

## **Avis juridique important**

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**Judgment of the Court (Sixth Chamber) of 2 October 1997. - Stephen Austin Saldanha and MTS Securities Corporation v Hiross Holding AG. - Reference for a preliminary ruling: Oberster Gerichtshof - Austria. - Equal treatment - Discrimination on grounds of nationality - Dual nationality - Scope of application of the Treaty - Security for costs. - Case C-122/96.**

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Summary

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### **Keywords**

*1 Accession of new Member States to the Communities - Austria - Article 6 of the EC Treaty - Immediate application*

*(EC Treaty, Art. 6; 1994 Act of Accession, Art. 2)*

*2 Community law - Principles - Equal treatment - Discrimination on grounds of nationality - Prohibition - Scope - National provision requiring foreign litigants to lodge security for costs - Included - Condition*

*(EC Treaty, Art. 6, first para.)*

*3 Community law - Principles - Equal treatment - Discrimination on grounds of nationality - Prohibition - Scope - National provision requiring foreign litigants to lodge security for costs - Whether applicable in an action brought by a shareholder against a company - Not permissible*

*(EC Treaty, Art. 6, first para.)*

### **Summary**

*4 Since the 1994 Act of Accession contains no specific conditions with regard to the application of Article 6 of the EC Treaty, the latter provision must, pursuant to Article 2 of the Act of Accession, be regarded as immediately applicable, with the result that it is binding on the Republic of Austria from the date of its accession and applies in that Member State to the future effects of situations arising prior to accession.*

*5 A domestic rule of civil procedure in a Member State, such as that which requires a national of another Member State, in the case where he is non-resident, to lodge security for costs when he intends to bring legal proceedings, in his capacity as a shareholder, against a company established in that State comes within the scope of application of the Treaty within the meaning of the first paragraph of Article 6 thereof and is subject to the general principle of non-discrimination laid down by that article in so far as the rules which, in the area of company law, seek to protect the interests of shareholders come within the scope of application of the Treaty.*

*6 The first paragraph of Article 6 of the Treaty must be construed as precluding a Member State from requiring provision of security for costs by a national of another Member State who is also a national of a non-member country, in which he is resident, where that national, who is not resident and has no assets in the first Member State, has brought proceedings before one of its civil courts in his capacity as a shareholder against a company established in that Member State, if such a requirement cannot be imposed on the nationals of that State who are not resident and have no assets there.*

### **Parties**

*In Case C-122/96,*

*REFERENCE to the Court under Article 177 of the EC Treaty by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between*

*Stephen Austin Saldanha and MTS Securities Corporation*

*and*

*Hiross Holding AG*

*on the interpretation of the first paragraph of Article 6 of the EC Treaty,*

**THE COURT**

*(Sixth Chamber),*

*composed of: G.F. Mancini, President of the Chamber, P.J.G. Kapteyn (Rapporteur) and H. Ragnemalm, Judges,*

*Advocate General: A. La Pergola,*

*Registrar: H.A. Rühl, Principal Administrator,*

*after considering the written observations submitted on behalf of:*

*- Mr Saldanha and MTS Securities Corporation, by Peter Lambert, Rechtsanwalt, Vienna,*

*- Hiross Holding AG, by Gerold Zeiler, Rechtsanwalt, Vienna,*

*- the Austrian Government, by Franz Cede, Ambassador, Federal Ministry of Foreign Affairs, acting as Agent,*

*- the United Kingdom Government, by Stephanie R. Ridley, of the Treasury Solicitor's Department, acting as Agent,*

*- the Commission of the European Communities, by Ulrich Wölker, of its Legal Service, acting as Agent,*

*having regard to the Report for the Hearing,*

*after hearing the oral observations of Mr Saldanha and MTS Securities Corporation, Hiross Holding AG and the Commission at the hearing on 20 March 1997,*

*after hearing the Opinion of the Advocate General at the sitting on 6 May 1997,*

*gives the following*

**Judgment**

**Grounds**

*1 By order of 11 March 1996, received at the Court on 16 April 1996, the Oberster Gerichtshof (Austrian Supreme Court) referred for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of the first paragraph of Article 6 of that Treaty.*

*2 That question has arisen in proceedings brought by Mr Saldanha and MTS Securities Corporation against Hiross Holding AG, an Austrian company (hereinafter 'Hiross') in which they are shareholders, seeking an*

*injunction to restrain Hiross from selling or transferring shares which it holds in a number of its subsidiaries to its Italian subsidiary, or subsidiaries of that company established in Italy, without the approval of the general meeting of shareholders.*

*3 Hiross thereupon applied to the Handelsgericht Wien (Commercial Court, Vienna) for an order requiring Mr Saldanha, a national of both the United States of America and the United Kingdom living in Florida, and MTS Securities Corporation, a company domiciled in the United States, to provide security for the costs of the proceedings, pursuant to Paragraph 57(1) of the Zivilprozeßordnung (Austrian Code of Civil Procedure, hereinafter 'the ZPO').*

*4 Under that provision, foreign nationals who are plaintiffs in proceedings brought before Austrian courts must, on application by the defendant, lodge a sum as security for the costs of the proceedings (cautio judicatum solvi), except where otherwise provided by international treaty or convention. Paragraph 57(2) of the ZPO, however, provides that that obligation does not apply where, in particular, the plaintiff is normally resident in Austria or a judicial decision ordering the plaintiff to indemnify the defendant for his legal costs is enforceable in the State in which the plaintiff is normally resident.*

*5 In this connection, it appears from the order for reference that there is no convention or treaty between the Republic of Austria and the United States of America or the State of Florida enabling an Austrian decision on legal costs to be enforced in Florida (see Article 37 of the Decree of 21 October 1986 on international judicial assistance and other legal relations with foreign countries in civil matters, Austrian Journal of Judicial Administration (J.A. Bl.) 1986, p. 53). According to the Austrian Government, even though it appears that some American courts have recognized Austrian decisions on enforcement, recognition and enforcement of such decisions in the United States of America cannot be guaranteed because in the absence of a convention or treaty it is not possible to enforce American decisions in Austria. In any event, it appears from the order for reference that the Oberster Gerichtshof has already ruled that a foreign plaintiff normally resident in Florida must in principle be subject to the requirement of lodging security for legal costs owing to the absence of a convention or treaty governing the matter.*

*6 Although Article 11 of the Convention on legal assistance concluded on 31 March 1931 between the Republic of Austria and the United Kingdom (Treaty Series 4 (1932), Cmd. 4007) provides that nationals of the signatory States are to be exempt from the obligation to provide security for costs, that exemption is limited to persons domiciled in one or other of those States. Under the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9), which has been binding on both the Republic of Austria and the United Kingdom since 1 September 1996, a decision delivered in one Contracting State and capable of being enforced there must in principle also be recognized in another Contracting State after it has been declared enforceable. However, Paragraph 57(2)(1a) of the ZPO makes its application subject to the possibility of enforcement in the State in which the plaintiff is normally resident, in casu the United States of America.*

*7 On 22 November 1994 the Handelsgericht Wien made an order requiring Mr Saldanha and MTS Securities Corporation jointly and severally to lodge a sum of ÖS 500 000 as security for Hiross' legal costs, on the ground that they were not entitled to exemption under Paragraph 57(2) of the ZPO, and indicating that they would be deemed, on application by Hiross, to have discontinued the proceedings if they failed to comply with the time-limit for meeting that obligation.*

*8 The Republic of Austria acceded on 1 January 1995 to the European Union and to the Treaties on which the Union is founded, including the EC Treaty. The first paragraph of Article 6 of that Treaty provides: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'*

*9 The Oberlandesgericht Wien (Higher Regional Court, Vienna), before which the matter came on appeal, set aside the order of the Handelsgericht in so far as Mr Saldanha was concerned on the ground that he was a British national and that it would therefore be contrary to the first paragraph of Article 6 of the Treaty to require him to provide security. The Oberlandesgericht took the view that neither his dual nationality nor the fact that he was not normally resident in a Member State could in any way alter that conclusion.*

*10 Hiross appealed against that decision on a point of law to the Oberster Gerichtshof. Since it formed the view that Article 6 of the Treaty was a public policy provision which must, by virtue of Austrian procedural law, be taken into account by national courts, even in a case predating the Republic of Austria's accession to the*

Communities, the Oberster Gerichtshof decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

*'Where proceedings are brought before an Austrian civil court by a British national who is also a national of the United States of America, who resides in that country (in Florida) and does not have any residence or assets in Austria, against a limited company whose registered office is in Austria, seeking to have that company restrained from selling or otherwise transferring shares in specified subsidiary companies to its Italian subsidiary company, or to subsidiaries of that company with registered offices in Italy, without the approval of a qualified majority of three-quarters of the general meeting of shareholders or, in the alternative, of a simple majority of the general meeting of shareholders, does the fact that he has been ordered by the competent Austrian court (of first instance), on application by the defendant company pursuant to Paragraph 57(1) of the Austrian Code of Civil Procedure, to provide security for costs in a specified sum constitute discrimination on grounds of nationality contrary to the first paragraph of Article 6 of the EC Treaty?'*

*11 The question thus seeks to ascertain whether the first paragraph of Article 6 of the Treaty precludes a Member State from requiring provision of security for costs by a national of another Member State who is also a national of a non-member country, in which he is domiciled, where that national, who is not resident and has no assets in the first Member State, has brought before one of its civil courts an action in his capacity as a shareholder against a company established in that Member State, even though such a requirement is not imposed on its own nationals who are not resident and have no assets there.*

*The application ratione temporis of the first paragraph of Article 6 of the Treaty*

*12 As a preliminary point, Hiross argues that the matter at issue in the main proceedings is outside the scope ratione temporis of Community law, since the facts, including the order of the Handelsgericht requiring Mr Saldanha to provide security, predate the Republic of Austria's accession to the European Communities. From this Hiross concludes that there cannot be any discrimination contrary to Article 6 of the Treaty.*

*13 Article 2 of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, hereinafter 'the Act of Accession') provides that, from the date of accession, the provisions of the original Treaties are to be binding on the new Member States and are to apply in those States under the conditions laid down in those Treaties and in the Act of Accession.*

*14 In view of the fact that the Act of Accession contains no specific conditions whatsoever with regard to the application of Article 6 of the Treaty, the latter provision must be regarded as being immediately applicable and binding on the Republic of Austria from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member State's accession to the Communities. From the date of accession, therefore, nationals of another Member State can no longer be made subject to a procedural rule which discriminates on grounds of nationality, provided that such a rule comes within the scope ratione materiae of the EC Treaty.*

*The scope ratione materiae et personae of the first paragraph of Article 6 of the Treaty*

*15 It is first necessary to point out that the mere fact that a national of a Member State is also a national of a non-member country, in which he is resident, does not deprive him of the right, as a national of that Member State, to rely on the prohibition of discrimination on grounds of nationality enshrined in the first paragraph of Article 6 (see to that effect, with regard to Article 52 of the Treaty, Case C-369/90 Micheletti and Others v Delegación del Gobierno en Cantabria [1992] ECR I-4239, paragraph 15).*

*16 Since Article 6 of the Treaty produces effects within the area covered by the Treaty, it is necessary to consider next whether that article applies to a provision in a Member State, such as that at issue in the main proceedings, which requires nationals of another Member State to provide security for costs where, in their capacity as shareholders, they bring proceedings against a company established in that Member State, even though its own nationals are not subject to such a requirement.*

*17 In this connection, the Court has held, in Case C-43/95 Data Delecta and Forsberg v MSL Dynamics [1996] ECR I-4661, paragraph 15, and in Case C-323/95 Hayes v Kronenberger [1997] ECR I-1711, paragraph 17, that such a rule of domestic procedure falls within the scope of application of the Treaty within the meaning of*

*the first paragraph of Article 6, where the main proceedings relate to the exercise of the fundamental freedoms guaranteed by Community law, such as, in those cases, proceedings to recover payment for the supply of goods.*

*18 Hiross argues that, in this case, the main proceedings - which seek to prevent Hiross from selling or transferring shares which it holds in a number of its subsidiaries to its Italian subsidiary, or subsidiaries of that company established in Italy, without the approval of the general meeting of shareholders - are in no way connected with the exercise of a fundamental freedom guaranteed by Community law. Moreover, it contends that the national provision at issue in the main proceedings does not come within the scope of application of the Treaty by virtue of Article 220 of the EC Treaty.*

*19 It should be noted in this regard that, while a rule of procedure such as that at issue in the main proceedings is in principle a matter for which the Member States are responsible, the Court has consistently held that such a provision may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law (Case 186/87 Cowan v Trésor Public [1989] ECR 195, paragraph 19).*

*20 In the abovementioned judgments in Data Delecta and Forsberg, paragraph 15, and Hayes, paragraph 17, the Court held that a rule of domestic procedure requiring for judicial proceedings, such as those at issue in those cases, the provision of security for costs was liable to have an effect, even though indirect, on trade in goods and services between Member States and therefore fell within the scope of application of the Treaty.*

*21 Without its being necessary to examine the argument of Hiross that, in view of the subject-matter of the dispute in the main proceedings, the contested rule cannot in this case restrict, even indirectly, any fundamental freedom guaranteed by Community law, it must be held that such a rule cannot, in any event, discriminate against persons on whom Community law confers the right to equal treatment.*

*22 The dispute in the main proceedings concerns the protection of interests relied on by a shareholder who is a national of one Member State against a company established in another Member State.*

*23 Article 54(3)(g) of the EC Treaty empowers the Council and the Commission, for the purpose of giving effect to the freedom of establishment, to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 of the EC Treaty with a view to making such safeguards equivalent throughout the Community. It follows that rules which, in the area of company law, seek to protect the interests of shareholders come within the scope of the Treaty and are for that reason subject to the prohibition of all discrimination based on nationality.*

*24 If Community law thus prohibits all discrimination based on nationality in regard to the safeguards required, in the Member States, of companies or firms within the meaning of the second paragraph of Article 58 of the Treaty for the purpose of protecting the interests of shareholders, nationals of a Member State must also be in a position to seize the courts of another Member State of disputes to which their interests in companies there established may give rise, without being subject to discrimination vis-à-vis nationals of that State.*

*Discrimination within the meaning of the first paragraph of Article 6 of the Treaty*

*25 By prohibiting 'any discrimination on grounds of nationality', Article 6 of the Treaty requires, in the Member States, complete equality of treatment between persons in a situation governed by Community law and nationals of the Member State in question.*

*26 It is clear that a provision such as that at issue in the main proceedings amounts to direct discrimination on grounds of nationality. Under that provision, a Member State does not require its own nationals to provide security, even if they are not resident and have no assets in that State.*

*27 Hiross, however, takes the view that the distinction based on nationality is justified on objective grounds. In support of this view, it argues that the object of the provision in dispute is to ensure that a defendant will be able to exercise his right to recover his costs if successful. It refers in particular to the problems of enforcement which might arise where the plaintiff is not resident and has no assets in the Community, as is the position in the main case.*

*28 In this context, Hiross submits that the possession of Austrian nationality as a criterion permitting exemption from the obligation to provide security is justified by the likelihood of obtaining enforcement, within the national territory, of a right to reimbursement of costs awarded against a solvent national, a likelihood attributable, in particular, to the assumed existence of assets linked to the national territory and the tendency to comply with decisions of national courts.*

*29 Suffice it in this regard to point out that, even though the object of a provision such as that at issue in the main proceedings, namely that of ensuring enforcement of a decision on costs in favour of a defendant who has been successful in proceedings, is not as such contrary to Article 6 of the Treaty, the fact remains that that provision does not require Austrian nationals to provide security for costs, even if they are not resident and have no assets in Austria and are resident in a non-member country in which enforcement of a decision on costs in favour of a defendant is not guaranteed.*

*30 In those circumstances, the answer to the question submitted must be that the first paragraph of Article 6 of the Treaty must be construed as precluding a Member State from requiring provision of security for costs by a national of another Member State who is also a national of a non-member country, in which he is resident, where that national, who is not resident and has no assets in the first Member State, has brought proceedings before one of its civil courts in his capacity as a shareholder against a company established in that Member State, if such a requirement is not imposed on its own nationals who are not resident and have no assets there.*

#### **Decision on costs**

##### *Costs*

*31 The costs incurred by the Austrian and United Kingdom Governments and by the Commission of the European Communities, 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.*

#### **Operative part**

*On those grounds,*

*THE COURT*

*(Sixth Chamber),*

*in answer to the question referred to it by the Oberster Gerichtshof by order of 11 March 1996, hereby rules:*

*The first paragraph of Article 6 of the EC Treaty must be construed as precluding a Member State from requiring provision of security for costs by a national of another Member State who is also a national of a non-member country, in which he is resident, where that national, who is not resident and has no assets in the first Member State, has brought proceedings before one of its civil courts in his capacity as a shareholder against a company established in that Member State, if such a requirement is not imposed on its own nationals who are not resident and have no assets there.*