origin and under various procedures, of an inquiry in adversary proceedings.

2. The conditions imposed by Title III of the Convention on the recognition and the enforcement of judicial decisions are not fulfilled in the case of provisional or protective measures which are ordered or authorized by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party. It follows that this type of judicial decision is not covered by the system of recognition and enforcement provided for by Title III of the Convention.

In Case 125/79

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 [Higher Regional Court] Frankfurt am Main, for a preliminary ruling in proceedings pending before that court between

BERNARD DENILAULER, 26 Spessartstraße, 6204 Taunusstein 2

defendant and appellant,

and

S.N.C. COUCHET FRÈRES, Andrézieux-Bouthéon (France)

plaintiff and respondent,

on the interpretation of Articles 24, 27, 34, 36, 46 and 47 of the Convention of 27 September 1968 (Official Journal 1978, L 304, p. 36),

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments put forward by the parties during the written procedure may be summarized as follows:

I — Facts and written procedure

The undertaking S.n.c. Couchet Frères, the plaintiff in the main action, whose registered office is at Andrézieux-Bouthéon (France), transported goods for the German undertaking, B. Denilauler, and, after failing to receive payment of the relevant invoices, sued the other party to the contract before the Tribunal de Grande Instance, Montbrison, which, by a judgment of 4 July 1979, ordered B. Denilauler to pay the sums claimed, namely the principal sum of FF 120 000, having rejected a claim for set-off by the debtor for an amount of FF 65 000. In the course of the proceedings the President of the court seised of the main action made an order on 7 February 1979 pursuant to Article 48 of the Code Français de Procédure Civile [French Code of Civil Procedure] authorizing Couchet to have Denilauler's bank assets at the Société Générale Alsacienne de Banque at Frankfurt am Main frozen as security for the sum of FF 120 000 plus FF 10 000 for interest and expenses. That order was enforceable and made *ex parte*. Denilauler argues that his appeal against that order has not yet been decided.

By an application of 19 February 1979 to the Landgericht [Regional Court] Wiesbaden, Couchet, relying upon the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Convention"), requested that court to declare the order in question enforceable in the Federal Republic of Germany and at the same time that an order be made enabling it to attach the said bank assets.

In that application it maintained that its application for enforcement could be granted notwithstanding the fact that the French attachment order had not been served upon Denilauler. According to Couchet the service required by Article 47 of the Convention did not apply to an attachment order because otherwise the surprise effect decisive for the success of an attachment would be lost.

By an order of 23 March 1979 the President of the 6th Civil Chamber of the Landgericht Wiesbaden granted its application and ordered that a writ of execution be granted in respect of the French order of 7 February 1979; this was done on 28 March 1979 by the registrar of the Landgericht who, by an order of the same day, effected the attachment (Pfändungsbeschluß) sought.

Denilauler lodged an appeal against that order before the Oberlandesgericht Frankfurt am Main seeking as a principal claim to set aside the order on the

ground that the application to the Landgericht Wiesbaden should have been dismissed under Articles 27 (2) and 46 (2) of the Convention because the application of 7 February 1979 to the Tribunal de Montbrison had not been served on him. As a subsidiary claim he requested that enforcement be allowed only as regards FF 55 000, that is, by subtracting from the sum of FF 120 000 the sum of FF 65 000 which he had unsuccessfully sought before the French court as a set-off against his debt. He claims that the fact that the debt which he seeks to set off against Couchet arose before the date (7 February 1979) when the French court made the attachment order is irrelevant in this regard.

By an order of 25 July 1979 the Oberlandesgericht Frankfurt am Main requested the Court pursuant to Article 3 of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the 1968 Convention for a preliminary ruling upon the following questions:

"1. Do Articles 27 (2) and 46 (2) also apply to proceedings in which provisional protective measures are taken without the opposite party's being heard?

2. Is Article 47 (1) of the Convention to be interpreted as meaning that the party applying for enforcement must also produce the documents which establish that the judgment of which enforcement is sought has been served, even if that judgment concerns a provisional and purely protective measure?

3. May the party against whom enforcement is sought and who, in addition to the rule contained in the second paragraph of Article 34 of the Convention, exercises the appeal available under the first paragraph of Article 36 of the Convention against authorization of enforcement of a provisional protective measure within the meaning of Article 24 of the Convention, plead objections to the claim itself irrespective of the time at which the grounds for the objection arose; in cases of this sort can therefore the party against whom enforcement is sought set off a claim which he already possessed against the applicant before the provisional measure was taken in the first State?

4. If the third question is answered in the affirmative, is it possible in appeal proceedings under the first paragraph of Article 36 of the Convention to oppose the objections relied upon against the claim by the party against whom enforcement is sought on the grounds that that party has appealed in the proper way against the judgment in the State in which it was given and has founded that appeal on the same objections against the claim itself as he has raised in the appeal under the first paragraph of the said Article 36?".

The order making the reference was received at the Court of Justice on 6 August 1979.

The plaintiff in the main action, represented by G. H. Schroer of the Frankfurt am Main Bar, the Government of the United Kingdom, represented by R. D. Munrow, Treasury Solicitor, the Italian Government, represented by its

Agent Adolfo Maresca, assisted by the Avvocato dello Stato, F. Favara, and the Commission of the European Communities, represented by its Agent, G. Behr, assisted by W. D. Krause-Ablass of the Düsseldorf Bar, lodged written observations pursuant to Article 5 of the Protocol of 3 June 1971 in accordance with Article 20 of the Statute of the Court of Justice of the EEC.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — First and second questions

In these questions the Court is, in essence, asked to rule whether the formal requirements imposed by the Convention for recognition (Article 27 (2)) and recognition and enforceability of judgments (Article 46 (2), Article 47 (1)), are applicable to national proceedings for the adoption of interim or protective measures which because of their object are adopted *ex parte*, that is to say, in the absence of the defendant against whom they are directed. According to Article 27 (2) a judgment given in a Contracting State is not to be recognized in the other Contracting State: "Where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence".

According to Article 46 (2) a party seeking recognition or applying for enforcement of a judgment must produce "In the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings."

According to Article 47 (1) a party applying for enforcement must also produce: "Documents which establish that, according to the law of the State in which it has been given, the judgment is enforceable and has been served".

1. Observations of the plaintiff in the main action (Couchet)

According to the plaintiff in the main action, Articles 27 (2), 46 (2) and 47 (1) of the Convention are not applicable to proceedings in which protective measures have been adopted, in accordance with the national law of the competent court, without the other party's having first been heard. The provisions cover judgments given after default proceedings, that is, proceedings in which the defendant, although the plaintiff wishes him to appear, does not do so by default. They do not cover *ex parte* proceedings for the adoption of protective measures brought by the plaintiff alone. Such proceedings are provided for by Article 48 of the (former) French Code of Civil Procedure and by Articles 917 *et seq.* of the German Civil Code by which the courts concerned may make attachment orders without the appearance of the other party. It follows from the meaning and

object of a protective measure that the grant of enforcement under the Convention cannot be made dependent upon the document instituting the proceedings having been served on the other party. Such a requirement would impair the effectiveness and surprise effect upon which the success of such proceedings depends. Since the Convention regards interim or protective judicial measures as judgments capable of being recognized and enforced in another Contracting State, those judgments must have the same effectiveness in the State where the measure is to be enforced as they have in the State of origin.

These considerations must lead to the admission that a French attachment order must be made enforceable under the Convention even when that order has not been previously served in accordance with Article 47 (1) of the Convention.

2. Observations of the United Kingdom Government

According to the United Kingdom the language of the Convention is plain and requires a reply that the formality required by Articles 27 (2), 46 (2) and 47 (1) must be observed even when recognition or enforcement of a judgment is sought which in the Contracting State "of origin" may be given following *ex parte* proceedings. In support of its argument the United Kingdom Government (a) bases arguments on the wording; and (b) draws attention to the grave consequences in trade and commerce of attachments without the knowledge of the other party.

As to (a), the United Kingdom thinks that the language of Articles 46 (2) and 47 (1) of the Convention is clear and mandatory. It also draws support for its argument from the words of the third paragraph of Article 33 which provides that the documents referred to in Articles 46 and 47 *shall* be attached to the application. Finally, as endorsed by legal commentators, Article 27 (2) is directed not only at default judgments proper, but also at all other judgments given as a result of proceedings in which the defendant has not appeared.

The British Government thinks that the national court is correct in observing that if the strict application of Article 27 (2) is necessary for, and is intended to ensure that, the court of the State addressed verifies whether the rights of the defence have been sufficiently protected in the State of origin, this application leads to the further, unintended, result of depriving the plaintiff of the surprise effect which is most often necessary for the success of protective measures and which justifies the *ex parte* nature of such proceedings.

It does not however believe that the intention of the authors of the Convention to make judgments as effective in the State where enforcement is sought as in the State where the judgment was given, which the national court puts forward, enables an exception to be made to the requirements of Articles 42 (2) and 27 (2). According to Articles 31 and 32 of the Vienna Convention of 23 May 1969 on the Law of Treaties (not yet in force), in the interpretation of a treaty, regard must be had to the object and purpose of the

Convention as well as to the ordinary meaning of the terms used; and the ordinary meaning, which is unambiguous in this case, can only be displaced if its result were manifestly absurd or unreasonable.

As to (b), the interpretation which the United Kingdom Government proposes, far from leading to unreasonable results, would on the contrary lead to results meeting the needs of commercial practice. Provisional protective measures, in particular the freezing of a bank account, are often drastic in their effect, particularly for commercial undertakings which, following proceedings of which they have no knowledge, find accounts blocked which hold sufficient funds to honour obligations abroad without even having had the chance to make other arrangements to meet the presentation of bills or for payments to be made. Thus not only the interests of the defendant but also those of third parties may be seriously affected. If serious prejudice to the rights of such other persons is to be prevented and uncertainty avoided for commercial transactions, it is essential that protective measures of this kind should rapidly be brought to the notice of all concerned and that they should have opportunities for taking immediate counter-action.

Whilst the protective measure consisting of the freezing of a bank account should be available to a plaintiff in appropriate cases, the United Kingdom Government is however of the opinion that it is of the first importance that a defendant subjected to such a measure, and any other interested person, should have the chance within a very short period of putting forward his arguments before the court which imposed it. This will be possible only if that court is geographically close, if it operates a legal susytem with which the affected party is familiar, and if there are no linguistic difficulties. In other words, the effect of surprise provisional protective measures ordered on an *ex parte* application without the defendant's having any knowledge of them, should as a general rule be limited to the State in which the order is made.

This interpretation would in practice make it necessary for an applicant for provisional protective measures who wishes to take the defendant by surprise, to make his application in the State where the measure is to be enforced, even though the courts of that State do not have substantive jurisdiction and according to the United Kingdom Government Article 24 of the Convention confirms that such is indeed the appropriate solution in the context of the Convention on Jurisdiction.

The United Kingdom Government acknowledges that this solution will be effective only if the courts of the Contracting States have jurisdiction under their own laws to order provisional protective measures even where they do not have jurisdiction as to the substance of the case and it admits that in the United Kingdom orders freezing the assets of the defendant can be made

at present only if they are ancillary to an action justiciable in national courts. However, amendments to the law on this point are under consideration.

The United Kingdom therefore proposes that the first and second questions put to the Court of Justice should be answered as follows:

"Articles 27 (2), 46 (2) and 47 (1) of the Convention apply to proceedings in which provisional protective measures have been ordered without hearing the opposite party in the same way as they apply to other default judgments."

3. Observations by the Italian Government

The Italian Government primarily draws attention to Article 24 of the Convention which provides for protective proceedings to be independent of the judgment on the substance of the case and leaves it to the law of each Contracting State to extend the protective powers of national courts. It follows from this that judicial decisions ordering or allowing provisional and protective measures within the meaning of Article 24 come within the concept of "judgment" used by Article 25 of the Convention, that is to say, judicial decisions capable of being recognized and enforced in the State addressed.

Passing on to examine the first two questions, the Italian Government observes that the wording of the Convention does not provide any explicit answer. However, the fact that the Convention is silent on this point cannot be interpreted to mean that the formal conditions laid down by Articles 27 (2) and 46 (2) extend to protective proceedings. The need to deal with cases of urgency has led the national legislatures of the Contracting States, notably in Italy, to confer upon their courts the power to give judgment *inaudita altera parte* in certain circumstances. It is not possible to speak of "default" by the defendant in such cases since his participation in that stage of the judgment is not required by procedural law. The formal conditions laid down by Articles 27 (2) and 46 (2), taking account also of the first paragraph of Article 34 of the Convention, should not therefore apply to the enforcement of a protective measure adopted in the initial stage of the trial during which oral argument by both sides is not required by the law of the State to which the court which adopted that measure belongs. However, this initial *ex parte* stage must be followed by argument from both sides within a very short while.

The answer given as regards Articles 27 (2) and 46 (2) applies equally to Article 47 (1) of the Convention for the same reasons.

4. Observations of the Commission

The Commission has serious doubts whether Article 27 (2), 46 (2) and 47 (1) of the Convention are also applicable to the recognition and the enforcement of provisional measures which may be adopted under the national code of procedure of the State of origin without the other party's being heard. It holds this opinion on the following grounds:

— Provisional measures designed to safeguard rights and adopted under the legal systems of various Contracting States (France, Belgium, the Federal Republic of Germany, Italy and the Netherlands), are prompted by the urgency and the

surprise effect which they are intended to achieve. Refusal to recognize and enforce these measures affects an important category of judgments and the Contracting States cannot have intended to restrict the field of application of the Convention to that degree.

— The Convention itself provides in the first paragraph of Article 34 that when the enforcement of a foreign judgment is sought, the court applied to shall give its decision without delay and without the party against whom enforcement is sought being entitled to make any submissions. If the Convention itself dispenses with appearance by the defendant precisely in order to maintain the surprise effect, as is clear from the *Jenard* Report (Official Journal 1979, C 59, p. 50), it would be a contradiction to refuse to recognize and enforce protective measures of the same scope emanating from courts of the Contracting States. On the contrary it is essential to proceed from the principle that the Convention must reinforce the effectiveness of provisional measures of a protective nature since Article 24 has provided new and more extensive powers for the national courts to do this.

— The object of the Convention which is, by simplifying formalities, to facilitate recognition and establish quick enforcement procedures for judicial decisions, would not be achieved if provisional protective measures were refused recognition and enforcement because they had been ordered without the other party's being heard.

— When they examined Article 27 (2) and the corresponding second paragraph of Article 20, the government experts mainly had in mind judgments by default and the *Jenard* Report (Official Journal 1979, C 59, p. 42) provides no support for holding that those provisions must be extended to applications for the enforcement of protective measures adopted in the State of origin without the other side's being heard.

The Commission therefore proposes that the first two questions be answered as follows:

"1. Article 27 (2) of the Convention of 27 September 1978 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not apply to proceedings in which provisional measures of a protective nature are adopted without the other party's being heard.

2. The application for enforcement of a provisional measure of a protective nature must not necessarily be accompanied by documents containing proof of notification or service within the meaning of Articles 46 (2) and 47 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters".

B — Third and fourth questions

In these questions the Oberlandesgericht Frankfurt am Main asks whether the defendant in enforcement proceedings may, in cases such as those described in the order making the reference, rely on a set-off based upon a debt which was due to him from the plaintiff before pro-

visional measures were granted in the State of origin. Article 14 (1) of the German Law of 29 July 1972 implementing the Convention (BGBl. 1972, I, p. 1328) states that the debtor may in his appeal (Beschwerde) also raise objections to the claim itself, in so far as they arose only *after* the foreign judgment was given".

Denilauler thinks that the set-off on which he relies is admissible notwithstanding the fact that the debt due to him arose before the order of 7 February 1979; he argues that the factor determining whether the facts on which the main defence rests arose before or after the order was made is the time when the set-off was pleaded and not the time when the two debts could first be set off one against the other.

1. Observations by the plaintiff in the main action

The plaintiff in the main action (Couchet) is of the opinion that Article 14 of the implementing German Law does not apply to mere provisional and protective judicial measures and refers to the order of the Bundesgerichtshof of 16 May 1979 (Recht der internationalen Wirtschaft 1979, p. 570) by which objections on the merits of allowing an attachment which rest upon facts occurring before attachment was ordered cannot be taken into consideration in the enforcement proceedings. The hearing of submissions upon the principal claim during the enforcement procedure would give more rights to the other party than he has in his own State as regards the attachment ordered against him.

In fact according to Articles 917 *et seq.* of the German Code of Civil Procedure objections to the substance of the claim can only be examined in the defence to the main action and therefore do not in principle affect the enforceability of the attachment order. The court of the State addressed may moreover make the enforcement which it orders conditional upon security being given, which safeguards the interests of the party whose assets are attached.

Even if the raising of objections against the claim were regarded as permissible, any objections which the other party has already made in the proceedings which he has brought in the State of origin must still be barred by the principle of *lis pendens.*

2. Observations of the United Kingdom Government

The United Kingdom Government thinks that the defendant may not claim set-off. According to the *Jenard* Report (Official Journal 1979, C 59, p. 51): "The appellant could, however, effectively adduce grounds which arose after the foreign judgment was given. For example, he may establish that he has since discharged the debt". However, the United Kingdom thinks that it is not clear that the same considerations apply to a set-off. However, that may be the implication, though not stated in so many words, is that a claim which arose before the foreign judgment was given is

a matter to be raised before the court of origin and not before the court addressed.

If the Court shares this view on Question 3, Question 4 will not arise for decision. If, however, a decision on this question is necessary, the United Kingdom would submit that the fact that an appeal has been lodged in the court of origin is an additional reason for not allowing the matters raised in that appeal to be argued before the court addressed in the appeal against enforcement because of the *lis alibi pendens* rule.

The United Kingdom therefore submits that Questions 3 and 4 be answered as follows:

"The respondent in enforcement proceedings is not permitted to plead in those proceedings a set-off which arose before judgment was given in the court of origin; and *a fortiori* if he has already raised that issue in an appeal against the decision in the State of origin".

3. Observations of the Italian Government

According to the Italian Government Questions 3 and 4 concern the purpose of the appeal referred to in Article 36 of the Convention and consequently the limits of the jurisdiction of the court before which that appeal is brought. The special nature of the appeal against the order for enforcement gives reason to believe that Articles 36 *et seq.* of the Convention are not intended to change the normal criteria for distributing jurisdiction among the courts of the various Contracting States or between the courts within each Contracting State. The view to be preferred is therefore that the decision on the appeal referred to in Article 36 can only be intended to establish whether the conditions laid down by the Convention for the issue of the enforcement order are fulfilled and consequently to allow enforcement proceedings to be undertaken.

The appeal judgment is in substance nothing more than a continuation of the judgment upon the application for the grant of an enforcement order. This judgment seems to consist of two stages: first, one in which "the party against whom enforcement is sought" (Article 40 of the Convention) is not called upon to participate and may not even intervene "to make any submissions" (first paragraph of Article 34 of the Convention) and a possible second stage begun by an appeal under Article 36 of the Convention.

Supporting arguments may also be based on Articles 38 and 39 of the Convention which merely specify periods for enforcement and the provision of security.

The Italian Government consequently proposes that the answer to Questions 3 and 4 should be that:

"Preliminary objections or defence submissions other than those concerning the grant of the order for enforcement are not permissible in the appeal procedure referred to in Article 36 of the Brussels Convention".

4. Observations of the Commission

According to the Commission the principle that the foreign judgment may not be reviewed as to its substance applies to the procedure for the recognition and enforcement of judgments under the Convention. Nevertheless in exceptional circumstances the debtor may, as stated in the *Jenard* Report (Official Journal 1979, p. 51) effectively adduce submissions against enforcement which are founded upon facts which arose after the foreign judgment, for example, by proving that he has discharged the debt since the delivery of the foreign judgment. Article 14 (1) of the German Law implementing the Convention applies this principle. At all events, in judgments on the enforcement of provisional protective measures, submissions made upon the claim on behalf of which the protective measure is adopted must be barred for the simple reason that when ordering the provisional protective measures the foreign court does not at that stage generally proceed to the definitive examination of the claim protected by that measure. The definitive examination takes place only when proceedings are brought before the foreign court or during separate proceedings.

On the basis of the order of the Bundesgerichtshof of 16 May 1979 cited above, the Commission is of the opinion that it is only during the proceedings before the court of the State of origin or at the time of separate proceedings in which a definitive ruling is given upon the claim in dispute that the defendant may present its defence as to the substance and not during the proceedings to enforce the protective measure, otherwise the court ruling upon enforcement would encroach upon the power of decision of the court having jurisdiction to give a definitive ruling upon the claim in question.

To avoid this, Article 21 of the Convention provides that when claims involving the same cause of action and between the same parties are brought before the courts of different Contracting States, any court other than the court first seised must of its own motion decline jurisdiction in favour of that court.

Since the defendant in the main action has already claimed set-off during the proceedings before the Tribunal de Grande Instance, it falls to that French court to decide as to the set-off.

In accordance with the observations referred to above the Commission proposes that Questions 3 and 4 be answered as follows:

"In enforcement proceedings regarding provisional measures of a protective nature the submissions of the debtor upon the claim which constitutes the subject-matter of the protective measure are not permissible irrespective of the time when the grounds arose on which those submissions are based".

III — Oral procedure

At the sitting on 26 February 1980 the defendant, represented by Dr. G. H. Schroer, Rechtsanwalt of Frankfurt am Main, the Commission of the European Communities, represented by Dr W.-D. Krause-Ablass, Rechtsanwalt of Düsseldorf, and the Government of the United Kingdom, represented by K. M. Newman, C. B., Under Secretary, Lord Chancellor's Office, presented oral argument.

The Advocate General delivered his opinion at the sitting on 26 March 1980.

Decision

1 By an order of 25 July 1979 received at the Court on 6 August 1979 the Oberlandesgericht [Higher Regional Court] Frankfurt am Main referred to the Court under the Protocol 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) (Official Journal 1978, L 304, p. 36) four questions relating to the interpretation of Articles 24, 27 (2), the second paragraph of Article 34, the first paragraph of Articles 36 and Articles 46 (2) and 47 (1) of the Convention.

2 In 1978 a dispute between a creditor, Couchet Frères, and its debtor, Denilauler, was brought before the Tribunal de Grande Instance [Regional Court], Montbrison (France). On 7 February 1979 the President of that court, exercising the powers conferred on him by Article 48 of the French Code of Civil Procedure at the request of the creditor and without the other party's having been summoned to appear, made an order which was declared provisionally enforceable, authorizing the creditor to freeze the account of the debtor at a bank in Frankfurt am Main as security for a debt estimated at FF 130 000. Under French law such freezing of assets ["saisie conservatoire"] which the creditor was thus authorized to carry out may be affected without prior service of the order on the debtor whose assets are seized.

3 The questions before the Court have been referred to it pursuant to proceedings before German courts for the issue of an order for the enforcement of the French order and also for a "Pfändungsbeschluß" [attachment order] seizing the funds in the bank's possession. These proceedings were first before the President of the Landgericht [Regional Court] Wiesbaden who ordered enforcement on 23 March 1979 resulting in seizure of the funds on 28 March, all without the debtor's having been a party to the proceedings. It seems that the order by the President of the Landgericht Wiesbaden was not served on the debtor until 3 May 1979; the debtor immediately appealed against it before the Oberlandesgericht Frankfurt am Main which referred to the Court the questions now under consideration.

4 These questions first seek to know whether decisions of the judicial authorities of a Contracting State ordering provisional and protective measures, where the party against whom they are directed has not been summoned to appear and does not become aware of them until after their enforcement, may be recognized and made enforceable in another Contracting State without prior service on the party against whom they are directed (Questions 1 and 2). They secondly seek clarification of the objections which the party against whom enforcement is sought may raise when lodging the appeal against the enforcement order as provided by Article 36 of the Convention (Questions 3 and 4).

Questions 1 and 2

5 Questions 1 and 2, which should be answered together, read as follows:

"1. Do Articles 27 (2) and 46 (2) also apply to proceedings in which provisional protective measures are taken without the opposite party's being heard?

2. Is Article 47 (1) of the Convention to be interpreted as meaning that the party applying for enforcement must also produce the documents which establish that the judgment of which enforcement is sought has been served, even if that judgment concerns a provisional and purely protective measure?"

6 The Commission, the Italian government and the plaintiff in the main action express the opinion in their observations that such judgments must be recognized as enforceable in the Contracting State addressed without prior service on the party against which they are directed.

The specific object of this type of provisional or protective measure is thought to be to produce a surprise effect intended to safeguard the threatened rights of the party seeking them by preventing the party against whom they are directed from removing the assets in its possession, whether they be the subject-matter of the dispute or constitute the creditor's security. To stipulate that the recognition and the enforcement of such types of judgments must be subject to their prior service on the other party and from the stage of the proceedings in the Contracting State of origin would, it is said, make them totally meaningless.

The United Kingdom Government, on the other hand, is of the opinion that the recognition and the enforcement of these judgments must be subject to the conditions set out in Articles, 27, 46 and 47 as regards service on the other party. It acknowledges that this requirement removes the surprise effect peculiar to such decisions and destroys all their practical value so that it virtually amounts to a refusal to recognize and enforce the decisions in question. However, it feels that the effect of this is not so serious as what it regards the intolerable risks which would have to be run by undertakings having assets in different Contracting States as a result of a procedure which obliges the courts of the State addressed to authorize measures freezing assets located in that State without the owner of those assets having ever had the opportunity to put forward his version of the case either before the court of the State of origin or before the court of the State addressed when such assets may have been legitimately intended to meet other obligations. Only the court having jurisdiction in the State in which the assets are located is in a position to determine, in the full knowledge of the facts of the case, the necessity to authorize this type of provisional or protective measure. The United Kingdom government further contends that its point of view does not create a lacuna in the scheme of the Convention because Article 24 enables any party to apply to the courts of a Contracting State for such provisional or protective measures as may be available under the law of that State, even if the courts of another Contracting State have jurisdiction as to the substance of the matter.

7 Article 27 of the Convention sets out the conditions to be fulfilled for the recognition in a Contracting State of judgments given in another Contracting State. Under Article 27 (2) a judgment shall not be recognized "if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence". Article 46 (2) stipulates that a party seeking recognition or applying for enforcement of a judgment given in default in another Contracting State must produce amongst other documents the document which establishes that the party in default was served with the document instituting the proceedings or notice thereof.

8 These provisions were clearly not designed in order to be applied to judgments which, under the national law of a Contracting State, are intended to be delivered in the absence of the party against whom they are directed and to be enforced without prior service on him. It is apparent from a comparison of the different language versions of the words in question and in particular from the terms used to describe the party who does not appear that these provisions are intended to refer to proceedings in which in principle both parties participate but in which the court is nevertheless empowered to give judgment if the defendant, although duly summoned, does not appear.

9 The same applies to Article 47 (1) of the Convention under which the party seeking enforcement must produce documents which establish that, according to the law of the State in which it has been given, the judgment is enforceable and has been served. This provision which relates to judgments in cases in which both parties participate as well as to judgments in default delivered in the State of origin cannot by definition apply to judgments such as the type in dispute, which have a different character.

10 However, it cannot be inferred from the fact that Articles 27 (2), 46 (2) and 47 (1) cannot apply to decisions of the type in question, save by distorting their substance and scope, that such decisions must nevertheless be recognized and enforced in the State addressed. It is necessary to consider whether judicial decisions of this type, having regard to the scheme and objects of the Convention, may be dealt with under the simplified procedure for recognition and enforcement provided by the Convention.

11 In favour of an affirmative answer, the Commission and the Italian government maintain that, according to Article 25, the Convention covers all decisions given by the courts of the Contracting States without distinguishing between those involving adversary proceedings and those given without the other party's being summoned to appear. As is apparent from Article 24 the field of application of the Convention embraces protective and provisional measures which, under the law of the different Contracting States and by reason of their very nature or their urgency are often adopted without the opposite party's having first been heard. The Contracting States cannot have

intended to restrict the field of application of the Convention to such an extent without express mention being made to that effect. Finally, it may clearly be seen from Article 34 of the Convention, which states that in the proceedings for an enforcement order "the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application", that the Convention itself recognizes that proceedings in which only one party is heard are, where circumstances justify them, in keeping with the basic principle of the rights of the defence.

12 These arguments cannot prevail over the scheme of the Convention and the principles underlying it.

13 All the provisions of the Convention, both those contained in Title II on jurisdiction and those contained in Title III on recognition and enforcement, express the intention to ensure that, within the scope of the objectives of the Convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed. It is because of the guarantees given to the defendant in the original proceedings that the Convention, in Title III, is very liberal in regard to recognition and enforcement. In the light of these considerations it is clear that the Convention is fundamentally concerned with judicial decisions which, before the recognition and enforcement of them are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversary proceedings. It cannot therefore be deduced from the general scheme of the Convention that a formal expression of intention was needed in order to exclude judgments of the type in question from recognition and enforcement.

14 Nor is the argument by analogy, based on Article 34 of the Convention, of such a nature as to turn the scale. Although enforcement proceedings may be unilateral — but only provisionally so — this fact has to be brought into accord with the liberal character of the Convention as regards the procedure for enforcement, which is justified by the guarantee that in the State of origin both parties have either stated their case or had the opportunity to do so. Whilst another reason for the unilateral character of the enforcement procedure under Article 34 is to produce the surprise effect which this procedure must have in order to prevent a defendant from having the oppor-

tunity to protect his assets against any enforcement measures, the surprise effect is attenuated since the unilateral proceedings are based on the assumption that both parties will have been heard in the State of origin.

15 An analysis of the function attributed under the general scheme of the Convention to Article 24, which is specifically devoted to provisional and protective measures, leads, moreover, to the conclusion that, where these types of measures are concerned, special rules were contemplated. Whilst it is true that procedures of the type in question authorizing provisional and protective measures may be found in the legal system of all the Contracting States and may be regarded, where certain conditions are fulfilled, as not infringing the rights of the defence, it should however be emphasized that the granting of this type of measure requires particular care on the part of the court and detailed knowledge of the actual circumstances in which the measure is to take effect. Depending on each case and commercial practices in particular the court must be able to place a time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorization subject to all conditions guaranteeing the provisional or protective character of the measure ordered.

16 The courts of the place or, in any event, of the Contracting State, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered. The Convention has taken account of these requirements by providing in Article 24 that application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under the Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

17 Article 24 does not preclude provisional or protective measures ordered in the State of origin pursuant to adversary proceedings — even though by default — from being the subject of recognition and an authorization for enforcement on the conditions laid down in Articles 25 to 49 of the Convention. On the other hand the conditions imposed by Title III of the Convention on the recognition and the enforcement of judicial decisions are not fulfilled in the case of provisional or protective measures which are ordered or authorized by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party. It follows that this type of judicial decision is not covered by the simplified enforcement procedure provided for by Title III of the Convention. However, as the Government of the United Kingdom has rightly observed, Article 24 provides a procedure for litigants which to a large extent removes the drawbacks of this situation.

18 The reply to Questions 1 and 2 should therefore be that judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by Title III of the Convention.

Questions 3 and 4

19 In view of the answer to Questions 1 and 2 there is no longer any reason to examine Questions 3 and 4 which now have no purpose.

Costs

20 The costs incurred by the Government of the Italian Republic, the Government of the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of 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

in answer to the questions referred to it by the Oberlandesgericht Frankfurt am Main by order of 25 July 1979 received at the Court on 6 August 1979, hereby rules:

Judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by Title III of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 21 May 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 26 MARCH 1980 [1]

Mr President,
Members of the Court,

This reference for a preliminary ruling is made by the Oberlandesgericht [Higher Regional Court] Frankfurt am Main in the Federal Republic of Germany concerning a dispute between S.n.c. Couchet Frères, a French transport undertaking, and a German customer,

1 — Translated from the French.