

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 – 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)»

Opinion of Advocate General Léger delivered on 9 September 2003

I - 0000

Judgment of the Court (Full Court), 9 December 2003

I - 0000

Summary of the Judgment

- 1..
Convention on Jurisdiction and the Enforcement of Judgments – Protocol on the Interpretation of the Convention by the Court of Justice – Preliminary rulings – Jurisdiction of the Court of Justice – Question relying on the submissions of a party to the main proceedings – Whether admissible – Conditions (Brussels Convention of 27 September 1968; Protocol of 3 June 1971)
- 2..
Convention on Jurisdiction and the Enforcement of Judgments – Lis pendens – Actions brought before courts in different Contracting States – Jurisdiction of the court second seised claimed under an agreement conferring jurisdiction – Not relevant to the obligation to decline jurisdiction (Brussels Convention of 27 September 1968, Art. 21)
- 3..
Convention on Jurisdiction and the Enforcement of Judgments – Lis pendens – Actions brought before courts in different Contracting States – Excessive duration of proceedings before courts in the Member State of the court first seised – Not relevant to the application of Article 21 of the Convention (Brussels Convention of 27 September 1968, Art. 21)

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. see para. 27, operative part 1

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. 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. see paras 47, 54, operative part 2

3.
Article 21 of the Brussels Convention of 27 September 1968 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. An interpretation whereby the application of that article should be set aside in such a situation would be manifestly contrary both to the letter and spirit and to the aim of the Convention. see paras 70, 73, operative part 3

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 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 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.

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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).

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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.

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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

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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

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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

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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).

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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

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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.

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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.

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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.

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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.

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

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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.

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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

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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

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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

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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.**

Skouris	Jann	Timmermans
Gulmann	Cunha Rodrigues	Rosas
Edward	La Pergola	Puissochet
Schintgen	Macken	Colneric
von Bahr		

Delivered in open court in Luxembourg on 9 December 2003.

R. Grass

V. Skouris

Registrar

President

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Language of the case: German.