

OPINION OF MR ADVOCATE GENERAL CAPOTORTI
DELIVERED ON 15 OCTOBER 1981¹

*Mr President,
Members of the Court,*

1. This reference for a preliminary ruling raises a problem concerning the interpretation of Article 18 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Brussels on 27 September 1968. The same problem was recently encountered by the Court of Justice within the framework of another case of the same nature: the reference for a preliminary ruling in Case 150/80, *Elefanten Schuh*, in which judgment was given on 24 June 1981. I shall accordingly be able to deal with the matter very briefly.

First of all, I shall summarize the facts. The undertaking Ossberger Turbinenfabrik [hereinafter referred to as "Ossberger"] which has its registered office in Weissenburg, Bavaria, instituted proceedings before the Landgericht [Regional Court] Ansbach against a French customer, Établissements Rohr SA [hereinafter referred to as "Rohr"], Sarcelles, Val d'Oise, for an order that the latter should pay certain outstanding accounts. In order to establish that the Landgericht had jurisdiction the plaintiff invoked a clause conferring jurisdiction which was contained in its general conditions of sale. Rohr confined itself to contesting the jurisdiction *ratione loci* but did not submit any defence on the substance. By a judgment of 15 December 1978 the Landgericht Ansbach ruled that the clause conferring jurisdiction was valid (pursuant to Article 17 of the above-mentioned Brussels Convention); since the defendant had failed to submit a defence on the substance the court ordered it to pay the plaintiff the sum claimed together with the costs of the case.

Before the Oberlandesgericht Nürnberg [Higher Regional Court, Nuremberg], the court of second instance, Rohr repeated its objection of lack of jurisdiction and again did not submit any defence on the substance. Its appeal was dismissed by a judgment of 13 June 1979. A further appeal on a point of law by Rohr to the Bundesgerichtshof [Federal Court of Justice] was dismissed as inadmissible by an order of 19 March 1980 because the grounds for the appeal were not stated within the prescribed time-limits.

On the application of Ossberger the President of the Tribunal de Grande Instance [Regional Court], Pontoise, had meanwhile issued an order of 5 June 1979 declaring enforceable in France the judgment of the Landgericht Ansbach and the relative taxing order.

In challenging the order of the President of the Tribunal de Grande Instance before the Cour d'Appel, Versailles, Rohr claimed that Article 18 of the Brussels Convention did not permit a defendant who wished to contest the jurisdiction of the court to submit a defence on the substance at the same time. The fact that the German court, in addition to dismissing the objection of lack of jurisdiction, also gave judgment on the substance of the case constitutes a manifest infringement of the rights of the defence and is accordingly contrary to public policy within the meaning of Article 27 (1) of the Brussels Convention. On that argument the judgment of the Landgericht Ansbach should not be recognized in France.

By a judgment of 26 November 1980 the Court d'Appel, Versailles, decided to stay the proceedings, requested the

¹ — Translated from the Italian.

Court of Justice to give a ruling pursuant to the Protocol of 3 June 1971 on the interpretation of the Brussels Convention and submitted the following preliminary question:

"Must it be held with regard to all the versions of the Convention of 27 September 1968 which are drawn up in the Dutch, French, German and Italian languages in accordance with Article 68 of the Convention either that Article 18 thereof prohibits the simultaneous submission in the alternative of a defence concerning the substance of the case where an objection contesting jurisdiction as allowed by that provision has been raised, in order that a final decision on jurisdiction must be reached before any argument on the substance of the action, or that the said Article 18 permits, although it does not say so expressly, the objection contesting jurisdiction for which it makes provision to be submitted at the same time as defence in the alternative regarding the substance of the action in order to permit the court before which the action is brought to give a decision in a single judgment, if that is appropriate, on both the objection and the substance of the action on the pattern of the express provisions of Article 76 of the Nouveau Code de Procédure Civile [New Code of Civil Procedure] together with the detailed procedures for the protection of rights of the defence?"

2. The provisions of Article 18 of the Brussels Convention are as follows:

"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 by virtue of Article 16."

In setting out the reasons on which the judgment making the reference was

based the Cour d'Appel, Versailles, emphasized the difference existing between the French version of the above-mentioned provision and the Dutch, German and Italian versions. In fact the French version of the second sentence of Article 18 provides: "Cette règle n'est pas applicable si la comparution a pour objet de contester la compétence . . .", whilst according to the versions drawn up in the other three languages the provision contained in the first sentence does not apply "where appearance was entered *solely* to contest the jurisdiction . . .".

That difference in the four language versions of Article 18 has already prompted the Belgian Hof van Cassatie, to request the Court, by an order of 9 June 1980, to reply to the following question: "Is the rule on jurisdiction contained in Article 18 applicable if the defendant has not only contested jurisdiction but has in addition made submissions on the action itself?" As I recalled at the beginning that question was a subject of the reference for a preliminary ruling in Case 150/80, *Elefanten Schuh*, and led to the judgment of 24 June 1981 in which it was held, *inter alia*, that the said article "must be interpreted as meaning that the rule on jurisdiction which that provision lays down does not apply where the defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that, if the challenge to jurisdiction is not preliminary to any defence as to the substance, it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised".

In this connection the statement of the Court of Justice at paragraph 14 of the decision should be recalled: it was that the interpretation permitting a defendant to contest the jurisdiction of the court as

well as the substance of the claim "is more in keeping with the objectives and spirit of the Convention. In fact under the law of civil procedure of certain Contracting States a defendant who raises the issue of jurisdiction and no other might be barred from making his submissions as to the substance if the court rejects his plea that it has no jurisdiction. An interpretation of Article 18 which enabled such a result to be arrived at would be contrary to the right of the defendant to defend himself in the original proceedings, which is one of the aims of the Convention". The Court then added a single restrictive condition stating: "However, the challenge to jurisdiction may have the result attributed to it by Article 18 only if the plaintiff and the court seised of the matter are able to ascertain from the time of the defendant's first defence that it is intended to contest the jurisdiction of the court".

The views upheld in that judgment should, in my opinion, be fully confirmed. Article 18, as the Court is aware, is intended to govern "jurisdiction implied from submission" (cf. the Report on the Convention, known as the Jenard Report, at page 38) and in that connection the entry of an appearance by the defendant is deemed to imply submission to the court seised of the proceedings which, it is supposed, the plaintiff selected without any regard for the cases provided for by the other provisions of the Convention. In order to prevent in particular cases entry of an appearance being considered as implying an intention to submit to the jurisdiction it is sufficient that a clear declaration that this is not so should be made: that is to say, an objection of lack of jurisdiction. Nevertheless, once the objection of lack of jurisdiction has been submitted there does not appear to be any reason why the defendant should be

precluded from dealing in the alternative with the substance of the case lest the court should hold that it has jurisdiction. Clearly, the essential aim of entering an appearance remains that of raising an objection to the jurisdiction (the French version of Article 18 was thus well drafted, unlike the other versions); but what purpose is served by prohibiting the defendant from submitting arguments, as a precaution, to apply only if his objection is overruled?

3. In stating the reasons on which the judgment making the reference is based the French court properly points out that the interpretation of Article 18 is decisive in resolving the problem raised by Rohr in connection with the enforcement of the German judgment: namely whether or not recognition of that judgment is precluded by the fact that it is contrary to the public policy in the State in which recognition is sought (Article 27 (1) of the Brussels Convention). We have seen that the objection concerning public policy is based, according to Rohr, on an interpretation of Article 18 whereby that provision precludes a defence concerning substance of the case (thereby violating, it is said, the principle that the rights of the defence must be respected); accordingly, the rejection as such of that interpretation means that there is no basis for holding the said Article 27 (1) applicable to this case. In fact, it is Rohr which has misinterpreted Article 18 of the Convention and certainly not the German courts; it is clear that an error as to procedure committed by Rohr cannot and may not prevent recognition of the judgment against it.

I have, however, two considerations to add. First, the restriction concerning public policy may not be relied upon to obtain in the course of enforcement a

sort of review of the jurisdiction of the courts of the State in which judgment was given: the last paragraph of Article 28 of the Convention expressly excludes such a review, subject to the provisions of the first paragraph, and states "the test of public policy referred to in Article 27 (1) may not be applied to the rules relating to jurisdiction". For the purposes of the first paragraph of Article 28 the jurisdiction of the court, enforcement of whose judgment is sought, may be reviewed only where the provisions on jurisdiction contained in Sections 3, 4 and 5 of Title II (Articles 7 to 16) are infringed; the fact that Article 18 is not included amongst those provisions confirms that it is excluded from consideration in such a review. There does exist a case of infringement of the rights of the defence which may have the effect of precluding recognition of a foreign judgment but it concerns a well-defined situation: that is the case in which "the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence" (Article 27 (2)). It is clear that the foregoing does not apply to this case; all that may be inferred from it is that a particular aspect of the protection of the rights of the defence has been ensured by the authors of the Brussels Convention by means of a provision other than that concerning public policy.

Secondly — and this observation is even more relevant to the case under consideration — I do not see what basis there is for considering that Article 18 applies to the proceedings pending before the Cour d'Appel, Versailles. So far as the file indicates, Ossberger claimed that the German court had jurisdiction (and the claim was upheld by the Landgericht) pursuant to a clause expressly providing for submission to jurisdiction which had been agreed upon by the parties when delivery was made. Rohr could of course have contested the jurisdiction by challenging, on any ground whatever, the validity of the clause and by referring to Article 17 of the Brussels Convention; however, precisely because there was a clause in existence there was no reason to discuss the matter of implied submission to the jurisdiction which is the only matter covered by Article 18. In general, this makes clear that Article 18 does not concern all situations in which the defendant claims that he is entitled to raise an objection of lack of jurisdiction but only the case in which the defendant wishes to protect himself against the risk that his entry of an appearance may be interpreted as tacit submission to a jurisdiction which could not be founded on any other ground.

4. I accordingly suggest that the Court should rule, in reply to the reference for a preliminary ruling made to it by the Cour d'Appel, Versailles, by judgment of 26 November 1980, that Article 18 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters permits a defendant who contests the jurisdiction of the court before which the plaintiff has brought proceedings to submit at the same time in the alternative a defence on the substance of the action.