

European Court of Justice, 27 June 1991, Overseas Union



LITIGATION – PRIVATE INTERNATIONAL LAW

International jurisdiction: Second seised court to stay proceedings

- [Article 21 of the Convention applies irrespective of the domicile of the parties to the two sets of proceedings](#)
- [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 the proceedings and may not itself examine the jurisdiction of the court first seised](#)

It therefore appears both from the wording of Article 21 and from the scheme of the Convention that the only other possibility available, as an alternative solution, to the court second seised, which should normally decline jurisdiction, is to stay the proceedings if the jurisdiction of the court first seised is contested. However, it cannot itself examine the jurisdiction of the court first seised. The answer to the second and third questions submitted by the national court must therefore be that, without prejudice to the case where the court second seised has exclusive jurisdiction under the 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 the proceedings and may not itself examine the jurisdiction of the court first seised.

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European Court of Justice, 27 June 1991

(Mancini, O'Higgins, Kakouris, Schockweiler, Kapteyn)

In Case C-351/89,

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 Court of Appeal, London, for a preliminary ruling in the proceedings pending before that court between

Overseas Union Insurance Limited,
Deutsche Ruck UK Reinsurance Limited, and
Pine Top Insurance Company Limited,
and
New Hampshire Insurance Company,

on the interpretation of Articles 7 to 12a and Article 21 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 to that Convention and to the Protocol on its interpretation by the Court of Justice (amended version published in Official Journal 1978 L 304, p. 77),

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, T.F. O' Higgins, C.N. Kakouris, F.A. Schockweiler and P.J.G. Kapteyn, Judges,

Advocate General: W. Van Gerven,

Registrar: V. Di Bucci, Administrator,

after considering the written observations submitted on behalf of:

- Overseas Union Insurance Limited, Deutsche Ruck UK Reinsurance Limited and Pine Top Insurance Company Limited, by Peter Goldsmith QC and David Railton, Barrister-at-Law, instructed initially by Messrs Holman Fenwick & Willan, Solicitors, and subsequently, as regards Overseas Union Insurance Limited, by Messrs Stephenson Harwood, Solicitors,

- New Hampshire Insurance Company, by Jonathan Mance QC and Alan Newman QC, instructed by Messrs Hextall, Erskine & Co, Solicitors,

- the Government of the Federal Republic of Germany, by Christof Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

- the United Kingdom, by Rosemary Caudwell, of the Treasury Solicitor's Department, acting as Agent, and

- the Commission of the European Communities, by John Forman, Legal Adviser, and Adam Blomefield, a member of the Commission's Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument from Overseas Union Insurance Limited, Deutsche Ruck UK Reinsurance Limited, Pine Top Insurance Company Limited, New Hampshire Insurance Company and the Commission at the hearing on 5 February 1991,

after hearing the Opinion of the Advocate General at the sitting on 7 March 1991,

gives the following

Judgment

Grounds

1 By order dated 26 July 1989, which was received at the Court on 17 November 1989, the Court of Appeal, London, referred to the Court for a preliminary ruling pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Convention") a number of questions on the interpretation of Articles 7 to 12a and Article 21 of that Convention.

2 The questions arose in proceedings between Overseas Union Insurance Limited (hereinafter referred to as "OUI"), Deutsche Ruck UK Reinsurance Limited

("Deutsche Ruck") and Pine Top Insurance Company Limited ("Pine Top"), on the one hand, and New Hampshire Insurance Company ("New Hampshire"), on the other, relating to the obligations which may arise on the part of OUI, Pine Top and Deutsche Ruck on account of insurance contracts which they concluded with New Hampshire.

3 It appears from the documents before the Court that New Hampshire, a company incorporated in the State of New Hampshire, USA, is registered in England as an overseas company pursuant to the provisions of the Companies Act 1985 and in France as a foreign company, since it has several offices in that country. In 1979 it issued a policy of insurance covering certain costs relating to the repair or replacement of electrical appliances sold with the benefit of a five-year warranty by Société Française des Nouvelles Galeries Réunies, a company incorporated in France with its registered office in Paris.

4 In 1980 New Hampshire reinsured a proportion of its risk under that policy inter alia with OUI, a company incorporated in Singapore and registered in England as an overseas company, and with Deutsche Ruck and Pine Top, companies incorporated in England with their registered offices in London.

5 After raising a number of queries with Hew Hampshire concerning the management of the insurance account, OUI, Deutsche Ruck and Pine Top first ceased all payment of claims and then purported to avoid their respective insurance commitments on the grounds of non-disclosure, misrepresentation and breach of duty in both the placing and operation of the reinsurance policies.

6 On 4 June 1987 New Hampshire issued proceedings against Deutsche Ruck and Pine Top in the Tribunal de Commerce (Commercial Court) in Paris, claiming monies due under the reinsurance policies. On 9 February 1988 New Hampshire brought similar proceedings against OUI in the same court. Deutsche Ruck and Pine Top formally challenged the jurisdiction of the French court, whilst OUI made clear its intention to do likewise.

7 On 6 April 1988, OUI, Deutsche Ruck and Pine Top brought an action against New Hampshire in the Commercial Court of the Queen's Bench Division of the High Court of Justice in which they sought a declaration that they had lawfully avoided their obligations under the reinsurance policies. On 9 September 1988 the Commercial Court granted a stay of the proceedings pursuant to the second paragraph of Article 21 of the Convention until such time as the French court gave a decision on the question of its jurisdiction in the proceedings pending before it.

8 OUI, Deutsche Ruck and Pine Top appealed that order to the Court of Appeal. Taking the view that the dispute raised a question concerning the interpretation of the Convention, that court stayed the proceedings and submitted the following questions to the Court of Justice for a preliminary ruling:

"(1) Does Article 21 of the Convention apply:

(a) irrespective of the domicile of the parties to the two sets of proceedings?

or

(b) only if the defendant in the proceedings before the court second seised is domiciled in a Contracting State, irrespective of the domicile of any other party?

or

(c) if at least one, and if so which, of the parties to the two sets of proceedings is domiciled in a Contracting State?

(2) Under Article 21, paragraph 2, of the Convention, where the jurisdiction of the court first seised is contested, is the court second seised obliged in all circumstances to stay its proceedings as an alternative to declining jurisdiction?

(3) (a) If the court second seised is not so obliged, is it (i) required or (ii) permitted for the purpose of deciding whether to stay its proceedings to examine whether the court first seised has jurisdiction?

(b) If so, under what circumstances and to what extent may the second-seised court examine the jurisdiction of the first-seised court?

(4) If the answer to questions 3(a) and (b) indicate that the court second seised is required, or, if not required, is permitted, in circumstances which do, or may, include the present to examine whether the court first seised has jurisdiction, do the provisions of Title II Section 3 of the Convention apply as between an insurer (reassured) and a reinsurer under a contract of quota share reinsurance?"

9 In its order the Court of Appeal makes it clear that it is common ground between the parties that the French court was in each case the court first seised and that the proceedings before the courts of the two Contracting States involve in each case the same cause of action between the same parties within the meaning of Article 21 of the Convention, as interpreted by the Court of Justice in the judgment of 8 December 1987 in Case 144/86 *Gubisch Maschinenfabrik v Palumbo* [1987] ECR 4861.

10 Reference is made to the Report for the Hearing for a fuller account of the legal and factual background to the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

11 In its first question the national court essentially seeks to establish whether Article 21 of the Convention applies irrespective of the domicile of the parties to the two sets of proceedings.

12 In order to answer that question it should be recalled that Article 21 of the Convention provides that:

"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 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."

13 Thus, the wording of Article 21, unlike the wording of other provisions of the Convention, makes no reference to the domicile of the parties to the proceedings. Moreover, Article 21 does not draw any distinction between the various heads of jurisdiction provided for in the Convention. In particular, it does not provide for any derogation to cover a case where, in accordance with the provisions of Article 4 of the Convention, a court of a Contracting State exercises its jurisdiction by virtue of the law of that State over a defendant who is not domiciled in a Contracting State.

14 Consequently, it appears from the wording of Article 21 that it must be applied both where the jurisdiction of the court is determined by the Convention itself and where it is derived from the legislation of a Contracting State in accordance with Article 4 of the Convention.

15 The interpretation suggested by the wording is borne out by an examination of the aims of the Convention. In the [judgment of 11 January 1990 in Case C-220/88 \(Dumez France and Tracoba v Hessische Landesbank and Others \[1990\] ECR I-49\)](#), the Court held that essentially the aim of the Convention was to promote the recognition and enforcement of judgments in States other than those in which they were delivered and that it was therefore indispensable to limit the risk of irreconcilable decisions, which is a reason for withholding recognition or an order for enforcement by virtue of Article 27(3) of the Convention.

16 With regard in particular to Article 21, the Court observed in the judgment in *Gubisch*, cited above, that that provision, 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, in so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), 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. 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.

17 In view of that conclusion, it is necessary to reject the argument of the appellants in the main proceedings to the effect that the very existence of Article 27(3) of the Convention shows that Articles 21 and 22 cannot prevent irreconcilable judgments from being given in certain cases in different Contracting States. The fact that the Convention makes provision for cases in which such situations might nevertheless arise cannot constitute an argument against an interpretation of Articles 21 and 22, which, according to the case-law of the Court (see the judgment in *Dumez France and Tracoba*, cited above), have the specific aim of precluding or limiting

the risk of irreconcilable judgments and non-recognition.

18 The answer to the first question submitted by the national court must therefore be that Article 21 of the Convention must be interpreted as applying irrespective of the domicile of the parties to the two sets of proceedings.

The second and third questions

19 By its second and third questions, the national court essentially seeks to establish whether Article 21 of the Convention must be interpreted as meaning that, if it does not decline jurisdiction, the court second seised may only stay its proceedings, or whether Article 21 permits or requires it to examine whether the court first seised has jurisdiction and, if so, to what extent.

20 In that connection, it must be observed in the first place that nothing in the documents before the Court suggests that the main proceedings fall within an exclusive head of jurisdiction laid down in the Convention, in particular in Article 16 thereof. The Court's ruling does not, therefore, have to cover cases in which the court second seised has such exclusive jurisdiction.

21 In the case of a dispute over which it is not claimed that the court second seised has exclusive jurisdiction, the only exception to the obligation imposed by Article 21 of the Convention on that court to decline jurisdiction is where it stays proceedings, an option which it may exercise only if the jurisdiction of the court first seised is contested.

22 It appears from the report of the committee of experts which drafted the Convention (Official Journal 1979 C 59, p. 1) that that rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction. However, the objective of the provision, which is to avoid negative conflicts of jurisdiction, may be achieved without the court second seised examining the jurisdiction of another court.

23 Moreover, it should be noted 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. Either the jurisdiction of the court first seised is determined directly by the rules of the Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them, or it is derived, by virtue of Article 4 of the Convention, from the law of the State of the court first seised, in which case that court is undeniably better placed to rule on the question of its own jurisdiction.

24 Moreover, the cases in which a court in a Contracting State may review the jurisdiction of a court in another Contracting State are set out exhaustively in Article 28 and the second paragraph of Article 34 of the Convention. Those cases are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction having a mandatory or public-policy nature. It follows that, apart from those limited exceptions, the Convention does not authorize the jurisdiction of a court to be reviewed by a court in another Contracting State.

25 It therefore appears both from the wording of Article 21 and from the scheme of the Convention that the only other possibility available, as an alternative solution, to the court second seised, which should normally decline jurisdiction, is to stay the proceedings if the jurisdiction of the court first seised is contested. However, it cannot itself examine the jurisdiction of the court first seised.

26 The answer to the second and third questions submitted by the national court must therefore be that, without prejudice to the case where the court second seised has exclusive jurisdiction under the 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 the proceedings and may not itself examine the jurisdiction of the court first seised.

27 In view of the answers given to the first three questions, the fourth question is redundant.

Decision on costs

Costs

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

Operative part

On those grounds,

THE COURT (Sixth Chamber),

in reply to the questions submitted to it by the Court of Appeal, London, by order of 26 July 1989, hereby rules:

1. Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as applying irrespective of the domicile of the parties to the two sets of proceedings;

2. Without prejudice to the case where the court second seised has exclusive jurisdiction under the 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 the proceedings and may not itself examine the jurisdiction of the court first seised.

Opinion of the Advocate-General Van Gerven

Mr President,

Members of the Court,

1. 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 Convention") the Court of Appeal in the United Kingdom has referred for a preliminary ruling a

number of questions concerning the interpretation of some of the Convention's provisions, notably Article 21 which deals with the question of *lis pendens*.

2. The questions were raised in a dispute between three reinsurance companies (Overseas Union Insurance Limited, "OUI"; Deutsche Ruck UK Reinsurance Limited, "Deutsche Ruck"; Pine Top Insurance Company Limited, "Pine Top") and the insurers New Hampshire Insurance Company ("New Hampshire") concerning the effects of a reinsurance policy.

OUI is a company incorporated in Singapore and registered in England as an overseas company. Deutsche Ruck and Pine Top are companies incorporated in England with their registered offices in London. New Hampshire is a company incorporated in the State of New Hampshire (U.S.A.) and has its head office in that State. New Hampshire carries on business not only in the United States but also in France and in England. It is registered in England as an overseas company. In France it is registered as a foreign company and it has several offices there. It conducts its business in France through the agency of American International Underwriters SARL, a company incorporated in France.

3. The facts of the case and the course of the procedure were described in the order making the reference as follows. In September 1979 New Hampshire issued a policy of insurance to Nouvelles Galeries Réunies, a company incorporated in France, to cover risks for that company incurred under the five year warranty it gives on sales of electrical appliances. In December 1980 New Hampshire reinsured a proportion of that risk with OUI, Deutsche Ruck and Pine Top. In July 1986 the reinsurers ceased paying claims after raising a large number of queries concerning the operation and management of the insurance account.

On 4 June 1987 New Hampshire issued proceedings against Deutsche Ruck and Pine Top in the Tribunal de Commerce in Paris seeking performance under the reinsurance policy. On 9 February 1988 it brought similar proceedings in that court against OUI. In the French proceedings Deutsche Ruck, Pine Top and OUI have contested the jurisdiction of the French court.

In a letter dated towards the end of March 1988 OUI, Deutsche Ruck and Pine Top claimed that they were no longer bound by the reinsurance agreement because of non-disclosure and/or misrepresentation or breach of duty in both the placing and operation of the agreement on the part of New Hampshire. On 6 April 1988 they brought an action in the Commercial Court of the Queen's Bench Division seeking a declaration from the English court that they are no longer bound by the reinsurance policy. New Hampshire applied to the Court for a stay of the proceedings. That was granted by the Commercial Court, which decided pursuant to Article 21, second paragraph, of the Convention to stay the English proceedings pending the decision of the French court on the objection concerning its jurisdiction. OUI, Deutsche Ruck and Pine Top appealed against that order to the Court of Appeal. It is in the course of those proceedings that the Court of

Appeal has referred to the Court of Justice for a preliminary ruling a number of questions concerning the interpretation of the Convention.(1)

First question

4. The first question concerns the applicability of Article 21 of the Convention. The Court of Appeal seeks to know whether Article 21 applies regardless of the domicile of the parties.

Article 21 of the Convention provides 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 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."

5. This Court has already delivered two judgments concerning Article 21 of the Convention.

In *Gubisch*(2) the Court explained what was to be understood by the words "proceedings involving the same cause of action". It was held that the concept of *lis pendens* for the purposes of that article covered the case in which one party had brought proceedings before an Italian court for a contract to be set aside, or in the alternative for the party's discharge therefrom, when an action for enforcement of the same contract was pending before a German court. Between the parties in the main dispute there is no dispute as regards that point. In the order making the reference the Court of Appeal states that it is common ground that the proceedings before the French and English courts involve the same cause of action within the meaning of Article 21 of the Convention as explained by the Court of Justice in *Gubisch*.

In *Zelger*(3) the Court explained the meaning of the words "the court first seised". The Court held that those words were to be interpreted as meaning:

"[the court] before which the requirements for proceedings to become definitively pending are first fulfilled, such requirements to be determined in accordance with the national law of each of the courts concerned".

In the order making the reference the Court of Appeal stated that it was common ground between the parties that the French court was the court first seised.

6. In the first question the Court of Appeal asks whether the applicability of Article 21 of the Convention depends on the domicile of the parties and if so, of which one of them. The question was raised as a result of one of the arguments put forward by OUI, *Deutsche Ruck* and *Pine Top* before the Court of Appeal: they maintain that Article 21 of the Convention does not apply in this case as New Hampshire is not domiciled in a Contracting State, and in particular is not domiciled in France.

Whether a company such as New Hampshire is in fact domiciled outside the Contracting States is a question which was not referred to this Court. Nevertheless, I will discuss that point briefly, since it was the origin, because of Article 4 of the Convention, to which I will

refer later, of the dispute as regards the applicability of Article 21.

The first paragraph of Article 53 of the Convention provides as follows:

"For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law."

The Court of Appeal states in the order making the reference that the national rules enabling the seat of a legal person to be determined for the purposes of Article 53 of the Convention are to be found in Section 42 of the Civil Justice and Judgments Act 1982. The section provides that a corporation has its seat in a Contracting State if and only if:

- it was incorporated or formed under the law of that State and has its registered office or some other official address there; or

- its central management and control is exercised in that State.

Consequently, the Court of Appeal is of the opinion that under the rules of private international law applicable by it New Hampshire does not have its seat in another Contracting State within the meaning of Article 53 of the Convention. However, the Court of Appeal adds that the question whether under French law New Hampshire is to be regarded as domiciled in France is a matter of dispute between the parties.

7. I now come back to the argument relied on by OUI, *Deutsche Ruck* and *Pine Top* as explained by them in their observations to this Court. They submit that Article 21 of the Convention applies solely if the defendant is domiciled in the territory of a Contracting State and not when, as the Court of Appeal assumed, he is not domiciled there. Whereas in the first case Article 2 and the provisions referred to in Article 3 of the Convention itself indicate which court has jurisdiction, jurisdiction in the second case is determined according to Article 4 of the Convention in each Contracting State by the law of that State. In that case English law provides that the principle of *forum conveniens* applies, according to which the English court itself may deal with the case if it is to be considered, in the circumstances of the case, as the most appropriate forum.

New Hampshire, the United Kingdom, the German Government and the Commission take the view in their observations that Article 21 of the Convention does apply in the present procedural situation, that is to say, assuming as the Court of Appeal does that New Hampshire is not domiciled in a Contracting State. I agree with them for the reasons I shall set out.

8. Article 21 of the Convention governs cases where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States. According to that article the court last seised (which I shall call the second court) must decline jurisdiction in favour of the court first seised (which I shall call the first court), unless it

chooses to stay its proceedings where the jurisdiction of the first court is contested.

As regards the principle of *lis pendens* Article 21 of the Convention makes no distinction based on the provisions applied pursuant to the Convention to determine the jurisdiction of a court. More particularly, it makes no special provision, as the representative of the reinsurers suggested at the hearing, for cases in which Article 4 of the Convention applies. Consequently, Article 21 must be read as meaning that its provisions apply both when the jurisdiction of the court is determined pursuant to Articles 2 and 3 of the Convention by the provisions of the Convention itself (that is to say, when the defendant is domiciled in the territory of a Contracting State) and when jurisdiction is governed in accordance with Article 4 of the Convention by the legislation of the relevant Contracting State (that is to say, when the defendant is not domiciled in the territory of the Contracting State). Thus the wording of Article 21 of the Convention indicates that that article applies irrespective of the domicile of the parties.

9. That interpretation is in accordance with the purpose of the provision. In *Gubisch* the Court of Justice described that purpose as follows (paragraph 8 of the decision):

"Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention; that section 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, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought."

That purpose is best served if Article 21 of the Convention is interpreted as broadly as possible in order to enable it to be applied in principle (granted that there may be an exception in the case of exclusive jurisdiction: see paragraph 13, below) in all cases of proceedings pending before the courts of different Contracting States which are capable of leading to irreconcilable decisions and thus, as I have said, regardless of whether those courts have jurisdiction pursuant to the provisions of Articles 2 and 3 or pursuant to those of Article 4 of the Convention.

Consequently, I see no reason connected with the purpose of Article 21 of the Convention, either, to exclude its application in cases where Article 4 applies. I therefore conclude on the basis of both the wording and the purpose of Article 21 of the Convention that it applies regardless of the domicile of the parties.(4)

Second and third questions

10. The second and third questions concern the interpretation of the second paragraph of Article 21 of the Convention.

In the second question the Court of Appeal assumes that Article 21 of the Convention is applicable, that the jurisdiction of the first court is contested and that the second court, under the option given to it by the second paragraph of Article 21, has not declined jurisdiction in favour of the first court. The Court of Appeal wishes to know if in those circumstances the second court is obliged to stay its proceedings or whether it may consider the case directly itself.

The third question applies if the second is answered to the effect that the second court is not bound to stay the proceedings, but may deal with the case itself. In the third question the Court of Appeal wishes to know whether in that case the second court is required or permitted, in order to decide whether to stay its proceedings or decide the case itself, to examine whether the first court has jurisdiction, and, if so, in what circumstances and to what extent such an examination may or must be conducted.

11. Those questions arose as a result of an alternative argument relied on by OUI, Deutsche Ruck and Pine Top to the effect that the second paragraph of Article 21 of the Convention applies only where the first court has been properly seised, a fact which the second court must accordingly ascertain. If the English court did in fact examine the jurisdiction of the French court in their case, they maintain that it would be apparent that the French court is not entitled under the Convention to assume jurisdiction as regards Deutsche Ruck and Pine Top since they have their seat in England and ought therefore to have been sued there, and that as regards OUI, which is registered in England as an overseas company, the French court cannot derive jurisdiction from either the Convention or French law. New Hampshire contends, according to the order making reference, that the French courts do have jurisdiction on the ground that under French law it must be regarded as being domiciled in France for the purposes of the second paragraph of Article 4 of the Convention (or possibly the second paragraph of Article 8), and that such jurisdiction may in fact also be founded on Article 5(1) of the Convention.

12. The question whether the French courts have jurisdiction has not been put to this Court. The Court of Justice has been asked to give a preliminary ruling solely on the question whether the second court may or must examine the jurisdiction of the first.

The representative of OUI, Deutsche Ruck and Pine Top submitted at the hearing that the second court may in some cases proceed to hear itself a case pending before it without awaiting a declaration by the first court that it has no jurisdiction. That argument is based on the view held by some writers(5) that Article 21 of the Convention does not apply where the second court has exclusive jurisdiction on one of the grounds set out in Article 16 of the Convention. That is said to indicate that the second court must in all cases consider whether the first court was properly seised.

13. Whether Article 16 of the Convention, like other articles (for instance Article 17) which confer exclusive jurisdiction, constitutes an exception to the rule laid

down in Article 21 of the Convention is a question which I need not consider here. It has not been referred by the Court of Appeal. In any case, neither of the parties has suggested that this is a case of exclusive jurisdiction.

Whatever the answer to that question may be, it seems to me to be going too far to draw from the (possible) existence of an exception where there is exclusive jurisdiction the conclusion that the second court may or must in other cases, too, examine whether the first court has jurisdiction. There is a radical difference between the two hypotheses. Where there is exclusive jurisdiction the second court examines solely the question of its own (exclusive) jurisdiction. That is not so in cases such as the present where there is no ground for exclusive jurisdiction. In such a case the second court, if one takes the view put forward by the reinsurers, would be led to examine the jurisdiction of the first court in place of the latter in order to assume jurisdiction itself if it takes the view that the first court has no jurisdiction. Given the difference between the two hypotheses, the possible existence of an exception to Article 21 of the Convention where there is exclusive jurisdiction is not relevant to the case in hand.

14. Now, as regards the questions actually referred, I agree with New Hampshire, the United Kingdom, the German Government and the Commission that the interpretation of the second paragraph of Article 21 of the Convention advocated by OUI, Deutsche Rück and Pine Top (see paragraph 11, above) must be rejected. That is clear from the purpose of the provision, as just described.

The second paragraph of Article 21 of the Convention contains an exception to the general principle that jurisdiction must be declined in favour of the first court. The purpose of that exception was described in the Jenard Report as follows:(6)

"This rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction. The risk of unnecessary disclaimers of jurisdiction is thereby avoided."

In view of that statement of its purpose I consider that if the second court does not wish to decline jurisdiction in favour of the first court when the jurisdiction of the first court is contested, it must confine itself to staying the proceedings before it without embarking on an examination of the matter itself. Staying the proceedings is entirely sufficient, indeed, to satisfy the aim of avoiding unnecessary disclaimers of jurisdiction as far as possible (that is to say, avoiding the possibility that whenever the first court declares that it has no jurisdiction, the second may no longer validly be seised). It is therefore unnecessary for the second court to proceed to make the examination and decide the case on that basis. Indeed, if it does so, conflicting decisions might arise, if the first court, too, declared that it had jurisdiction and ruled on the case, a result which the Convention seeks to avoid as far as possible (paragraph 9, above).

15. Consequently, the second court must in circumstances such as those of the present case stay its proceedings, if it has not declined jurisdiction in favour of the first court.(7) That also applies if the second court is of the opinion that the first court has no jurisdiction. In any case, whether the first court has jurisdiction or not is a matter not for the second court - leaving aside the case of exclusive jurisdiction - but for the first alone to decide. Any other conclusion would constitute an unjustified interference by the second court in the legal autonomy of the first.

That conclusion also accords best with the wording of the second paragraph of Article 21 of the Convention, which merely states that suspending the proceedings is an alternative to declining jurisdiction in favour of the first court, and does not provide for the possibility that the second court also chooses to proceed with the case.

Fourth question

16. The fourth question concerns the ambit of the provisions of Title II, Section 3, of the Convention with regard to reinsurance contracts. Since that question is asked only if the answer to the other questions indicates that the second court must or may examine the jurisdiction of the first court, I think that on the basis of the answers I have suggested up to now, this question needs no further consideration.

Conclusion

17. I suggest that the questions referred for a preliminary ruling should be answered as follows:

"(1) Article 21 of the Convention applies irrespective of the domicile of the parties who have brought proceedings involving the same course of action in the courts of different Contracting States.

(2) Where Article 21 of the Convention applies, and the jurisdiction of the court first seised is contested, the court second seised is obliged merely to stay its proceedings if it does not decline jurisdiction in favour of the court first seised pursuant to the second paragraph of that article."

(*) Original language: Dutch.

(1) In view of the date on which the dispute was brought before the English courts (6 April 1988), these questions should be considered in the light of the Convention as amended by the Convention of Accession of 1978 (OJ 1978 L 304, p. 1) which came into force in the United Kingdom on 1 January 1987 (OJ 1986 C 285, p. 1). The version of the Convention as amended by the Convention of Accession of 1982 (Official Journal 1982 L 388, p. 1) did not come into force in the United Kingdom until 1 October 1989 (Official Journal 1989 C 249, p. 1). As regards the interpretation of the articles of the Convention discussed subsequently there is no difference because those articles were not amended.

(2) Judgment of 8 December 1987 (Case 144/86 Gubisch [1987] ECR 4861).

(3) Judgment of 7 June 1984 (Case 129/83 Zelger [1984] ECR 2397).

(4) See also: G. Droz, *Compétence judiciaire et effets des jugements dans le marché commun*, 1972, p. 189, P. Gothot and D. Holleaux, *La Convention de*

Bruxelles du 27 Septembre 1968, 1985 p. 123; P. Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments*, 1987, p. 1221; J. Kropholler, *Europaisches Zivilprozessrecht*, 1987, p. 215.

(5) G. Droz, *op. cit.*, pp. 192-194; P. Kaye, *op. cit.*, pp. 1221-1223.

(6) Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1, at p. 41).

(7) See to the same effect: P. Gothot and D. Holleaux, *op. cit.*, p. 126; P. Kaye, *op. cit.*, p. 1219.