JUDGMENT OF THE COURT (Fourth Chamber)
3 October 1985 *

In Case 119/84,

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 Corte suprema di cassazione [Supreme Court of Cassation], for a preliminary ruling in the proceedings pending before that court between

P. Capelloni and F. Aquilini

and

J. C. J. Pelkmans

on the interpretation of Article 39 of the abovementioned Convention of 27 September 1968,

THE COURT (Fourth Chamber)

composed of: G. Bosco, President of Chamber, P. Pescatore, T. Koopmans, K. Bahlmann and T. F. O'Higgins, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

after considering the observations submitted on behalf of:

the United Kingdom, by R. N. Ricks, Treasury Solicitor, acting as Agent,

the Commission of the European Communities, by G. Olmi, Deputy Director-General of its Legal Department, acting as Agent, assisted by S. Pieri, an Italian official seconded to the Commission under the scheme for exchanges with national civil servants,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 July 1985,

gives the following

* Language of the Case: Italian.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 9 November 1983, which was received at the Court on 8 May 1984, the Corte suprema di cassazione referred 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 (hereinafter referred to as 'the Convention') three questions on the interpretation of Article 39 of the Convention.

2 The questions were raised in proceedings instituted by Messrs Capelloni and Aquilini against Mr Pelkmans. It is apparent from the documents before the Court that Mr Pelkmans secured from the Corte d'Appello [Court of Appeal], Brescia, a decision dated 19 December 1980 whereby, pursuant to Article 31 *et seq.* of the Convention, the enforcement was authorized in Italy of a judgment delivered on 8 May 1979 by a court in Breda (Netherlands) ordering Messrs Capelloni and Aquilini to pay Mr Pelkmans the sum of HFL 127 400, together with interest and costs.

3 Messrs Capelloni and Aquilini appealed against that decision to the same Corte d'Appello pursuant to Article 36 of the Convention. On 13 March 1981, before any decision had been given on that appeal, Mr Pelkmans arranged for protective sequestration of immovable property belonging to Messrs Capelloni and Aquilini under Article 39 of the Convention.

4 Mr Pelkmans then requested the Corte d'Appello, Brescia, to confirm the sequestration in accordance with Article 680 of the Italian Code of Civil Procedure. Messrs Capelloni and Aquilini objected to any such confirmation, claiming that certain provisions of that Code regarding protective sequestration had not been complied with, and the Corte d'Appello expressed the view, in its judgment of 14 July 1981, that the provisions of the Italian Code of Civil Procedure cited above were not applicable to a sequestration carried out under Article 39 of the Convention. For the same reason, the Corte d'Appello also held

that Mr Pelkmans' application for confirmation was unacceptable on the ground that Article 680 of the Italian Code of Civil Procedure, which provides for such confirmation, did not cover sequestrations of the type in question.

5 The case was brought before the Corte suprema di cassazione, which stayed the proceedings and submitted the following questions to the Court:

'(1) Are the protective measures against the property of the debtor which may be proceeded with in the event of his appealing against an order for the enforcement of decisions given in another Member State of the European Community subject to the procedural rules of municipal law, as regards the procedures for their implementation and the conditions for their validity and effectiveness, or did the States which acceded to the Brussels Convention intend to adopt a single legal instrument, identical in all the Contracting States, whose purpose is to ensure that the debtor cannot dispose of his property in the meantime, that purpose being satisfied once execution is levied after dismissal of an appeal under Article 37 of the Brussels Convention, without the need, in particular, for a court ruling to confirm the protective measure?

(2) Notwithstanding that an order has already been made in a Contracting State declaring enforceable a judgment given in another Contracting State, is authorization required from the same court to enable protective measures to be taken against the property of the party against whom enforcement is sought, or may the applicant proceed directly with the protective measures without the need for specific authorization?

(3) Are cases governed by Article 39 of the Brussels Convention also subject to the procedural rules of the State in which protective measures are adopted, which rules prescribe a non-extendable period, running from the date on which the party applying for those measures is in a position to proceed with them, within which protective measures against property must be commenced or completed, or may that party proceed with such measures, without limitation as to time, until such time as the competent judicial authority has adjudicated on the appeal referred to in Article 37 of the Convention?'

6 The United Kingdom and the Commission of the European Communities have submitted observations on those questions pursuant to Article 20 of the Protocol on the Statute of the Court.

7 By order of the Court of 12 December 1984, the case was assigned to the Fourth Chamber.

8 Article 39 of the Convention provides as follows:

'During the time specified for an appeal pursuant to Article 36 and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought.

The decision authorizing enforcement shall carry with it the power to proceed to any such protective measures.'

9 In the first part of its first question, the national court seeks, in substance, to establish whether, and if so to what extent, it is necessary, in order to determine what rules govern the protective measures referred to in Article 39, to refer to the provisions of the various national laws applicable to similar measures.

10 In the other questions submitted to the Court, the national court is concerned more particularly with the applicability to the protective measures referred to in Article 39 of the provisions of the Italian Code of Civil Procedure which apply the following principles to protective sequestration:

(i) Any sequestration of that kind must be authorized by a decision of the competent court and therefore the debtor may not proceed with it directly;

(ii) Protective sequestration must be carried out within a non-extendable period which commences on the date on which the party applying for the measure is in a position to proceed with it;

(iii) Any such sequestration must, after being carried out, be the subject of proceedings for confirmation thereof.

Applicability to the protective measures referred to in Article 39 of the national provisions applicable to similar measures

11 With respect to the question whether in general the court to which application is made may refer to its own internal procedural law in order to determine the rules applicable to the protective measures referred to in Article 39, the Commission states that the requirements laid down in that article are not complete. More specifically, according to the Commission, neither Article 39 nor any other provision of the Convention gives a list of the measures in question, the type and value of the goods in respect of which they may be adopted, the conditions to be satisfied for such measures to be valid or the detailed provisions for implementing them and ensuring that they are proper. As regards those matters and any other matter not dealt with in a uniform manner by the Convention itself, the Commission considers that the national court has no alternative but to apply the relevant provisions of its national code of procedure, to which the Convention refers by implication.

12 The United Kingdom shares the Commission's view and considers that the question of how a national court must exercise the power to grant protective measures provided for in Article 39 is a matter falling wholly within the domain of its national procedural law. The United Kingdom considers that all the questions raised by the national court should be resolved by application of Italian procedural law, since the Convention does not lay down specific rules.

13 Before a reply is given to the question submitted on that point by the national court, it is necessary to examine the context of Article 39 and the aim which it pursues.

14 Article 39 appears in Section 2 of Title III of the Convention, which is concerned with the enforcement in one Contracting State of decisions given in another Contracting State.

15 As the Court has already indicated in its judgment of 27 November 1984 (Case 258/83 *Brennero* [1984] ECR 3971), the Convention is intended to limit the requirements to which the enforcement of a judicial decision may be made subject in another Contracting State and for that purpose lays down a very summary

procedure for obtaining authorization for enforcement, whilst at the same time giving the party against whom enforcement is sought an opportunity to appeal against that decision.

16 However, the Convention confines itself to governing the procedure for obtaining authorization for enforcement, and does not contain any provisions concerning enforcement properly so called, which, as stated in the judgment of 2 July 1985 (Case 148/84 *Deutsche Genossenschaftsbank* [1985] ECR 1987), is subject to the national law of the court hearing the proceedings.

17 In that context, Article 39 governs, during the period laid down in Article 36 within which an appeal may be lodged and until that appeal has been determined, the rights of the party who has applied for and obtained authorization for enforcement.

18 As is apparent from the first paragraph of Article 39, the party in question may not, during that time, take any measures of enforcement properly so called but must confine itself to taking, if it considers that there is a need for them, protective measures against the propertyof the party against whom enforcement is sought. The authorization to take such protective measures flows, as indicated in the second paragraph, from the decision authorizing enforcement.

19 The obvious purpose of that provision is to offer the party who has obtained authorization for enforcement, but who cannot yet proceed with measures of enforcement, a means of preventing the party against whom enforcement is sought from disposing of his property in the meantime so as to render future enforcement fruitless or indeed impossible.

20 However, as in the case of enforcement properly so called, the Convention confines itself, with respect to the protective measures referred to in Article 39, to laying down the principle that the party who has applied for enforcement may, during the period indicated in that article, proceed with such measures. By contrast, the Convention leaves the matter of resolving any question not covered by specific provisions of the Treaty to the procedural law of the court hearing the proceedings.

21 It must nevertheless be made clear that the application of the requirements of the national procedural law of the court hearing the proceedings must not in any circumstances lead to frustration of the principles laid down in that regard, whether expressly or by implication, by the Convention itself and by Article 39 thereof in particular. Accordingly, the question whether any given provision of the national procedural law of the court hearing the proceedings is applicable to protective measures taken pursuant to Article 39 depends upon the scope of each provision of national law and upon the extent to which it is compatible with the principles laid down by Article 39.

22 Consequently, it is impossible to reply in general terms to the questions submitted by the national court: it is necessary to consider in each individual case whether the national provisions mentioned by the Italian court in its other questions are compatible with Article 39.

The need to obtain a specific decision authorizing the protective measures

23 In its second question the national court asks whether there applies to protective measures taken pursuant to Article 39 the principle embodied in its own national law whereby a person seeking to proceed with protective sequestration must first be authorized to do so by a specific decision of the court of competent jurisdiction.

24 As the Commission has correctly stated, the effect of Article 39 is that a party who has obtained authorization for enforcement is under no obligation to obtain specific and separate judicial authorization in order to proceed with protective measures during the period mentioned in that article, even though such authorization may normally be required by the national procedural law of the court in question.

25 That conclusion follows from the very wording of the second paragraph of Article 39 which states that the decision authorizing enforcement 'shall carry with it' the power to proceed with protective measures. That expression indicates that the right to proceed with such measures derives from the decision allowing enforcement and therefore that a second decision, which could not in any event undermine that right, would not be justified.

26 It must therefore be stated in reply to the second question submitted by the national court that by virtue of Article 39 of the Convention a party who has applied for and obtained authorization for enforcement may, by virtue of that article and during the period mentioned therein, proceed directly with protective measures against the property of the party against whom enforcement is sought and is under no obligation to obtain specific authorization.

The period during which measures of enforcement may be taken

27 In its third question, the national court asks whether the protective measures referred to in Article 39 are subject to the rule embodied in its national law whereby a protective measure must be taken within a non-extendable period running from the date on which the party applying for those measures is in a position to proceed with them.

28 It must be stated, in conformity with the view put forward by the Commission, that the reply to that question is to be inferred from the very wording of the first paragraph of Article 39. Since the Convention provides that 'during the time specified for an appeal pursuant to Article 36 and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures', the right to proceed with the measures in question cannot be restricted in time by the application of national measures prescribing a shorter period.

29 Consequently, such provisions are not applicable to the cases governed by Article 39.

30 It must therefore be stated in reply to the third question submitted by the national court that a party who has obtained authorization for enforcement may proceed with the protective measures referred to in Article 39 until the expiry of the period for lodging an appeal prescribed in Article 36 and, if such an appeal is lodged, until a decision is given thereon.

The need for a judgment confirming the protective measures

31 In the second part of its first question the national court asks whether a party who has proceeded with protective measures under Article 39 must obtain in respect of such measures any confirmatory judgment required by its national procedural law.

32 The Commission considers that neither the wording nor the purpose of the article in question prevents the requirement of such a confirmatory judgment from extending to protective measures adopted under Article 39. According to the Commission, provided that such measures are allowed automatically and without prior examination by the judicial authority, a procedure for examination of the measures *ex post facto*, such as the confirmatory procedure required by Italian law, constitutes the only way of averting the risk that irrelevant or vexatious protective measures might be adopted.

33 It must be noted in that connection that the confirmatory procedures laid down by the law in several Contracting States are intended to ensure *ex post facto* that the decision authorizing the protective measures is subject to examination in order to establish whether it was well founded, in view of the fact that the procedure preceding the adoption of such decisions is normally summary in character.

34 An examination of that kind is unjustified and even superfluous in the case of protective measures adopted under Article 39. Those measures are granted not on the basis of a summary procedure for authorization but rather on the basis of the legal effect with which a decision adopted in another Contracting State is endowed by the Convention.

35 It is to be noted in that connection that the only means of challenging the decision authorizing enforcement afforded by the Commission is the appeal referred to in Article 36. Consequently, anyother remedy provided for by the national law of the court in question, even if limited to the part of the decision which implicitly authorizes the protective measures, is excluded.

36 As regards the argument put forward by the Commission to the effect that the procedure of subsequent examination enables any irregularities or abuses committed in the application of the protective measures in question to be rectified, it must be observed that Article 39 does not prevent the party against whom those measures have been applied from taking legal proceedings in order to secure, by recourse to the appropriate procedures laid down in the national law of the court dealing with the matter, adequate protection of the rights which he alleges to have been infringed by the measures in question.

37 It must therefore be stated in reply to the second part of the first question submitted by the national court that a party who has proceeded with the protective measures referred to in Article 39 of the Convention is under no obligation to obtain in respect of such measures any confirmatory judgment required by the national law of the court in question.

Costs

38 The costs incurred by the United Kingdom and the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in reply to the questions submitted to it by the Corte suprema di cassazione by order of 9 November 1983, hereby rules:

(1) By virtue of Article 39 of the Convention, a party who has applied for and obtained authorization for enforcement may, within the period mentioned in that article, proceed directly with protective measures against the property of the party against whom enforcement is sought and is under no obligation to obtain specific authorization.

(2) A party who has obtained authorization for enforcement may proceed with the protective measures referred to in Article 39 until the expiry of the period prescribed in Article 36 for lodging an appeal and, if such an appeal is lodged, until a decision is given thereon.

(3) A party who has proceeded with the protective measures referred to in Article 39 of the Convention is under no obligation to obtain, in respect of those measures, any confirmatory judgment required by the national law of the court in question.

Bosco Pescatore

Koopmans Bahlmann O'Higgins

Delivered in open court in Luxembourg on 3 October 1985.

P. Heim
Registrar

G. Bosco
President of the Fourth Chamber