OPINION OF ADVOCATE GENERAL LÉGER

delivered on 10 June 1997 *

1. The reference for a preliminary ruling, made pursuant to Article 3 of the Protocol of 3 June 1971 [1] by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), will undoubtedly give the Court occasion to consider a number of questions of principle concerning the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, [2] as amended by the Convention of Accession of 1978 [3] (hereinafter 'the Convention' or 'the Brussels Convention'). In particular, the Court is asked for a ruling on the interpretation of Articles 1, point 4, 5, point 1, and 24 of the Convention, the repercussions of which are likely to extend well beyond the context of this case.

2. The circumstances of this case are as follows.

I — Facts and procedure

3. In March 1993, the companies Van Uden Maritime (hereinafter 'Van Uden' or 'the applicant in the main proceedings'), established in Rotterdam, the Netherlands, and Kommanditgesellschaft in Firma Deco-Line, Peter Determann (hereinafter 'Deco-Line' or 'the defendant in the main proceedings'), established in Hamburg, Germany, concluded a 'slot/space charter agreement'. Under the agreement, Van Uden made available to Deco-Line cargo space on board vessels operated within the framework of a liner service, in return for payment of a charter hire (calculated according to rates agreed between the parties).

4. Deco-Line having failed to pay certain invoices, its contracting partner instituted arbitration proceedings against it in the Netherlands pursuant to the agreement.

5. It is pointed out by the court making the reference [4] that Deco-Line does not possess any seizable assets in that country.

6. Taking the view that Deco-Line was procrastinating over the appointment of arbitrators and that the continuing non-payment of

* Original language: French.

1 — Protocol concerning 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 (OJ 1975 L 204, p. 28).

2 — OJ 1972 L 299, p. 32.

3 — 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 of the Convention of 27 September 1968, cited above, p. 77).

4 — Point 3.1(iv) of the order for reference.

its outstanding invoices was seriously disturbing its cash flow, Van Uden made an interim application to the President of the Rechtbank (District Court), Rotterdam, seeking collection of four of the debts payable under the agreement. Its principal claim was for a sum of DM 830 919.13, together with interest thereon at the statutory rate, and, in the alternative, an advance of DM 404 923.29 on the sum sought in the principal claim.

7. Deco-Line disputed the jurisdiction of the Netherlands court, claiming that the German courts should hear the case under the general jurisdiction conferred, in principle, under the first paragraph of Article 2 of the Brussels Convention, on the courts of the State in which the defendant is domiciled. In the alternative, it disputed the urgency of the matter.

8. The President first of all rejected the objection that he did not have jurisdiction. He held that an application for interim relief, such as that made to him, must be regarded as seeking an order granting a 'provisional' measure within the meaning of Article 24 of the Convention, inferring from that that his jurisdiction did not have to be based on the rules of principle contained in Articles 2 to 18 of the Convention, and that he fulfilled the criterion for the exercise of jurisdiction under his national law.

9. Article 126(3) of the Netherlands Code of Civil Procedure confers on the courts of the place where the plaintiff is domiciled jurisdiction to hear and determine proceedings brought against a defendant who has neither a fixed place of residence nor a recognised domicile in the Netherlands, provided that there are certain minimum connections with Netherlands law. The Netherlands court held that that criterion was fulfilled in this case for two reasons. Firstly, Deco-Line is engaged in international trade and thus acquires claims in the Netherlands, so that any judgment against it could be enforced in the Netherlands. Secondly, such a judgment could also be enforced in Germany.

10. The President further considered that the jurisdiction conferred on him under Netherlands law by Article 1022(2) of the Code of Civil Procedure was not affected by the fact that the parties had agreed to have recourse to arbitration in the Netherlands. Article 1022(2) of the Code of Civil Procedure is worded as follows:

'An arbitration agreement shall not preclude a party from applying to the ordinary courts for a protective measure or from making an application to the President of the court for interim relief pursuant to Article 289 ...'.

11. By a provisionally enforceable judgment of 21 June 1994, he therefore granted Van Uden's application to an amount of DM 377 625.35, together with interest thereon at the statutory rate.

12. Hearing the case on appeal, the Gerechtshof (Regional Court of Appeal), The Hague, denied the Netherlands courts jurisdiction and set aside the contested judgment by judgment of 11 October 1994.

13. In that court's view, although Article 24 of the Convention allows the President to base his jurisdiction on Article 126(3) of the Code of Civil Procedure, the criteria for the application of which are, in principle, fulfilled in this case, that jurisdiction is nevertheless subject to the additional criterion that the matter must have sufficient connection with Netherlands law. However, in the context of the Brussels Convention, the Gerechtshof considered that this latter criterion is fulfilled only if the relief granted by the court hearing interlocutory applications is capable of taking effect within the territorial jurisdiction of that court, and if it is enforceable there. Under the scheme of the Brussels Convention, the latter condition must likewise be fulfilled in order for the jurisdiction of the President also to be based, as in this case, on Article 5, point 1, of the Convention (in so far as Van Uden's claim is for the payment of a sum of money and the place where that contractual obligation is to be performed is in the Netherlands). However, in the Gerechtshof's view, the mere possibility that Deco-Line will acquire assets in Netherlands territory in the future is insufficient for that purpose.

14. Van Uden appealed in cassation. The Hoge Raad, considering it necessary to seek clarification concerning the interpretation of the Convention provisions relied on, stayed the proceedings and submitted the following questions to the Court for a preliminary ruling:

'(1) Where an obligation to pay a sum or sums due under a contract must be performed in a Contracting State — so that, under Article 5, point 1, of the Brussels Convention, the creditor is entitled to sue his defaulting debtor before the courts of that State with a view to obtaining performance, even though the debtor is domiciled in the territory of another Contracting State — do the courts of the first-mentioned State (for that same reason) have jurisdiction also to hear and determine a claim brought by a creditor against his debtor in interim (kort geding) proceedings for an order requiring the debtor, by provisionally enforceable judgment, to pay a sum which, in the view of the court hearing the interlocutory application, is very probably due to the creditor, or do additional conditions apply in relation to the jurisdiction of the court hearing the interim application, for example the condition that the relief sought from that court must take effect (or be capable of taking effect) in the Contracting State concerned?

(2) Does it make any difference to the answer to Question 1 whether the contract between the parties contains an arbitration clause and, if so, what the place of arbitration is according to that clause?

(3) If the answer to Question 1 is that, in order for the court hearing the interim application to have jurisdiction, the relief sought from it must also take effect (or be capable of taking effect) in the Contracting State concerned, does that mean that the order applied for must be capable of enforcement in that State, and is it then necessary for this condition to be fulfilled when the interim application is made, or is it sufficient that it can be reasonably expected to be fulfilled in the future?

(4) Does the possibility, provided for in Article 289 et seq. of the Netherlands Code of Civil Procedure, of applying on grounds of pressing urgency to the President of the Arrondissementsrechtbank for a provisionally enforceable judgment constitute a "provisional" or "protective" measure within the meaning of Article 24 of the Brussels Convention?

(5) Does it make any difference to the answer to Question 4 whether substantive proceedings on the main issue are, or may become, pending and, if so, is it material that arbitration proceedings had started in the same case?

(6) Does it make any difference to the answer to Question 4 that the interim relief sought is an order requiring performance of an obligation of payment, as referred to in Question 1?

(7) If Question 4 must be answered in the affirmative, and "the courts of another Contracting State have jurisdiction as to the substance of the matter", must Article 24, and in particular the reference therein to "such provisional ... measures as may be available under the law of [a Contracting] State", be interpreted as meaning that the court hearing the application for interim measures has (for that same reason) jurisdiction if it has jurisdiction under provisions of its national law, even where those provisions are referred to in the second paragraph of Article 3 of the Brussels Convention, or is its jurisdiction in the latter case conditional on the fulfilment of additional conditions, for example that the interim relief sought from that court must take effect, or be capable of taking effect, in the Contracting State concerned?

(8) If the answer to Question 7 must be that, in order for the court hearing the application for interim relief to have jurisdiction, it is also required that the relief sought from it must take effect (or be capable of taking effect) in the Contracting State concerned, does that mean that the order applied for must be capable of enforcement in that State, and is it

then necessary for this condition to be fulfilled when the application for interim relief is made, or is it sufficient that it can reasonably be expected to be fulfilled in the future?'

3. social security;

4. arbitration'.

II — Legal framework

A — *The relevant provisions of the Brussels Convention*

15. The scope *ratione materiae* of the Convention (Title I), as defined in Article 1 thereof, includes civil and commercial matters. Under the second paragraph of that article, it does not apply to:

'1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

16. Various grounds of jurisdiction (Title II) serve to determine the courts in which a person can validly be sued; the principle is that general jurisdiction lies with the forum of the place where the defendant is domiciled (Article 2). Under the second paragraph of Article 3, exorbitant jurisdiction and, in particular, 'in the Netherlands: Articles 126(3) and 127 of the code of civil procedure (Wetboek van Burgerlijke Rechtsvordering)', may not be invoked against him.

17. Under 'special jurisdiction' (Section 2 of Title II), other rules are laid down which the plaintiff may prefer to that in Article 2, on account of the close connecting link between a particular court and a dispute. Thus, under Article 5, point 1:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question ...'.

18. Finally, 'provisional, including protective, measures' are the subject of Article 24 of the Convention, which is the sole provision of Section 9 of Title II. That article allows a court which does not have jurisdiction as to the substance of the matter to order such measures, within the scope *ratione materiae* of the Convention, if the plaintiff chooses to apply to that court rather than to the court of another Contracting State having jurisdiction as to the substance. The measures which may be ordered will be those available under the law of the State of the court to which the application is made.

B — *National law*

19. Interim civil proceedings, termed as '*kort geding*', are dealt with by Article 289 et seq. of the Code of Civil Procedure.

20. The Commission gives the following details concerning them: [5]

'They consist of an application for interim relief made to the President of the Arrondissementsrechtbank. Such interim applications are in very widespread use in the Netherlands. The condition of urgency which governs them is applied flexibly. Although interim proceedings lead to the granting or refusal of the interim relief sought, a decision given in such proceedings is often regarded as final by the parties in that no substantive proceedings are initiated on the main issue. Although originally the interim relief sought could relate only to orders to act or refrain from acting, for some time now the Hoge Raad has also, within certain limits, accepted pecuniary claims. It is thus possible to obtain, by interim proceedings, an advance on the payment of a debt, provided that the validity of that debt is indisputable or virtually indisputable.'

21. Although the Netherlands Government has not lodged any observations during these proceedings, reference may usefully be made to the information which it supplied in the context of Case 25/81 *W.* v *H.* [1982] ECR 1189:

'... the Netherlands Government states that interlocutory proceedings for interim relief are special arrangements for urgent cases which, if not protective in nature, are at all events provisional. The provisional nature of decisions on interlocutory applications referred to in Article 289 of the Netherlands Code of Civil Procedure finds expression in Article 292 of that Code which provides that: "interlocutory judgments shall not affect the outcome of the main action".' [6]

5 — Point 5 of its observations.

6 — At [1982] ECR 1199.

III — The answers to the questions

22. It is clear from reading the order for reference that the Netherlands court essentially envisages two possible ways in which the jurisdiction of the President hearing an application for interim relief could be established on the basis of the Convention: on the one hand (Questions 1 to 3), Article 5, point 1 (which provides for the possibility of a *forum speciale* for disputes in matters relating to a contract); on the other (Questions 4 to 8), Article 24 (which introduces a special jurisdictional rule for provisional or protective measures).

23. In both cases, the court raises the more specific question of whether the jurisdiction of a court to hear interim applications is subject to the condition that its decision will take effect within its territorial jurisdiction and, from that point of view, whether that condition must be fulfilled when the application is made, or whether it is sufficient that it is merely likely to be fulfilled in the future.

24. With regard to both those possibilities, the court also asks, in particular, whether it is material that the case brought before it has been referred to arbitration (Questions 2 and 5).

25. I propose to deal with the questions referred from three angles in turn, corresponding to the three provisions of the Brussels Convention to which the national court relates its questions: Articles 1, point 4, 5, point 1, and 24.

A — *Preliminary remarks on the applicability of the Brussels Convention despite the existence of an arbitration clause*

26. It should first be determined whether the existence of an arbitration clause has the effect of excluding proceedings such as those in this case from the scope of the Convention on the basis of Article 1, point 4, thereof.

27. The written observations submitted to the Court by the parties to the main proceedings, the German and United Kingdom Governments and the Commission consider this issue in their examination of Questions 2 and 5, even though those two questions do not relate directly to it. The arbitration clause and arbitration proceedings are mentioned by the national court more, it seems, in the context of determining any effect they may have on whether the decision given by the court hearing the application can take effect in the territory of its own State than in order to establish whether their existence is such as to preclude the application of the Convention.

28. It is, moreover, symptomatic that at no time during the national proceedings was it objected that the Netherlands courts hearing the case did not have jurisdiction on grounds of the existence of the arbitration clause. The objection of lack of jurisdiction raised by the defendant in the main proceedings before the court hearing the interim application was intended to secure recognition, *pursuant to the rules of the Convention*, of the principle that the German courts, within whose territorial jurisdiction the defendant is established, had general jurisdiction. The arbitration clause was not relied on, and it was merely as an incidental matter, it would appear, that the court hearing the appeal examined this question of its own motion in the light of the relevant provisions of its national law.

1. *Article 17 of the Convention*

29. That observation gives rise to a preliminary remark. The observations submitted with regard to the effect of the arbitration clause in this case have all hinged on an interpretation of Article 1, point 4, of the Convention. However, I think it best to reject immediately an argument which, although it has not been taken up during the proceedings, could nevertheless appear attractive.

30. It is tempting to regard the arbitration clause agreed upon between the parties as a voluntary prorogation of jurisdiction as referred to in Article 17 of the Convention, which provides 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 ...'

31. Without commenting on the issue of whether a clause conferring jurisdiction on an arbitration tribunal must be regarded as a clause conferring jurisdiction on 'a court or the courts of a Contracting State' within the meaning of that provision, and therefore whether Article 17 should apply in this case, it is sufficient to point out that, if that were the case, it would still not deprive the provisions of the Convention of their effect.

32. We would actually be faced with a choice between two possibilities.

33. On the one hand, the situation could be treated as that, envisaged by the academic writings, of a clause conferring jurisdiction on a court of a State not party to the Convention or a clause not fulfilling the conditions laid down in Article 17. It would then

no longer be the Brussels Convention, but the law of each State, which would determine the scope of that clause, and it would be for the *lex fori* to state whether, if necessary, the clause is not to take effect. [7] However, it was pursuant to the provisions of its national law (Article 1022(2) of the Code of Civil Procedure) that the court hearing the application ruled out the operation of the clause at issue in the present case.

34. On the other hand, the designated arbitration tribunal could be simply treated in the same way as 'a court or the courts of a Contracting State' within the meaning of Article 17. However, the defendant's entry of a voluntary appearance in this case and the fact that no objection was raised in favour of the jurisdiction of the arbitration tribunal would then imply tacit prorogation of jurisdiction as provided for in Article 18 of the Convention, [8] under which:

'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.'

7 — See, to this effect, Gaudemet-Tallon, H.: *Les conventions de Bruxelles et de Lugano*, L. G. D. J., 1993, point 237; Gothot, P. and Holleaux, D.: *La convention de Bruxelles du 27.9.1968*, Jupiter, 1985, point 119; Droz, G. A. L.: *Compétence judiciaire et effets des jugements dans le Marché Commun (Étude de la Convention de Bruxelles du 27 septembre 1968)*, Dalloz, 1972, point 93 and 102.

8 — Cases 150/80 *Elefanten Schuh* [1981] ECR 1671, paragraph 11, and 48/84 *Spitzley* [1985] ECR 787, paragraph 26.

35. It is clear, in all events, that, even if Article 17 of the Convention had been relied on, the Convention would nevertheless have been applicable. It would, of course, still be necessary for the dispute to come substantively within the scope of the Convention. I therefore come back the problem raised by the arbitration clause in the light of Article 1, point 4, of the Convention.

2. *Article 1, point 4, of the Convention*

36. Although, as we have seen, this aspect of the proceedings has not been expressly considered by the court making the reference, it cannot be disregarded since, if it were to be held that the existence of the arbitration clause precluded the application of the Convention, there would be no point in answering the other questions.

37. Two arguments have been put forward in this regard, predicated on opposite interpretations of Article 1, point 4, of the Convention.

38. The first, put forward by Deco-Line, the United Kingdom Government and, less categorically, the German Government, leads to the conclusion that these proceedings cannot

be governed by the provisions of the Convention since the parties have agreed, under the terms of the agreement, to submit their disputes to arbitration.

39. The second, put forward by Van Uden and the Commission, suggests that the scope of that exclusion should not be stretched too far.

40. Although this may be the first time that the Court has had occasion to rule on the effect of the existence of an arbitration clause on the application of the provisions of the Brussels Convention to proceedings pending before a national court, [9] the framers of the Convention were aware of these issues. The report by Professor P. Schlosser [10] already identified the two ways in which the exclusion referred to in Article 1, point 4, could be understood:

'Two divergent basic positions which it was not possible to reconcile emerged from the discussion on the interpretation of the relevant provisions of Article 1, second paragraph, point (4). The point of view expressed principally on behalf of the United Kingdom was that this provision covers all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration. The other point of view, defended by the original Member States of the EEC, only regards proceedings before national courts as part of "arbitration" if they refer to arbitration proceedings, whether concluded, in progress or to be started.' [11]

41. It is thus quite natural that those two 'divergent basic positions which it was not possible to reconcile' should have been stated and argued in detail before the Court.

42. The following considerations have been put forward in favour of the argument that the rules set out in the Convention are not applicable.

9 — It is, nevertheless, worth mentioning the Court's judgment in Case C-190/89 *Rich* [1991] ECR I-3855, which is particularly relevant to the examination of this case, and to which I shall return later, in which the Court had to determine the effect of other aspects of an arbitration agreement. On that occasion, the Court was asked whether the exclusion provided for in Article 1, point 4, extends to proceedings pending before a national court concerning the appointment of an arbitrator and, if so, whether that exclusion also applies where in those proceedings a preliminary issue is raised as to whether an arbitration agreement exists or is valid.

10 — Report on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71), known as the 'Schlosser Report'.

11 — Ibid., paragraph 61.

43. Deco-Line and the German Government, in particular, [12] have highlighted the risk of a conflict of decisions which would be introduced if parallel jurisdiction of national courts hearing interim applications and arbitration tribunals adjudicating on the substance were allowed for the purpose of dealing with aspects of the same dispute. They have cited the danger that an arbitration clause could be easily circumvented by a party in favour of the ordinary courts.

44. Moreover, the German Government asserts that the interim relief sought is inseparably linked to the subject-matter of the arbitration proceedings in the sense that both concern the payment of a debt; since the arbitration proceedings are excluded from the scope of the Convention, the application for interim relief, which is ancillary to those proceedings, must be treated in the same way. [13]

45. Finally, the United Kingdom Government has maintained [14] that the application in this case to a court for provisional measures is part of court proceedings 'which are ancillary to arbitration proceedings' according to the definition given in the Schlosser report [15] of proceedings excluded under Article 1, point 4, of the Convention.

46. Far from being convinced by that line of argument, I am of the opinion, together with the Commission and the plaintiff in the main proceedings, [16] that the exclusion of 'arbitration' from the scope of the Convention does not cover the circumstances of this case.

47. The first argument put forward by the German Government and Deco-Line, it should be noted, has already been set out in the *Rich* case cited above. I shall not re-examine it since the Court agreed with the view taken by Advocate General Darmon who proposed, in his Opinion in that case, [17] that it should be rejected in these terms:

'... irreconcilability between an arbitral award and a national judgment, although obviously not desirable, is susceptible of remedy. The ways of remedying the problem have been set out in a paper dealing with conflicts between judgments and arbitral awards [Schlosser, P. "Conflits entre jugement judiciaire et arbitrage", *Revue de l'arbitrage*, 1991, No 3, p. 371]. And its author considered in particular the situation where a judgment protected by the Brussels Convention and an arbitral award conflict and the solutions which would be applicable in such circumstances. In any event, it is clear from that paper that the applicable principles make it possible to say, according to the conflicting situations, whether the judgment or the award should prevail.'

12 — Pages 9 and 11 respectively of the French translations of their observations.

13 — The judgment in Case 143/78 *De Cavel* [1979] ECR 1055 (hereinafter the '*De Cavel I* judgment') and the *W.* v *H.* judgment, cited above, both given in connection with protective measures sought in the context of disputes concerning the status of persons and rights in property arising out of a matrimonial relationship, are cited in support of this line of argument.

14 — Point 8 of its observations.

15 — Paragraph 64.

16 — Points 18 and 19 and 2.1 respectively of their observations.

17 — Point 103.

48. I would add that, in the circumstances of this case, I see an advantage in allowing the application of the rules of the Convention, even though the risk of two courts both claiming jurisdiction cannot be discounted. If the Convention is not applied, it is difficult to see how a situation such as that which arose initially in this case, where arbitration could not be implemented due to the inertia of one of the parties, could be resolved. In line with the Court's judgment in *Rich*, cited above, any proceedings for the appointment of arbitrators would, in that case, certainly fall outside the scope of the Convention. The risk of both courts refusing jurisdiction could then not be discounted.

49. If we set out next to define the purpose of the exclusion referred to in Article 1, point 4, as it may be inferred from its logical basis in the mind of the drafters, that provision cannot be attributed the wide scope suggested by the German and United Kingdom Governments.

50. The reasons for the exclusion are very clear from the report by Mr P. Jenard: [18]

'There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration.' [19]

51. The objective was thus to prevent the Brussels Convention from duplicating pre-existing or future international provisions.

52. The purpose of the exclusion can therefore only be to ensure that the matter of arbitration, as regulated elsewhere, remains outside the scope of the Convention.

53. However, the abovementioned international agreements relate to very limited aspects of international disputes: those concerning arbitration as such. It is thus apparent from the study made of them by Advocate General Darmon in his Opinion in the *Rich* case, cited above — to which I refer for fuller details — that they essentially concern 'the effectiveness of arbitration agreements and the enforce-

18 — Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1), known as the 'Jenard report'.

19 — Ibid., p. 13.

ment of arbitration awards' [20] or else 'the arbitration agreement, the composition of the arbitration tribunal, the arbitration procedure, the making of awards, appeals against awards and recognition and enforcement thereof'. [21] Those conventions are thus clearly not intended to deal with all matters which could constitute the *subject-matter* of a dispute submitted to arbitration. The extent of such matters is virtually limitless and, in any event, variable from one dispute to another.

54. Those are, moreover, the lines along which the Court has already defined the exclusion referred to, when it held that '... by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude *arbitration in its entirety* ...'. [22]

55. That is why, as is clear from the experts' reports, the Convention cannot apply 'to the recognition and enforcement of arbitral awards ...; it does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration — for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings'. [23]

56. In actual fact, the matters covered by the exclusion are those which '... are ancillary to *arbitration proceedings*, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time-limit for making awards or the obtaining of a preliminary ruling on questions of substance as provided for under English law known as "statement of special case" (section 21 of the Arbitration Act 1950). In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention.' 'Nor does the 1968 Convention cover proceedings and decisions concerning applications *for the revocation, amendment, recognition and enforcement* of arbitration awards.' [24]

57. However, it should be kept firmly in mind that 'matters falling outside the scope of the Convention do so only if they constitute the principal subject-matter of the proceedings'. [25]

20 — Point 10 of the Opinion, which makes reference to the New York Convention of 10 June 1958.

21 — Point 11 of the Opinion, which makes reference to the Model Law (Uncitral) of 1985 on international commercial arbitration.

22 — *Rich* judgment, cited above, at paragraph 18, emphasis added.

23 — Jenard report, p. 13.

24 — Schlosser report, paragraphs 64 and 65, emphasis added.

25 — Jenard report, p. 10.

58. In particular, '"arbitration" refers only to arbitration *proceedings*. Proceedings before national courts would therefore be affected by Article 1, second paragraph, point (4) of the 1968 Convention *only if they dealt with arbitration as a main issue* and did not have to consider the validity of an arbitration agreement merely as a matter incidental to an examination of the competence of the court of origin to assume jurisdiction'. [26]

59. The Court has drawn attention to that consideration: 'In order to determine whether a dispute falls within the scope of the Convention, reference must be made *solely to the subject-matter of the dispute*. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever the issue may be, justify application of the Convention.' [27]

60. Consequently, as the German Government and Deco-Line have rightly pointed out, we must concern ourselves in this case with the *subject-matter of the dispute* brought before the Netherlands courts, in order to determine whether it constitutes 'arbitration' as defined above and whether it must, therefore, be excluded from the application of the provisions of the Convention.

61. However, it is clear from the account of the facts and procedures that Van Uden made an interlocutory application to the Netherlands court for, principally, an order requiring its debtor to pay the amount of four unpaid invoices due under the terms of the agreement, and, in the alternative, a part only of the amount of those invoices.

62. Consequently, the subject-matter of its claim is in no way that of arbitration. [28] It is, rather, a claim in a matter relating to a contract [29] in the sense that 'the basis for [it] is the failure to comply with a contractual obligation'. [30]

63. That consideration is not, in my view, affected in any way by the fact that the dispute brought before the Netherlands courts can be regarded, as the German Government and Deco-Line suggest, as ancillary to the principal arbitration proceedings.

64. The Court has held that '... the general scheme of the Convention does not necessarily link the treatment of an ancillary claim

26 — Schlosser report, paragraph 62, third subparagraph, emphasis added.

27 — *Rich* judgment, cited above, at paragraph 26, emphasis added.

28 — See, to this effect, the observations of Tagaras, H. on the *Rich* judgment, cited above, in *Cahiers de droit européen*, 1992, p. 668, 670. That author distinguishes between disputes connected with the operation of arbitration agreements and disputes the subject-matter of which is a substantive issue which would normally fall within the scope of the Convention but in which the defendant may invoke an arbitration agreement. Although the Convention is entirely applicable in the case of the former, the latter fall within the scope of the Convention as regards the jurisdiction of the ordinary courts (the author points out that they may, however, raise some delicate issues for recognition and enforcement).

29 — See below, at point 81 of this Opinion.

30 — Case 9/87 *Arcado* [1988] ECR 1539, paragraph 13.

to that of a principal claim' [31] in the sense that a claim is not excluded from the scope of the Convention merely because the principal claim to which it is ancillary is excluded from it.

65. Once again, the decisive criterion is the subject-matter of the proceedings: 'Ancillary claims ... come within the scope of the Convention according to the subject-matter with which they are concerned and not according to the subject-matter involved in the principal claim'. [32]

66. I do not, therefore, find any argument capable of convincing the Court among those put forward in favour of holding the provisions of the Convention inapplicable.

67. I realise, of course, that it may be thought unsatisfactory that application might be made simultaneously to an arbitration tribunal and a national court in connection with the same dispute.

68. Nevertheless, I am of the view that, in such circumstances, reference should be made to the rules of national law 'since the Brussels Convention cannot be extended beyond what is covered by its subject-matter'. [33]

69. Consequently, the objection that a court lacks jurisdiction over a dispute with which it is seised, the subject-matter of which concerns a matter covered by the Convention, and that a panel of arbitrators should have jurisdiction, falls outside the scope of the Court's supervision. The resolution of that issue is a matter solely for the national court, by application of the *lex fori*.

70. However, in this case it is sufficient to point out that the Netherlands court based its jurisdiction on Article 1022(2) of the Code of Civil Procedure, which expressly provides that an arbitration clause does not preclude the jurisdiction of a court to hear interim applications.

71. In any event, as the Schlosser report pointed out, such 'differing basic positions lead to a different result in practice only in one particular instance': [34] 'If a national court adjudicates on the subject-matter of a dispute, because it overlooked an arbitration agreement or considered it inapplicable, can recognition and enforcement of that judgment be refused in another State of the Community on the ground that the arbitration agreement was after all valid and that therefore,

31 — Judgment in Case 120/79 *De Cavel* [1980] ECR 731, at paragraph 8, hereinafter the '*De Cavel II* judgment'.

32 — Ibid., at paragraph 9.

33 — Audit, B.: 'L'arbitre, le juge et la convention de Bruxelles', *L'internationalisation du droit — Mélanges en l'honneur d'Yvon Loussouarn*, Dalloz, 1994, pp. 15, 19.

34 — Paragraph 61 at the end.

pursuant to Article 1, second paragraph, point (4), the judgment falls outside the scope of the 1968 Convention?' According to the expert, that difficulty alone is easily disposed of: 'the court in the State addressed can no longer re-open the issue of classification; if the court of the State of origin, in assuming jurisdiction, has taken a certain view as to the applicability of the 1968 Convention, this becomes binding on the court in the State addressed'. [35]

72. I therefore conclude that the existence of arbitration proceedings does not preclude the application of the provisions of the Convention in this case.

73. Having dealt with that preliminary point, I now come to the questions referred by the national court.

B — *The application of Article 5, point 1, of the Convention*

74. By its first question, the Hoge Raad asks the Court whether Article 5, point 1, of the Convention confers jurisdiction on the court seised to hear and determine a claim brought in interim proceedings, as provided for by the Code of Civil Procedure, for an order requiring the debtor, as immediate provisional relief, to pay a sum due, or whether its jurisdiction to hear the interim application under that provision is subject to a condition that the debt be enforceable within its territorial jurisdiction.

75. The third question presupposes that the Court regards that condition as necessary for the application of Article 5, point 1, of the Convention: if so, must it be fulfilled when the application is made to the court, or is it sufficient that it will probably be fulfilled in the future?

76. It is, in fact, a question of determining whether interim proceedings such as those in this case fall within the scope of Article 5, point 1, of the Convention and, if so, under what conditions.

77. Although the wording of the first question shows that the Hoge Raad seems to consider it established that the Netherlands court has jurisdiction to hear and determine the substance of the dispute between the parties, it should nevertheless be briefly ascertained, before examining whether that jurisdiction extends to the interim proceedings, whether that is so.

78. I note at once, moreover, that, with the exception of Deco-Line, no one disputes that, short of excluding the application of the rules of the Convention by an interpretation, which

35 — Paragraph 62 at the end.

I have not accepted, of Article 1, point 4, of the Convention, the Netherlands court hearing interlocutory applications has jurisdiction under Article 5, point 1, to hear and determine Van Uden's claim.

79. As we know, that provision leaves it open to the plaintiff, if he prefers, to sue the defendant, not in the courts having general jurisdiction in principle for the place where the defendant is domiciled, but in the courts having the closest link with a dispute 'in matters relating to a contract', so that, '... because of the close links created by a contract between the parties thereto, it should be possible for all the difficulties which may arise on the occasion of the performance of a contractual obligation to be brought before the same court: that for the place of performance of the obligation'. [36]

80. That additional, optional jurisdiction presupposes that a number of conditions are fulfilled, as they are in this case.

81. First, since Article 1, point 4, does not apply, there is no doubt that the dispute submitted for determination by the court constitutes a 'matter relating to a contract'. Although it is sometimes difficult to be certain that a dispute constitutes such a matter, which the Court regards as an independent concept, [37] a claim for payment of the whole or part of a sum due under an agreement '... finds its very basis in that agreement and consequently constitutes a matter relating to a contract within the meaning of Article 5, point 1, of the Convention' since 'the basis for [it] is the failure to comply with a contractual obligation'. [38]

82. Second, the 'place of performance of the obligation in question' can, in this case, be determined without difficulty. There is only one obligation in question in the present case: Deco-Line's financial obligation towards Van Uden, and '... the place of performance of the obligation to pay ... is to be determined pursuant to the substantive law governing the obligation in dispute under the conflict rules of the court seised'. [39] However, the Netherlands appeal court found that 'payment of the charter hire owed by Deco-Line was to take place in the Netherlands'. [40]

83. Consequently, the Netherlands court seised does have jurisdiction under Article 5, point 1, of the Convention. It is, in my opinion, of little relevance that Van Uden's application was made in interim proceedings.

36 — Case 34/82 *Peters* [1983] ECR 987, paragraph 12.

37 — Ibid., paragraph 10.

38 — *Arcado*, cited above, paragraphs 12 and 13.

39 — Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913, paragraph 29, which applies the principles identified in Case 12/76 *Tessili* [1976] ECR 1473, paragraph 13, and Case 266/85 *Shenavai* [1987] ECR 239, paragraph 7.

40 — Paragraph 9 of the judgment given by the Gerechtshof, The Hague, reproduced on page 6 of the French translation of the observations lodged by Deco-Line.

84. In the first place, it must be remembered, Article 1 of the Convention provides that the Convention is to apply 'whatever the nature of the court or tribunal' seised.

85. Moreover, the nature of the relief sought is immaterial under the Convention. In its *De Cavel I* judgment cited above, the Court held that 'in relation to the matters covered by the Convention, no legal basis is to be found therein for drawing a distinction between provisional and definitive measures'. [41]

86. In the same way, and irrespective of how the interim relief sought by Van Uden is to be classified for the purpose of the Convention, [42] I see no reason to draw a distinction, in the context of the application of Article 5, point 1, according to the nature of the proceedings instituted. As Advocate General Warner pointed out in his Opinion in the *De Cavel I* case cited above, '[i]t would be odd if the applicability of the Convention depended on the particular forum or type of procedure chosen by the plaintiff, petitioner or other claimant'. [43]

87. Article 24 of the Convention does not in any way affect that conclusion.

88. Even if it were to be considered that the interim relief sought by Van Uden is a 'provisional' or 'protective' measure within the meaning of Article 24, [44] that provision is not intended to confer exclusive jurisdiction in the matter. It merely authorises a court which does not have jurisdiction as to the substance of the matter to take such measures, within the scope of the matters covered by the Convention, where the plaintiff chooses to apply to it rather than to the courts of another Contracting State which have jurisdiction as to the substance of the matter.

89. The fact remains that the plaintiff is perfectly entitled not to make use of that right and to abide by one of the other grounds of jurisdiction provided for by the Convention. Thus, the court which has jurisdiction as to the substance of the matter under Article 5, point 1, has, *a fortiori*, jurisdiction to hear and determine an application for a 'provisional' or 'protective' measure within the meaning of Article 24: '... Article 24 allows the plaintiff an *option*, but does not prevent him, if he so prefers, from applying for provisional or protective measures to the court having jurisdiction as to the substance of the matter; that jurisdiction as to the substance naturally always implying jurisdiction to order provisional or protective measures'. [45]

41 — At paragraph 9.

42 — This aspect will be dealt with below in the context of the examination of Article 24.

43 — Page 1071, final paragraph.

44 — In this respect, see the arguments below dealing with Article 24.

45 — Gaudemet-Tallon, H., cited above, point 267.

90. The relief sought from the court applied to under Article 5, point 1, must, of course, fall within the scope of the Convention. Since, in my opinion, there were no grounds for applying Article 1, point 4, and since the subject-matter of the dispute brought before the Netherlands court was contractual, that was the case here.

91. The second part of the first question asks the Court to make it clear whether the jurisdiction exercised under Article 5, point 1, in interim proceedings for an order requiring the debtor to pay a sum of money is subject to the further condition that the decision given should be enforceable in the State of the court hearing the application.

92. This question raised by the Hoge Raad probably stems from the fact that the relevant provisions of its national law specify such a condition, [46] whereas the defendant in the main proceedings does not possess any seizable assets in the Netherlands.

93. However, as the German Government points out, [47] no such requirement is contained in Article 5, point 1.

94. Moreover, that provision makes no reference to national provisions. On the contrary, it designates directly the courts having jurisdiction. It would therefore be incompatible with that direct designation to make jurisdiction subject to requirements of national law.

95. Furthermore, as the Commission points out, [48] it would be absurd to make jurisdiction under Article 5, point 1, dependent on the condition that the order granting interim relief should be capable of taking effect in the State of the court hearing the application, when the Brussels Convention was specifically drawn up in order to ensure the 'free movement of judgments' in the Common Market. [49] In particular, Title III makes it possible to guarantee in the Contracting States the expeditious and summary recognition and enforcement of a decision given in another Contracting State.

96. I therefore conclude, with regard to the first question, without there thus being any need to answer the third question, that a court having jurisdiction under Article 5, point 1, of the Convention has that jurisdiction irrespective of the nature of the proceedings in which the application was made to it. It may therefore, by virtue of that jurisdiction, in interim proceedings order the payment of a sum of money as immediate provisional relief, without its jurisdiction being made subject to

46 — See point 13 of this Opinion.

47 — Page 8 of the French translation of its observations; see also to this effect the observations of Van Uden, at point 1.4.

48 — Point 24 of its observations.

49 — Case 145/86 *Hoffmann* [1988] ECR 645, paragraph 10, which reproduces the wording of the Jenard report, p. 42.

the condition that the order be enforceable in the State concerned.

97. Two conclusions must be drawn from that.

98. On the one hand, since the court hearing the interim application has jurisdiction, in its capacity as the court for the 'place of performance of the obligation in question', in matters relating to a contract, it is not required to refer to the grounds of jurisdiction provided for by its national law. In particular, it is not necessary to rely on Article 126(3) of the Code of Civil Procedure (which is included in the list of rules of exorbitant jurisdictions in the second paragraph of Article 3 of the Convention and may not, therefore, be relied on in order to sue a defendant in the Netherlands courts).

99. On the other hand, in so far as the Court holds, as I propose that it should, that the Netherlands court has jurisdiction under Article 5, point 1, to hear and determine the application for interim relief, it is not necessary to ascertain whether its jurisdiction can also be based on Article 24. There is, in principle, no need to answer Questions 4 to 8.

100. I therefore put forward only in the alternative the following arguments concerning that provision.

C — *Article 24 of the Convention*

101. During the national proceedings, the President of the Rechtbank, Rotterdam, held that he had jurisdiction to hear and determine the application made by Van Uden in *kort geding* proceedings, not under Article 5, point 1, of the Brussels Convention, even though, as we have just seen, that possibility was open to him, but under Article 24.

102. By its fourth to eighth questions, the court making the reference therefore seeks to ascertain whether Article 24 of the Convention covers an application such as that made in the main proceedings and, if so, under what conditions.

103. The Court is thus once again faced (fourth question) with the issue of whether immediate provisional relief, applied for on grounds of pressing urgency and ordered in *kort geding* proceedings, may be regarded as a 'provisional' or 'protective' measure within the meaning of Article 24 of the Convention. That was also one of the questions referred to the Court by the Hoge Raad in the *W.* v *H.*

case cited above. [50] On that occasion, the Court was not required to rule on this issue. [51]

104. The other questions submitted essentially ask the Court to clarify the conditions of application of Article 24. They are of two types: two (Questions 4 and 6) are concerned with 'provisional' or 'protective' measures, the others (Questions 5, 7 and 8) with jurisdiction.

1. *The concept of provisional or protective measures*

105. Article 24 obviously applies only if the 'provisional' or 'protective' measures sought fall within the scope *ratione materiae* of the Convention: '[Article 24] cannot ... be relied on to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded therefrom'. [52] As we have seen, that is the case in this instance.

106. With regard to the measures envisaged by that provision, which, as the Court has held, may serve '... to safeguard a variety of rights', [53] academic writers often draw attention to the difficulty of defining their content. Indeed, 'the absence of a uniform definition of the concept of provisional and protective measures established by the Brussels Convention is liable to result in appreciably different systems of legal protection in the Member States'. [54]

107. The Court has in any event opted for a 'Community' definition of the concept:

'The expression "provisional, including protective, measures" within the meaning of Article 24 must ... be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.' [55]

108. Can measures ordered in proceedings on an application for interim relief under

50 — The same question has been referred to the Court by the Bundesgerichtshof, which is required to rule on the recognition and enforcement of a judgment given by the Arrondissementsrechtbank, Leeuwarden, in *kort geding* proceedings, in Case C-99/96 *Mietz* (published in OJ 1996 C 145), currently pending.

51 — It held that the relief applied for in the main proceedings constituted a matter (rights in property arising out of a matrimonial relationship) excluded from the scope of the Convention.

52 — *W.* v *H.*, paragraph 12, and *de Cavel I*, paragraph 9, cited above.

53 — Case C-261/90 *Reichert and Others* [1992] ECR I-2149, paragraph 32, hereinafter the '*Reichert II* judgment', and the *De Cavel I* judgment, paragraph 8, cited above.

54 — Tarzia, G.: 'Les mesures provisoires dans les pays de la C. E. E.', *Annales de droit de Louvain*, 1996, No 1, p. 163, point 1.

55 — *Reichert II* judgment, cited above, at paragraphs 34 and 35, in which, on the basis of that definition, the Court held that the *action paulienne* in French law did not come within the scope of Article 24.

Netherlands law, as provided for by Article 289 et seq. of the Netherlands Code of Civil Procedure, be regarded as satisfying such a definition?

109. That question is justified, according to one writer, because '... the procedure of applying for interim relief (*kort geding*) has undergone very considerable changes in Netherlands practice. From an expeditious and *provisional* procedure, it has to a large extent become a procedure for urgent cases with definitive character ... Indeed, social or economic issues of major importance which demand an urgent solution, such as, for example, an injunction to end a strike, are often the subject-matter of an application for interim relief, the substance of which will not be further discussed by the ordinary courts. In fact, in the Netherlands, courts hearing applications for interim relief make very little use of the power available to them to enjoin the parties to bring an action on the substance of the matter within a certain time, which deprives the procedure of most of its provisional character'. [56]

110. That is because, according the classification proposed by another writer, [57] the Netherlands *kort geding*, like the French *référé-provision*, for example, is one of those 'measures totally or partly anticipatory of the decision on the substance' which differ from the more conventional provisional measures which exist in other legal systems, such as 'protective measures in the narrow sense of the term [which] are designed to ensure performance or bring about an advance on performance', or 'temporary and protective measures for the provisional resolution of the factual situation in relation to a disputed legal relationship'.

111. According to certain writers, however, 'it may ... be considered that the letter of Article 24 imposes a rigorous distinction between provisional and substantive measures, so that any measure anticipating the decision on the substance would cease to be provisional within the meaning of the Brussels Convention'. [58] That was also the opinion of the Commission in the *W.* v *H.* case cited above.

112. However, I do not think that a measure such as that ordered in the interim proceedings in this case on the basis of Article 289 et seq. of the Code of Civil Procedure, requiring the debtor to pay a sum as immediate provisional relief, [59] can be regarded as 'intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter'.

56 — Droz, G. A. L., commentary on the judgment in the *W.* v *H.* case, cited above, in: *Revue critique de droit international privé*, 1984, p. 354, point 4.

57 — Tarzia, G., cited above, point 2.

58 — Bischoff, J.-M. and Huet, A.: 'Chronique de jurisprudence de la Cour de Justice des Communautés européennes', *Journal du droit international*, 1982, No 1, pp. 942, 947.

59 — Because of the diversity of measures which can be granted in *kort geding* proceedings, I shall not deal with such proceedings in the light of Article 24 of the Convention in general terms, as requested by the Hoge Raad in its fourth question. I shall confine my observations to the proceedings as instituted in this particular case. Questions 4 and 6 will therefore be considered together.

113. On the one hand, the pecuniary character of such a measure is not such as to preclude it from being characterised as 'provisional' or 'protective'.

114. That was, in any event, what the Court held in its judgment in Case 125/79 *Denilauler* [1980] ECR 1553. On that occasion, reference was made to the Court by a German appeal court asked to register for enforcement an order made by a French court, declared provisionally enforceable, authorising a creditor to freeze the account of a debtor at a bank in Germany. Although the Court did not expressly rule on the classification of such a measure in the light of Article 24, it refused to allow the enforcement order in that case only because the proceedings in the French court had not involved the hearing of both parties, and thus had not respected the rights of the defence. In so doing, it seems to me that the Court implicitly acknowledged that such measures, while capable of being classified as 'provisional' or 'protective' within the meaning of Article 24, could not be covered by the provisions of Title III unless they had been ordered pursuant to adversary proceedings.

115. Another example can be found in a recent order [60] which, although not made in the context of the Brussels Convention but on appeal against an order of the President of the Court of First Instance made in interlocutory proceedings, seems to me to identify some principles which may guide the Court in giving the interpretation requested from it. While:

'[t]he wording of the order under appeal ... appears to indicate that a measure granting (by way of advance) a part of the compensation claimed in the main proceedings and seeking to protect the applicant's interests until judgment is delivered in those proceedings is inconsistent with the conditions for or nature of an interim application, irrespective of the factual and legal circumstances of the individual case', [61]

it was held that:

'[i]t is not possible ... to rule out in advance, in a general and abstract manner, that payment, by way of an advance, even of an amount corresponding to that sought in the main application, may be necessary in order to ensure the practical effect of the judgment in the main action and may, in certain cases, appear justified with regard to the interests involved'. [62]

116. Moreover, the relief sought in the *kort geding* proceedings is certainly intended to

60 — Order in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441.

61 — Ibid., at paragraph 35.

62 — Ibid., at paragraph 37.

achieve the 'recognition of rights sought elsewhere from the court having jurisdiction as to the substance of the matter', in the sense that it does not have definitive character.

117. Article 292 of the Code of Civil Procedure lays down that such relief must be without prejudice to the main action. It does not, therefore, constitute *res judicata*. Consequently, the proceedings provided for in Article 289 et seq. are intended by that legislation to be provisional in character.

118. The fact that the current trend of practice in the Netherlands courts frequently seems to mean that no proceedings on the substance of the matter are either pending when the application for interim relief is made or instituted subsequently does not in any way detract from the foregoing consideration.

119. Indeed, if, despite the merely provisional status which it is intended to have, the measure acquires definitive character, that is only because of the attitude of the parties. As the Commission points out: 'If the defendant submits to the judgment, the fact that what is intended as a provisional measure acquires definitive character must be attributed to that submission. Similarly, where the defendant does not apply for the annulment of a measure ordered in interlocutory proceedings, although there are no proceedings pending on the substance of the matter, that decision is a matter for the defendant alone and does not alter the provisional character of the measure in any way.' [63]

120. I therefore conclude, in answer to the fourth and sixth questions, that a provisionally enforceable measure requiring a debtor to pay a sum of money, ordered pursuant to Article 289 et seq. of the Code of Civil Procedure, is a 'provisional' or 'protective' measure within the meaning of Article 24 of the Brussels Convention.

2. *Courts having jurisdiction*

121. By allowing application to be made to the courts of a Contracting State, 'even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter', Article 24 is intended to apply irrespective of which jurisdictional rule is laid down by the Convention for disposing of the substantive issues. Consequently, each court must determine its jurisdiction according to the *lex fori*.

122. Within the powers thus conferred on the national court by Article 24 of the Convention, the Court has held that the national court must '... make its authorisation subject to all conditions guaranteeing the provisional

63 — Point 37 of its observations.

or protective character of the measure ordered'. [64]

In particular, the Court emphasised 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 measure contemplated, require bank guarantees or nominate a sequestrator ...'.

123. Do more specific conditions apply to the exercise of jurisdiction?

(a) The requirement that proceedings should also be pending before another court having jurisdiction as to the substance of the matter

124. By its fifth question, the Hoge Raad seeks to ascertain whether the jurisdiction conferred pursuant to Article 24 necessarily presupposes that substantive proceedings on the main issue are, or may become, pending before another court.

125. In answer to this question, I concur with the opinion expressed by a number of writers: '... Article 24 applies regardless of whether substantive proceedings on the main issue are or are not pending before another court ... Of course, Article 24 does not require a substantive action on the main issue to have already been brought before one court in order for a provisional or protective measure to be sought from another court ...' [65]

126. As the Commission points out, [66] it is sufficient to refer to the wording of Article 24, which provides the applicant with an additional ground of jurisdiction, '*even if*, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter'. [67]

127. The jurisdiction conferred pursuant to Article 24 applies only to provisional or protective measures. The possibility of disposing of the substantive issues of the case therefore remains, as we have seen, unaffected by that provision. However, the court from which such provisional or protective measures are sought will not necessarily be the same as the court having jurisdiction pursuant to Sections 2 to 6 of Title II of the Convention to hear and determine the substantive issues of the case. That is why Article 24 makes it clear that the fact that another court has jurisdiction as to the substance of the matter does not in any way preclude the aforementioned court, which is '... best able to assess the

64 — *Denilauler* judgment, cited above, paragraph 15.

65 — Bischoff, J.-M. and Huet, J., cited above, p. 947.

66 — Point 41 et seq. of its observations.

67 — Emphasis added.

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...', [68] from ordering the measures at issue.

128. There is no point, in this context, in requiring that substantive proceedings on the main issue be already pending. It is sufficient in this regard that the possibility of disposing of the substantive issues exists. I have pointed out that Article 292 of the Code of Civil Procedure guarantees the principle that such proceedings may be brought.

129. In answer to the fifth question, I therefore conclude that the jurisdiction provided for under Article 24 of the Convention is not conditional upon the prior commencement of substantive proceedings on the main issue. It is sufficient in this regard that the possibility of bringing such proceedings exists.

(b) The possibility for the court to hold that it can hear the application under a rule of exorbitant jurisdiction

130. If the court from which a provisional or protective measure is sought pursuant to Article 24 determines its jurisdiction according to the *lex fori*, it may be wondered whether all the international jurisdictional rules of the Contracting States can serve as the basis for the exercise of jurisdiction by their courts in matters relating to provisional or protective measures or whether, on the contrary, Article 24 leads to the exclusion of certain jurisdictions. Can a court having jurisdiction under Article 24, for example, be allowed to give judgment on the basis of a national legal rule of exorbitant jurisdiction of the kind referred to in Article 3 of the Convention? That is the substance of the first part of the seventh question.

131. The German Government points out that the answer to this question is particularly important because, 'under the third paragraph of Article 28 of the Brussels Convention, the international jurisdiction of the court applied to may not be reviewed when recognising and ordering the enforcement of an interim measure, and because the rules relating to jurisdiction are not a matter of public policy within the meaning of Article 27, point 1, of the Brussels Convention'. [69]

132. As we know, Article 3 establishes the principle that a defendant may be sued in the courts of a Contracting State other than that in which he is domiciled 'only by virtue of the rules set out in Sections 2 to 6 [of Title II of the Convention]'.

68 — *Denilauler* judgment, cited above, at paragraph 16.

69 — Point II(4)(e) of its observations.

133. However, Article 24 is the sole provision in Section 9 of that title. Consequently, the provisions of Article 3 do not appear to be applicable to it.

134. To allow the exercise of an exorbitant jurisdiction in the context of the reference made by Article 24 to the *lex fori* does not appear to me to distort the meaning of the exclusion provided for in Article 3.

135. On the contrary, I see an advantage in it. In view of the urgency which generally underlies the making of such applications, the person seeking a measure intended to preserve a factual or legal situation must be able to apply to his nearest court.

136. The jurisdiction of the courts of the plaintiff's domicile is certainly accepted in such a case, contrary to the rule of principle established by Article 2. However, measures ordered under the jurisdiction conferred by Article 24 will necessarily have 'provisional' or 'protective' character. Once such measures have been ordered, it will then be for the party concerned — in some cases the defendant — to commence proceedings in the court having jurisdiction as to the substance of the matter, if that has not already been done.

(c) The requirement that the measure be capable of enforcement in the State of the court hearing the application

137. Certain writers sometimes add a further condition: that the court seised should not assume jurisdiction to adopt the measures referred to in Article 24, even though its law may give it such jurisdiction, where its decision could be complied with only by way of proceedings to obtain an enforcement order; on that view, the court would adopt such measures only if its decision could be complied with in the territory of its State. [70]

138. The extremely general terms in which Article 25 [71] is couched mean that decisions ordering provisional or protective measures fall within the scope of Title III of the Convention: 'Article 24 does not preclude provisional or protective measures ordered in the State of origin pursuant to adversary proceedings ... from being the subject of recognition and an authorisation for enforcement on the conditions laid down in Articles 25 to 49 of the Convention.' [72]

70 — See, to this effect, Béraudo, J.-P. in *Juris-Classeur 'Europe'*, vol. 6, part 3030, point 39; Gaudemet-Tallon, H., cited above, point 271; Gothot, P. and Holleaux, D., cited above, points 202 and 203.

71 — Under which: 'For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.'

72 — *Denilauler* judgment, cited above, at paragraph 17.

139. A court of a Contracting State may thus have jurisdiction to order such a measure even if it can be enforced only in another Contracting State. Moreover, in the *De Cavel I* and *Denilauler* judgments cited above, the Court did not dispute that a French court can order protective measures relating to property situated in Germany (placing under seal and freezing of assets in the *De Cavel I* case; freezing of a bank account in the *Denilauler* case). And in both cases, although the French decisions did not come within the system of recognition and enforcement provided for by the Brussels Convention, that was for reasons connected with the matter at issue and the rights of the defence respectively.

140. Consequently, in answer to the second part of the seventh question, there can be no requirement making a court's jurisdiction under Article 24 dependent on fulfilment of the condition that the relief granted by the court must be capable of enforcement in the territory of its State.

141. The eighth question therefore becomes devoid of purpose.

IV — Conclusion

142. In the light of the foregoing I propose that the Court give the following replies to the Hoge Raad der Nederlanden:

(1) The jurisdiction in matters relating to a contract exercised by a court under Article 5, point 1, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968, applies irrespective of the nature of the proceedings in which application is made to that court. In particular, a court of a Contracting State may have jurisdiction, under that provision, to hear and determine a claim brought in interim proceedings for an order requiring the debtor, as immediate provisional relief, to pay a sum to the creditor, without its jurisdiction being made dependent on the fulfilment of conditions other than those specified in Article 5, point 1, such as the condition that the decision given be capable of enforcement in the State of the court hearing the application.

(2) The fact that the parties have agreed on an arbitration clause is relevant, if at all, only under the *lex fori*, pursuant to which it is for the court hearing the application to make sure that it has jurisdiction.

143. In the alternative:

(3) In answer to the fourth and sixth questions:

Article 24 of the Convention must be interpreted as meaning that the concept of 'provisional' or 'protective' measures to which it refers covers the possibility, as provided for in Article 289 et seq. of the Netherlands Code of Civil Procedure, of applying on grounds of pressing urgency to the President of the Arrondissementsrechtbank for an order requiring the debtor, as immediate provisional relief, to pay a sum of money in performance of a contractual obligation.

(4) In answer to the fifth question:

It is immaterial, in the context of the application of Article 24 of the Convention, whether substantive proceedings on the main issue are, or may become, pending, provided that the possibility of bringing such proceedings before a court exists in national law.

(5) In answer to the seventh question:

Likewise, it is immaterial whether the court bases its jurisdiction under Article 24 of the Convention on a provision of its national law referred to in the second paragraph of Article 3 of the Convention.

The court's jurisdiction under Article 24 of the Convention may not be made dependent on fulfilment of the condition that the measure which it adopts be capable of enforcement in the territory of its State.