction is in the affirmative or in the negative. If that question is answered in the affirmative, the referring court will have to rule on whether such an agreement exists. If the

existence of that agreement is established, the Austrian court will have exclusive jurisdiction to give judgment on the dispute between the parties. Conversely, if the answer is in the negative, the examination of the existence of an agreement conferring jurisdiction will no longer be relevant and Article 21 of the Brussels Convention will have to apply.

40. Last, the referring court has explained why, in the light of the judgment in MSG, cited above, MISAT's acceptance of invoices containing a clause designating the court in whose jurisdiction Dornbirn is located as having jurisdiction to rule on any dispute between the parties must be regarded as initial evidence of the existence of an agreement conferring jurisdiction within the meaning of subparagraph (c) of the first paragraph of Article 17 of the Brussels Convention. The other conditions laid down in that provision, namely that the usage in the particular trade or commerce concerned must be one which is accepted in international trade or commerce and of which the parties are or ought to have been aware, are not disputed in a specific and reasoned manner by MISAT. There is therefore nothing to indicate that the premiss relating to the existence of an agreement conferring jurisdiction is manifestly erroneous.

41. The second question, which seeks to ascertain whether the existence of an agreement conferring jurisdiction permits derogation from Article 21 of the Brussels Convention, is therefore highly material to the decision to be given in the main proceedings. The action taken by the referring court in asking the Court of Justice about the effects of an agreement conferring jurisdiction, before starting the investigations which might be required in the present case to establish the existence of such an agreement, cannot therefore be regarded, in my view, as a failure by that court to discharge the duty to cooperate which underpins the preliminary-ruling procedure.

42. In the light of the foregoing, I propose that the answer to the first question should be that it is for the national court to determine whether to refer a question to the Court of Justice for a preliminary ruling on the basis of a party's submissions or whether it is necessary to verify those submissions first. It is nevertheless incumbent on the national court to provide the Court of Justice with the factual and legal information enabling it to give an answer which will be of use to it in giving judgment in the main proceedings and to explain why it considers an answer to its questions to be necessary.

B - The second question

43. By this question, the referring court is essentially asking whether Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction. In other words, the referring court seeks to ascertain whether Article 17 of the Brussels Convention constitutes a derogation from Article 21 of the same Convention.

44. Article 21 of the Brussels Convention is intended, in the interests of the sound administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3) of the Convention, that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought. (21)

45. In pursuit of the objectives set out above, Article 21 provides a simple system for determining at the start of proceedings which of the courts seised will ultimately have jurisdiction to give judgment in the case. That system is based on the chronological order in which those courts are seised. It requires that the court second seised to stay the proceedings until such time as the court first seised has given a decision as to its own jurisdiction. It is this effect of blocking the proceedings before the court second seised, an integral part of Article 21 of the Brussels Convention, which is at the centre of these preliminary-ruling proceedings.

46. In its observations on the third question, Gasser, in arguing that that article should not be applied, asks the Court to reconsider its case-law on the subject, which began with the judgment in Gubisch Maschinenfabrik, (22) in which the Court held that an action for the rescission or discharge of a contract involves the same cause of action as an action to enforce the same contract. (23) It was in the light of that case-law that the referring court was able to consider that the action brought before the Landesgericht Feldkirch involved the same cause of action as the action brought previously before the Tribunale civile e penale di Roma.

47. I take the view that there is no reason in these proceedings for the Court to depart from that broad interpretation of cause of action within the meaning of Article 21 of the Brussels Convention. First, although it has generally been contested by legal writers, that interpretation was implicitly confirmed in the judgment in Overseas Union Insurance and Others, cited above. (24) It was clearly maintained in the judgment in Tatry, (25) in which the Court held that an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss. (26) It was reiterated more recently in the judgment in Gantner Electronic, cited above. (27)

48. Furthermore, another solution to the problem raised by Gasser may be inferred from case-law. In its judgment in Overseas Union Insurance and Others, cited above, the Court held that the requirements of Article 21 of the Brussels Convention may be derogated from where the court second seised has exclusive jurisdiction to hear the case. I consider that that case-law may be extended to circumstances in which the court

second seised has exclusive jurisdiction under an agreement conferring jurisdiction.

49. It is appropriate to recall the context in which the judgment in Overseas Union Insurance and Others, cited above, was delivered. In that case, the Court was faced with the following situation. In 1980, New Hampshire Insurance Company, (28) registered in England as an 'overseas company', reinsured with three companies also registered in England a risk which it had covered for the benefit of the French company Nouvelles Galeries Réunies. In July 1986, the three reinsurers ceased payment of claims. By applications lodged in 1987 and in February 1988, New Hampshire brought actions against the reinsurers for enforced performance of the contract before the Tribunal de Commerce (Commercial Court), Paris. On 6 April 1988, the three reinsurers themselves brought an action against New Hampshire before the Commercial Court of the Queen's Bench Division seeking a declaration that they were no longer bound to perform any commitments which might arise from the reinsurance policies. That court decided to stay the proceedings pursuant to the second paragraph of Article 21 of the Brussels Convention until such time as the French court had given a decision on the question of its own jurisdiction in the disputes pending before it.

50. The three reinsurers appealed against that decision to the Court of Appeal, which referred to the Court of Justice questions seeking to ascertain, in particular, whether Article 21 must be interpreted as meaning that the court second seised may only stay proceedings where it does not decline jurisdiction, or whether that provision authorises or obliges it to examine the jurisdiction of the court first seised, and to what extent. (29)

51. The Court of Justice ruled that, 'without prejudice to the case where the court second seised has exclusive jurisdiction under the [Brussels] Convention and in particular under Article 16 thereof,' Article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay proceedings and may not itself examine the jurisdiction of the court first seised. (30)

52. It follows from the Court's answer that a court second seised which has exclusive jurisdiction to hear the case, in particular under Article 16 of the Brussels Convention, is not obliged to stay proceedings until such time as the court first seised has declared that it has no jurisdiction. The court second seised may therefore continue to examine the merits of the case and give judgment in it.

53. In this case, that judgment has been interpreted in different ways by those who have submitted observations as to whether Article 17, like Article 16, may constitute a derogation from the requirements of Article 21 of the Brussels Convention. The Commission, the Italian Government and MISAT consider that the derogation thus accepted by the Court in that judgment does not apply to Article 17 of the Convention.

54. The Commission takes the view that such a derogation is justified in the case of Article 16 by the first paragraph of Article 28 of the Brussels Convention, according to which decisions given by a court in breach of Article 16 cannot be recognised in any other Contracting State. It would therefore be absurd to require the court with exclusive jurisdiction under Article 16 to stay proceedings, since a decision given by the court first seised, which would by definition have no jurisdiction, could take effect only in the State where it was given. The first paragraph of Article 28 of the Brussels Convention, it submits, is not applicable where the court second seised has jurisdiction under an agreement conferring jurisdiction within the meaning of Article 17.

55. The Commission considers that, since it cannot be completely ruled out that the court first seised might make a different assessment as to existence of an agreement conferring jurisdiction from that of the court second seised, contradictory decisions on the substance of the case might ensue if the court second seised did not stay proceedings. The parties would then find themselves in the situation envisaged in Article 27(3) of the Brussels Convention, which states that a judgment given in another Contracting State is not recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought, a situation that Article 21 specifically seeks to avoid.

56. In addition, it points out that the jurisdiction conferred by Article 17 is less effective than that arising from Article 16 because the parties cannot refrain from applying the latter article, whereas they can always terminate an agreement conferring jurisdiction or waive their right to rely on it. Under Article 18 of the Brussels Convention, if the defendant enters an appearance before the court first seised without raising an objection as to lack of jurisdiction on the basis of an agreement conferring jurisdiction, that court may hear and determine the case.

57. I do not share that view. Like Gasser and the United Kingdom Government, I consider that Article 17 of the Brussels Convention may constitute a derogation from Article 21 thereof. That analysis is based on the following considerations. First, courts designated under an agreement conferring jurisdiction in accordance with Article 17 have jurisdiction which may be described as exclusive. Second, the argument that the court second seised is obliged to comply with the requirements of Article 21 even if it has exclusive jurisdiction under an agreement conferring jurisdiction is such as to undermine the effectiveness of Article 17 and the legal certainty that attaches to it. Third, the risk of irreconcilable decisions can be significantly reduced.

58. First, the most important point to bear in mind is that, in Overseas Union Insurance and Others, the Court ruled that the requirements of Article 21 of the Brussels Convention might be derogated from in 'the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof'. In my view, there are two points to be made about the wording of that derogation. The first is that, by using the adverb 'in particular', the Court

meant to indicate that that derogation is not confined solely to the cases of exclusive jurisdiction covered by Article 16. The second is that the Court likewise did not refer, as it could have done, only to the cases of exclusive jurisdiction covered by the first paragraph of Article 28 of the Brussels Convention, namely the heads of jurisdiction provided for in matters of insurance or consumer contracts or by Article 16. There is therefore nothing in the judgment in Overseas Union Insurance and Others to suggest that the exclusive jurisdiction referred to in Article 17 is excluded from the derogation from the requirements of Article 21, which was accepted by the Court in that judgment.

59. Next, it should be pointed out that, since the Court was not asked a question on this matter, it gave no explanation of the grounds capable of justifying that derogation. I take the view that that derogation can be explained as follows. Since the court first seised can only declare that it has no jurisdiction, it is pointless, in such a situation, to oblige the court second seised to stay proceedings. In other words, where the court second seised has exclusive jurisdiction, there is no lis pendens, since this requires that the two courts seised of the same dispute should both have jurisdiction to hear the case. (31)

60. That reasoning can be transposed to Article 17 of the Brussels Convention. As the wording of that article makes clear, the court or courts designated by the parties pursuant to that article 'shall have exclusive jurisdiction'. Read in conjunction with Article 18 of the Brussels Convention, Article 17 means that, where the parties are bound by an agreement conferring jurisdiction under that article, any other court seised by one of the parties has no jurisdiction, otherwise than with the consent of the defendant. It follows that if, as appears to be the situation here, the defendant contests the jurisdiction of the court first seised by the other party in breach of an agreement conferring jurisdiction, that court must, on the basis of that clause, declare that it has no jurisdiction. The Schlosser report (32) states that that court must even do so of its own motion if the defendant does not enter an appearance. (33)

61. In such circumstances, the jurisdiction of the court designated by the parties in the agreement conferring jurisdiction does indeed preclude the jurisdiction of the courts designated under the Brussels Convention by the general rule laid down in Article 2 and the rules of special jurisdiction contained in Articles 5 and 6. (34) In this respect, the effects of Article 17 are therefore similar to those of Article 16. It may therefore seem just as pointless to require the court second seised to stay proceedings when its jurisdiction derives from Article 17 as when it is based on Article 16.

62. Second, such an obligation would be liable to jeopardise the effectiveness of Article 17 and the legal certainty which attaches to it.

63. For the purposes of determining the effectiveness of Article 17 of the Brussels Convention, it should be borne in mind that that article is intended to leave room for the voluntary prorogation of jurisdiction. It is therefore the consensus between the parties which permits derogation from the rules of general and special jurisdiction laid down in Articles 2, 5 and 6 of the Brussels Convention. Consequently, the requirement of their consent to this exceptional attribution of jurisdiction is inherent in the spirit of that article. Accordingly, in its judgments in Estasis Salotti (35) and Segoura, (36) the Court held that Article 17 of the Brussels Convention requires the court seised to examine whether the clause which confers jurisdiction on it was indeed the result of consent between the parties. (37)

64. Such consent by the parties is also the basis for agreements conferring jurisdiction concluded in accordance with a usage in international trade or commerce. That reference to a usage in international trade or commerce was of course added in the 1978 Accession Convention to make the formal conditions originally laid down in the Brussels Convention more flexible, in other words an agreement concluded in writing or a verbal agreement evidenced subsequently in writing. (38) However, the Court of Justice has held that, in spite of that new flexibility, real consent remains one of the objectives of Article 17. That requirement of real consent is justified by the concern to protect the weaker party to the contract by preventing jurisdiction clauses, incorporated in a contract by one party, from going unnoticed. (39) The Court has thus held that the contracting parties' consent to a jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the branch of international trade or commerce in which they operate and of which they are, or ought to have been, aware. (40)

65. It follows that Article 17 upholds the autonomy of the consensus formed between the parties by conferring exclusive jurisdiction on the courts so designated by them, by way of derogation from the rules of jurisdiction laid down by the Brussels Convention, but subject to those contained in the fourth paragraph of that article. As the Court has held, Article 17 is intended to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. (41) Article 17 thus seeks to secure legal certainty by enabling the parties to determine which court will have jurisdiction.

66. In this way, Article 17 is entirely in harmony with the objectives of the Brussels Convention. Indeed, as the Court has consistently held, the Convention seeks to unify the rules on jurisdiction of the Contracting States' courts, so as to avoid as far as possible the multiplication of heads of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the claimant easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued. (42)

67. If, however, under Article 21 of the Brussels Convention, the court with exclusive jurisdiction is obliged to stay proceedings until such time as the court first

seised declares that it has no jurisdiction, the effectiveness of Article 17 and, thus, the legal certainty to which it contributes would, in my view, be seriously jeopardised. For, in such a situation, a party who, in breach of his obligations under the agreement conferring jurisdiction, commenced proceedings first and did so before a court which he knew to have no jurisdiction could unreasonably delay judgment on the substance of a case in which he knew he would be unsuccessful. A party who failed to discharge his commitments in that way, by seising a court other than the one designated in the agreement conferring jurisdiction, would therefore derive an advantage from such a failure.

68. That is a disturbing consequence as far as principles are concerned and runs the risk of encouraging dilatory conduct. A party seeking to delay judgment on the substance of a case might thus be encouraged to 'take the initiative' and bring an action before a court which has no jurisdiction and which is less convenient for the other party, so as to bring to a halt any action based on the same contract until such time as that court declares that it has no jurisdiction. In that regard, I share the view of the United Kingdom Government that that risk is all the more worthy of consideration since the legal systems of the Contracting States generally allow proceedings to be brought for a declaration of non-liability.

69. Unlike the Commission, I do not consider this problem to be attributable solely to the domestic judicial systems of the Member States and the speed with which national courts seised in breach of an agreement conferring jurisdiction are able to give a decision as to their jurisdiction. After all, however quickly such a decision can be given, the defendant can still avail himself of all the remedies available under national law in order to put off the moment when the decision as to that court's lack of jurisdiction becomes final. I therefore take the view that the problem lies primarily in the interpretation of the Brussels Convention.

70. That is why I propose that the Court should adopt a solution which can ensure the effectiveness of Article 17 and the legal certainty to which it contributes. Indeed, a solution of this kind seems to me to be in keeping with the case-law on the interpretation of that article, according to which its interpretation must respect the consensus of the parties. Accordingly, in its judgment in Elefanten Schuh, (43) the Court held that the legislation of a Contracting State cannot allow the validity of an agreement conferring jurisdiction to be called in question solely on the ground that the language used is not that prescribed by that legislation. More recently, in its judgment in Benincasa, cited above, the Court found that a court in a Contracting State which is designated in a clause conferring jurisdiction validly concluded under Article 17 of the Brussels Convention also has exclusive jurisdiction where the action seeks a declaration that the contract containing that clause is void. According to the Court, the 'legal certainty which that provision seeks to secure could easily be jeopardised if one party to the contract could frustrate that rule of the [Brussels] Convention simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law'. (44)

71. Furthermore, that interpretation has the advantage of taking into consideration the requirements of international trade or commerce. I support the argument put forward by the United Kingdom Government that the sound development of international commercial relations requires that companies be able to trust the agreements between them. That requirement also extends to agreements by which the parties determine which courts will be responsible for settling disputes arising in the performance of their reciprocal obligations. Lastly, it seems undeniable that a delay in the settlement of those disputes can result in significant losses for economic operators, particularly where they relate to the payment of invoices for small and medium-sized enterprises. In that regard, the solution I propose is also in keeping with the intentions of those who drafted the Brussels Convention, since it was precisely in order to satisfy the requirements of international trade and commerce that, in 1978, they made the formal rules contained in Article 17 more flexible by adding to the original two rules a reference to usage in international trade or commerce. (45) If the Court accepts that, where a court is the court second seised and has exclusive jurisdiction under an agreement conferring jurisdiction it may continue to examine the substance of the dispute without waiting for a declaration from the court first seised that it has no jurisdiction, it will indisputably facilitate the implementation of agreements conferring jurisdiction incorporated in contractual documents or documents issued in the context of those relations, such as invoices.

72. Third, I consider that the risk of irreconcilable judgments being delivered can be significantly reduced.

73. In order to counter that risk, the United Kingdom Government proposes that the Court rule that a court first seised whose jurisdiction is contested in reliance on a clause conferring jurisdiction must stay proceedings until the court which is designated by that clause and is the court second seised has given a decision as to its jurisdiction.

74. I do not endorse such a solution. In my view, it might encourage the very delaying tactics we are seeking to avoid. It would allow an unscrupulous party to contest the jurisdiction of the court before which proceedings had been brought against him under Articles 2, 5 or 6 of the Brussels Convention by the artifice of alleging the existence of an agreement conferring jurisdiction and to bring an action before the court supposedly designated in order deliberately to delay judgment in the case until such time as that court had declared that it had no jurisdiction.

75. In point of fact, the risk of irreconcilable judgments being given and, consequently, the resultant difficulties associated with recognition and enforcement, are inherent in any derogation from Article 21 of the Brussels Convention. Such a risk also exists in the case of Article 16. Thus, the question whether the dis-

pute falls within the scope of that article may itself be assessed differently by the two courts seised. (46) Also, if the court first seised declares that it has jurisdiction and gives a decision on the substance of the case which is irreconcilable with that given by the court second seised, which has exclusive jurisdiction under Article 16, the decision of the latter court cannot be recognised in the Contracting State of the court first seised, by virtue of Article 27(3) of the Brussels Convention.
76. Consequently, the fact that determining the existence of an agreement conferring jurisdiction, in particular in the form required by subparagraph (c) of the first paragraph of Article 17, may sometimes necessitate complex investigations does not seem to me to justify the general exclusion of Article 17 from the derogation from Article 21 which has been accepted by the Court. The same is true, as I see it, of the fact that Article 28 of the Brussels Convention does not cover Article 17, with the result that the recognition and enforcement, in other Contracting States, of a decision given by a court second seised which has exclusive jurisdiction under that article might be precluded by a contrary decision of the court first seised if the latter decision was delivered first.
77. What matters, in my opinion, is that the risk of irreconcilable judgments can be significantly reduced. I consider such a reduction to be perfectly possible given that, pursuant to the case-law of the Court, the courts concerned must assess the validity of the contested agreement conferring jurisdiction in accordance with the same principles and the same conditions, provided that the court second seised refrains from complying with the requirements of Article 21 only after having made absolutely sure that it has exclusive jurisdiction.
78. On the first point, the Court's case-law shows that an ‘agreement conferring jurisdiction’ must be regarded as an independent concept. (47) It follows that the formal and substantive conditions governing validity to which agreements conferring jurisdiction are subject must be assessed in the light of the requirements of Article 17 alone. That rule has been given clear expression with regard to the assessment of formal requirements, (48) and, as regards the rules governing substance, follows from the judgments in which the Court has held that an ‘agreement’ requires that the parties actually give their consent. (49) As I see it, that rule was confirmed in the judgment in Benincasa, cited above, where the Court held that ‘[a] jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction’. (50)
79. That case-law has been extended to usage in international trade and commerce. The Court has held that the usage to which Article 17 refers cannot be frustrated by provisions of national legislation which require compliance with formal conditions additional to those permitted in the particular trade or commerce concerned. (51) Likewise, as the referring court points out, the Court of Justice has indicated the objective factors which the national court must take into consideration in order to determine whether a usage in the particular international trade or commerce in which the parties operate exists and whether that usage is or may be assumed to be known by the parties. (52)
80. The risk of judgments which are inconsistent as regards the validity of an agreement conferring jurisdiction will therefore be further reduced since the conditions required by Article 17 of the Brussels Convention will have been clarified by the Court. (53)
81. On the second point, I take the view that the court second seised should not be authorised to derogate from the requirements of Article 21 of the Brussels Convention until it has made absolutely sure that it does have exclusive jurisdiction under an agreement conferring jurisdiction. It will therefore have to check whether the relevant agreement conferring jurisdiction satisfies the requirements of Article 17. In addition to the conditions mentioned above, it must be satisfied that that agreement does concern ‘disputes which have arisen or which may arise in connection with a particular legal relationship’ as required by the first paragraph of Article 17, and that it does not derogate from the rules governing exclusive jurisdiction laid down in Article 16 and the provisions of the Brussels Convention which are applicable in matters of insurance and consumer contracts. Next, the court second seised will have to examine whether the agreement conferring jurisdiction does cover the dispute which has been brought before it. If there were any doubt as to the validity of the agreement conferring jurisdiction or its scope, the court second seised would have to stay proceedings pursuant to Article 21.
82. The advantage of this solution, namely that Article 17 of the Brussels Convention may constitute a derogation from Article 21 only where there is no room for any doubt as to the jurisdiction of the court second seised, would be that it takes into account the requirements of international trade and commerce and at the same time makes economic operators aware of their own responsibilities by encouraging them to conclude agreements conferring jurisdiction which do not in fact leave room for any doubt as to their validity and their scope. That solution might thus prompt the representatives of the various economic operators to negotiate standard conditions which are explicit and extensively disseminated in the economic sector concerned.
83. In the light of the foregoing, I propose that the Court's answer to the second question should be that Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction where there is no room for any doubt as to the jurisdiction of the court second seised.

C- The third, fourth, fifth and sixth questions

84. By its third question, the referring court is essentially asking whether Article 21 of the Brussels Convention must be interpreted as meaning that it may be derogated from where, in general, the duration of

proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

85. The referring court explains that it has raised this question because of Gasser's argument to the effect that, in Latin countries such as Italy, Greece and France, the average duration of legal proceedings is excessively long, which, in Gasser's view, is contrary to the requirements of Article 6 of the European Convention on Human Rights (hereinafter the 'ECHR').

86. The Commission raises doubts as to the admissibility of the third question and, therefore, of the questions which follow it and are related to it, on the ground that the referring court has not provided tangible evidence to show that the Tribunale civile e penale di Roma has infringed Article 6 of the ECHR in the present case.

87. I do not share that point of view. I consider that, by that question, the national court did not mean to refer to the proceedings brought by MISAT before the Tribunale civile e penale di Roma. This question clearly has to do with whether, because the average duration of proceedings before the courts of the Member State in which the court first seised is established is excessively long, the court second seised may disregard the requirements of Article 21. In order for the Court to be able to give a useful answer to that question, which concerns a provision of the Brussels Convention and which is relevant for the decision to be given in the main proceedings, it was therefore not necessary for the referring court to provide information on the conduct of the procedure before the Tribunale civile e penale di Roma.

88. However, I support the Commission's view with regard to the answer to be given on the substance of this question. It does not really seem conceivable that it should be possible to refrain from applying Article 21 of the Brussels Convention on the ground that the court first seised is established in a Member State in whose courts there are, in general, excessive delays in dealing with cases. That would be tantamount to saying that the rules on lis pendens do not apply where the court first seised is established in one of certain Member States.

89. Such an interpretation would be manifestly contrary to the scheme and the basis of the Brussels Convention. The Convention does not contain any provision to the effect that its rules, in particular those of Article 21, should cease to apply because of the length of proceedings before the courts in another Contracting State. Moreover, it should be noted that the Brussels Convention is based on the trust which the Member States accord to each other's legal systems and judicial institutions. (54) It is on the basis of that trust that the Convention establishes a compulsory system of jurisdiction which all the courts within its purview are required to observe. It is also that trust which enables the Contracting States to waive the right to apply their internal rules on the recognition and enforcement of foreign judgments in favour of a simplified mechanism for recognition and enforcement. It is therefore also the basis of the legal certainty which the Convention seeks to ensure by allowing the parties to foresee with certainty which court will have jurisdiction.

90. In the light of those considerations, I propose that the Court's answer should be that Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where the duration of proceedings before the courts of the Contracting State in which the court first seised is established is, in general, excessively long.

91. In view of that proposed answer, there is no need to rule on the fourth, fifth and sixth questions. Those questions are based on the premiss of a positive answer to the third question. Thus, by the fourth question, the referring court seeks to ascertain whether Italian Law No 89 of 24 March 2001 concerning compensation for damage caused by the unreasonable length of proceedings would none the less justify the application of Article 21 of the Brussels Convention. By the fifth and sixth questions, as I understand them, it is asking the Court to indicate, in the event of a positive answer to the third question, the circumstances in which the court second seised might derogate from the requirements of that article and the manner in which it might do so.

V - Conclusion

92. In the light of the foregoing, I propose that the Court should answer the questions referred to it by the Oberlandesgericht Innsbruck as follows:

(1) It is for the national court to determine whether to refer a question to the Court of Justice for a preliminary ruling on the basis of a party's submissions or whether it is necessary to verify those submissions first. It is nevertheless incumbent on the national court to provide the Court with the factual and legal information enabling it to give an answer which will be of use to it in giving judgment in the main proceedings and to explain why it considers an answer to its questions necessary.

(2) Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter 'the Brussels Convention') must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction where there is no room for any doubt as to the jurisdiction of the court second seised.

(3) Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where the duration of proceedings before the courts of the Contracting State in which the court first seised is established is, in general, excessively long.

1: - Original language: French.

2: - (OJ 1972 L 299, p. 32). Convention as amended by the Convention of 9 October 1978 on 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 amended text p. 77), by the Convention of 25 October 1982 on the accession of the

Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1). A consolidated version of the Convention, as amended by those four conventions of accession, is published in OJ 1998 C 27, p. 1 (hereinafter the 'Brussels Convention').

3: - Hereinafter 'Gasser'.

4: - Hereinafter 'MISAT'.

5: - Case C-106/95 [1997] ECR I-911.

6: - OJ 1975 L 204, p. 28, as amended by the conventions on accession.

7: - See the Opinion of Advocate General Tesauro in Case C-346/93 Kleinwort Benson [1995] ECR I-615, point 17.

8: - See Case C-220/95 Van den Boogaard [1997] ECR I-1147, paragraph 16, Case C-295/95 Farrell [1997] ECR I-1683, paragraph 11, Case C-159/97 Castelletti [1999] ECR I-1597, paragraph 14 and Case C-111/01 Gantner Electronic [2003] ECR I-4207, paragraph 38.

9: - See, in particular, Case 83/78 Pigs Marketing Board [1978] ECR 2347, paragraph 25, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59 and Case C-18/01 Korhonen and Others [2003] ECR I-5321, paragraph 19. See also, with regard to the Brussels Convention, Castelletti, paragraph 14.

10: - See Joined Cases 36/80 and 71/80 Irish Creamery Milk Suppliers Association and Others [1981] ECR 735, paragraph 7, Case 72/83 Campus Oil and Others [1984] ECR 2727, paragraph 10, Case 14/86 Pretore di Salò [1987] ECR 2545, paragraph 11, Case C-66/96 Høj Pedersen and Others [1998] ECR I-7327, paragraph 46 and Case C-236/98 JämO [2000] ECR I-2189, paragraph 32.

11: - See Bosman (paragraph 60) and Gantner Electronic (paragraph 35).

12: - See Case 104/79 Foglia [1980] ECR 745, paragraph 11, Case 244/80 Foglia [1981] ECR 3045, paragraph 18, Case 149/82 Robards [1983] ECR 171, paragraph 19, Case C-83/91 Meilicke [1992] ECR I-4871, paragraph 25 and Case C-153/00 der Weduwe [2002] ECR I-11319, paragraphs 32 and 33.

13: - See Irish Creamery Milk Suppliers Association and Others, paragraph 6, Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 19, and the abovementioned judgments in Meilicke, paragraph 26, Høj Pedersen and Others, paragraph 45 and JämO, paragraph 31. According to what is now settled case-law, 'the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based'. See, in particular, Joined Cases C-320/90 to C-322/90 Telemarsicabruzzo and Others [1993] ECR I-393, paragraph 6 and Case C-109/99 ABBOI [2000] ECR I-7247, paragraph 42.

14: - See Joined Cases 98/85, 162/85 and 258/85 Bertini and Others [1986] ECR 1885, paragraph 6 and Lourenço Dias, cited above, paragraph 19.

15: - Case C-127/92 [1993] ECR I-5535.

16: - See Enderby (paragraph 11).

17: - Ibid. (paragraph 12).

18: - In that case, the Arbetsdomstolen referred to the Court for a preliminary ruling several questions intended to enable it to determine whether an employer had paid midwives less than a clinical technician, without adopting a position as to whether the work of those two categories of employee was equivalent.

19: - Paragraph 32.

20: - Paragraph 29.

21: - See Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 16.

22: - Case 144/86 [1987] ECR 4861.

23: - Paragraphs 15 to 17. That case concerned an action seeking to have a machine sales contract declared void or, in the alternative, rescinded, and an action for payment for the machine at issue.

24: - Paragraph 16.

25: - Case C-406/92 [1994] ECR I-5439.

26: - Paragraph 45.

27: - Paragraph 25.

28: - Hereinafter 'New Hampshire'.

29: - In order fully to understand the wording of the questions raised by the referring court, it must be remembered that Article 21 of the Brussels Convention, in the version applicable in that case, read as follows: 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, the second court shall of its own motion decline jurisdiction in favour of that court. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested'. The new wording of Article 21, to the effect that, in the event of lis pendens, the court second seised must stay proceedings until such time as the jurisdiction of the court first seised is established, in no way changes the conclusions to be drawn from the judgment in Overseas Union Insurance and Others with respect to the answer to the question referred in this case. This new wording, which derives from the 1989 accession convention, does not change the meaning or the scope of that article but seeks to ensure that the court second seised does not decline jurisdiction to hear the case before being certain that the court first seised has jurisdiction to hear it, so as to avoid any jurisdictional vacuum.

30: - Paragraph 26.

31: - See, in that regard, Gaudemet-Tallon, H., Compétence et exécution des jugements en Europe, third edition, LGDJ, 2002, paragraphs 323 and 324.

32: - Report by Professor Schlosser on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71).

33: - Paragraph 22.
34: - In that regard, see Case 23/78 Meeth [1978] ECR 2133, paragraph 5.
35: - Case 24/76 [1976] ECR 1831.
36: - Case 25/76 [1976] ECR 1851.
37: - Paragraphs 7 and 6 respectively.
38: - For an overview of the various versions of Article 17 of the Brussels Convention, from the first one in 1968 to that resulting from the San Sebastián Convention of 26 May 1989, see my Opinion in Castelletti, cited above, points 5 to 7.
39: - See MSG, paragraph 17 and Castelletti, paragraph 19.
40: - See Castelletti, paragraph 21.
41: - See Case C-269/95 Benincasa [1997] ECR I-3767, paragraph 29.
42: - See Case 38/81 Effer [1982] ECR 825, paragraph 6, Case C-125/92 Mulox IBC [1993] ECR I-4075, paragraph 11 and Benincasa, paragraph 26.
43: - Case 150/80 [1981] ECR 1671.
44: - Paragraph 29. Also see Case C-387/98 Coreck [2000] ECR I-9337, paragraph 14.
45: - See the Schlosser Report, cited above, paragraph 179.
46: - For example, the question as to whether or not there is a lease falling within the scope of Article 16(1).
47: - See Case C-214/89 Powell Duffryn [1992] ECR I-1745, paragraph 14.
48: - See Elefanten Schuh, paragraphs 25 and 26.
49: - See Estasis Salotti and Segouras.
50: - Paragraph 25.
51: - See, in particular, MSG, paragraph 23 and Castelletti, paragraphs 33 to 39.
52: - See MSG and Castelletti.
53: - To date, the interpretation of that article has been the subject of around 15 references for a preliminary ruling.
54: - See Case C-201/94 Smith & Nephew and Primecrown [1996] ECR I-5819 relating to Directive 65/65 and Case C-379/97 Upjohn [1999] ECR I-6927 relating to trade mark rights in the medicinal products sector.