In Case 258/83

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 Bundesgerichtshof [Federal Court of Justice] for a preliminary ruling in the proceedings pending before that court between

CALZATURIFICIO BRENNERO SAS, Pastrengo, Verona (Italy),

and

WENDEL GMBH SCHUHPRODUKTION INTERNATIONAL, Detmold (Federal Republic of Germany)

on the interpretation of the second paragraph of Article 37 and the second paragraph of Article 38 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT (Fourth Chamber)

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

Advocate general: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The order making the reference, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The parties to the main dispute are shoe manufacturer, namely Calzaturificio Brennero sas (hereinafter referred to as "Brennero"), which has its registered

office at Pastrengo, Verona, in Italy, and Wendel GmbH Schuhproduktion International (hereinafter referred to as "Wendel") which has its registered office at Detmold in the Federal Republic of Germany.

By order of 17 June 1983, which was declared enforceable within Italian territory, the Tribunale [District Court], Verona, authorized Brennero to seize the movable and immovable assets in Wendel's possession up to an amount of LIT 700 000 000 in respect of the princial amount together with any interest accrued or accruing thereon.

On 7 July 1983 the President of the Fourth Civil Chamber of the Landgericht [Regional Cort], Detmold, pursuant to Article 31 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"), issued an order for the enforcement of the judgment given by the Italian court. The order was issued by an officer of the court with the proviso that enforcement should not go beyond the protective measures required until the creditor produced a certificate showing that enforcement could proceed without restriction.

Wendel appealed against that decision under Article 36 et seq. of the Convention and submitted an application under the second paragraph of Article 38 of the Convention, whereupon the Oberlandesgericht [Higher Regional Court], Hamm, by interim order of 15 July 1983 made enforcement of the order issued by the Tribunale, Verona, conditional on Brennero providing security of DM 1 200 000. It is clear from the order making the reference that the Oberlandesgericht did not at the same time give judgment on the appeal.

Brennero lodged a *Rechtsbeschwerde* [appeal on a point of law] against the Oberlandesgericht's order with the Bundesgerichtshof under the second paragraph of Article 37 of the Convention. Brennero considers that the interim order is unlawful in so far as it requires a security to be provided without at the same time judgment being given on Wendel's appeal and that it should therefore be set aside.

2. Article 37 of the Convention provides as follows:

"An appeal against the decision authorizing enforcement shall be lodged in accordance with the rules governing procedure in contentious matters:

...

in the Federal Republic of Germany, with the Oberlandesgericht,

...

The judgment given on the appeal may be contested only by an appeal in cassation or, in the Federal Republic of Germany, by a *'Rechtsbeschwerde'*."

Articles 38 and 39 of the Convention are worded as follows:

"Article 38

The court with which the appeal under the first paragraph of Article 37 is lodged may, on the application of the appellant, stay the proceedings if an ordinary appeal has been lodged against the judgment in the State in which that judgment was given or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 39

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."

Taking the view that an interpretation of the second paragraph of Article 37 and the second paragraph of Article 38 was necessary to enable it to resolve the dispute, the Bundesgerichtshof referred the following questions to the Court of Justice for a preliminary ruling:

"1. May the Oberlandesgericht in the Federal Republic of Germany with which an appeal against a decision authorizing enforcement has been lodged by a debtor under Articles 36 and 37 of the Convention issue an order under the second paragraph of Article 38 of the Convention making enforcement conditional on the provision of security only as part of its final judgment on the appeal or may it also issue the order as an interim measure during the appeal proceedings?

2. May a *Rechtsbeschwerde* (appeal on a point of law be lodged with the Bundesgerichtshof either directly under the second paragraph of Article 37 of the Convention, or by analogy therewith, against an order concerning the provision of security issued by the Oberlandesgericht on the basis of the second paragraph of Article 38 of the Convention as an interim measure during the appeal proceedings?"

In the grounds set out in the order making the reference, the Bundesgerichtshof points out that under Paragraph 567 (3) of the German Code of Civil Procedure, a Rechtsbeschwerde lodged against an order of the Oberlandesgericht would be dismissed as inadmissible and that none of the exceptions to that rule is applicable in the present case. However, that provision would be overridden if it were permissible, under the Convention, to lodge a *Rechtsbeschwerde* (second paragraph of Article 37) against an order concerning the provision of security not only where the order is issued as part of the judgment on the appeal and is contestable with it but also where it is issued merely as an interim measure during the appeal proceedings, whether or not such an order is possible under the Convention.

3. The order making the reference, issued on 12 October 1983, was lodged at the Court Registry on 18 November 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Brennero, represented by Alberto Miele, advocate at the Italian Court of Cassation, Francesco Camilotti, of the Padua Bar, and Herman Kroitzsch, advocate at the Bundesgerichtshof; by the Government of the Federal Republic of Germany, represented by Christof Böhmer, Ministerialrat at the Federal Ministry of Justice, acting as Agent; by the Government of the Italian Republic, represented by Arnaldo Squillante, President of Chamber at the Council of State, Head of the Department for Contentious Diplomatic Affaire at the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato; and by the Commission of the European Communities, represented by Jörn Pipkorn, a member of its Legal Department, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, of the Düsseldorf Bar.

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

By order of 28 March 1984, the Court decided, pursuant to Article 95 (1) and (2) of its Rules of Procedure, to assign the case to the Fourth Chamber.

II — Summary of written observations submitted to the Court

First question

Brennero, the appellant in the main action, contends that neither the wording of the second paragraph of Article 37 nor the system established by the Convention permit the issue of an interim order concerning the provision of security under the second paragraph of Article 38, before judgment is given on the appeal in accordance with the first paragraph of Article 36 and Article 37 of the Convention. The second paragraph of Article 37 does not apply to interim orders or interlocutory judgments. If a court were permitted to issue an interim order under Article 38 before giving judgment on the appeal, Article 39 would be rendered devoid of purpose. That provision lays down precisely that the decision authorizing enforcement permits the creditor to take protective measures during the period specified for lodging an appeal against the decision authorizing enforcement and until judgment has been given on the appeal. As long as the court of first instance's decision authorizing enforcement is not enforceable itself, that is to say whilst the appeal proceedings are in progress, it is inappropriate to issue an interim order under Article 38. It is only once the appeal proceedings are over that it may prove necessary to make the decision authorizing enforcement — if it has been upheld — conditional on the provision of security pursuant to Article 38 of the Convention. The measures referred to in that provision may therefore be adopted only in conjunction with the judgment dismissing the appeal whereby the decision of the court of first instance authorizing enforcement itself becomes enforceable.

Brennero also draws attention to a factor which was not expressly raised in the questions submitted. It considers that Article 38 of the Convention is inapplicable in proceedings for the enforcement of an interim order, such as the protective seizure order issued by the Tribunale, Verona, in the present case. Seizure is by definition a measure which has only temporary effects before final judgment is given on the substance of the case. A provisional suspension of the effects of an interim order of that kind or an order requiring a creditor effecting seizure to provide security for the same amount would be tantamount to cancelling out the effects of the original interim order by a protective measure having the opposite effect. In that respect, such a measure would amount to a review of the substance of the original judgment, something that is expressly prohibited by the last paragraph of Article 34 of the Convention. An interim protecitve measure creates, in so far as it prejudges the final decision, a risk which the court of the State in which the original judgment was given must assess at the time when it authorizes the seizure.

Brennero points out that suspension of enforcement and the provision of security are typical measures relating to the enforcement of judgments on the substance of a case and they do not apply to measures intended to provide interim legal protection.

The legal traditions of the Member States, which were followed in bilateral international agreements, always demanded as a pre-condition for enforcement that the judgment should have become final *(res judicata)*. Although the Convention departs from that tradition by providing that judgments which are open to appeal are also enforceable, it takes account in Article 38 of the possible consequences of enforcing a judgment which is subsequently reviewed. The decisive reason for limiting the scope of the measures provided for by Article 38 exclusively to judgments on the substance of a case is that enforcement proper produces irrevocable effects on the debtor's assets, with the result that precautionary measures are needed pursuant to Article 38 in cases where the judgment in question may still be amended. However, that does not apply where the measures are intended merely to provide interim legal protection.

The *Italian Government* and the *Commission* also consider that the court hearing an appeal against a decision authorizing enforcement may require the provision of security under Article 38 of the Convention only when it gives judgment on the appeal.

In the *Italian Government's* opinion, the second paragraph of Article 38, which permits the court to "make enforcement conditional" on the provision of security, refers to the time at which the court upholds the enforcement order issued at first instance. Furthermore, the purpose of Article 38 is to protect the interests of the party against whom enforcement is sought solely in view of the provisional nature of the foreign judgment. The provisions of Article 39 provide adequate guarantees for the duration of any appeal proceedings.

The *Commission* weighs the conflicting interests of the creditor and of the debtor. Under Article 34 of the Convention, the court of first instance hearing the creditor's application for an enforcement order is obliged to give its decision without delay and without hearing the debtor. Although the protective measures which the creditor may take in accordance with Article 39 in the event of an appeal by the debtor are not themselves sufficient to satisfy the creditor's claim, they may none the less on their own already create substantial economic difficulties for the debtor, for example by freezing his bank accounts. In view of the debtor's right of recourse against the creditor if the decision authorizing enforcement is subsequently reversed, the debtor has an interest in obtaining an order that the creditor must provide security. Conversely, where no such obligation is imposed by the original foreign judgment, it constitutes an additional burden for the creditor.

That appraisal of the parties' respective interests must however take account of the fundamental purpose of the Convention which is to ensure, as far as possible, the "free movement" of judgments and consequently to leave only limited powers to the courts of the State of enforcement. It follows from that principle that a restrictive interpretation must be given to Article 38 so as to limit the

powers of the courts of the State of enforcement to those which are expressly provided for. Article 38 allows the court hearing the appeal:

either *to stay the proceedings* where an ordinary appeal has been lodged in the State in which the judgment was given or where the period for lodging such an appeal has not yet expired;

or *to give judgment forthwith* on the appeal lodged with it and, if it upholds the enforcement order, to *authorize enforcement with or without provision of security.*

However, a restrictive interpretation of that kind does not deny a debtor the possibility of defending his legitimate interests. If the debtor, after lodging an appeal in the State in which the judgment was given, considers that the powers conferred by Article 38 are inadequate for the purpose of protecting his interests, he may apply to the competent courts of the State in which the judgment was given in order to obtain either an order suspending enforcement altogether or the provision of security. Those are the courts empowered to consider whether and to what extent a judgment that has not yet become final may be enforced.

Furthermore, to recognize that the court hearing the appeal in the State of enforcement is empowered to issue an interim order concerning the provision of security before giving judgment is incompatible with Article 39 of the Convention. The creditor is entitled under that provision to take protective measures during the time specified for lodging an appeal and until the appeal has been determined. To issue an interim order concerning the provision of security may thus jeopardize the objective of the Convention which is to permit the creditor to take whatever measures are appropriate with all possible speed.

The *German Government* considers that the court hearing an appeal against a decision authorizing enforcement may, under the second paragraph of Article 38 of the Convention, make an interim order for the provision of security during the appeal proceedings. It contends that Article 38 provides for the possibility of staying the proceedings *or* making enforcement conditional on the provision of security. A stay of proceedings is by its very nature an interim measure. Since a measure of that kind may cause substantial harm to the creditor, for example where the debtor becomes bankrupt whilst the proceedings are suspended, the second paragraph of Article 38 provides as an alternative the possibility of proceeding with enforcement in return for the provision of security. In the light of the purpose of Article 38 which is to diminish as far as possible the risks to which creditors and debtors are exposed, an order for the provision of security is also an interim measure which comes to an end with the final judgment in the main proceedings pending in the State in which the original judgment was given. Once the uncertainty concerning the outcome of the main proceedings has been dispelled, the court hearing the appeal in the State of enforcement can finally decide whether the enforcement order was issued on valid grounds or whether it is necessary to quash it at the debtor's request.

Second question

Brennero considers that it must be possible to contest any judgment by a

national court hearing an appeal against a decision authorizing enforcement given pursuant to the Convention, including an interim order, by a *Rechtsbeschwerde* (appeal on a point of law) pursuant to the second paragraph of Article 37. Brennero contends that this means of redress is not provided for by German national law but was introduced and is governed by the Convention and performs a specific function thereunder. In connection with such an appeal, therefore, the Bundesgerichtshof is not exercising its general function under German procedural law but is performing the specific function conferred upon it by the Convention, which is to review any judgment given by a court on an appeal. If it were impossible to lodge a *Rechtsbeschwerde* against a judgment given by such a court, the uniform interpretation of the Convention would be jeopardized since under the Protocol of 3 June 1971 on the interpretation of the Convention only the Bundesgerichtshof is obliged to submit a question to the Court of Justice for a preliminary ruling.

According to the *Commission,* the second paragraph of Article 37 allows a Rechtsbeschwerde to be lodged only against the final judgment on the appeal. To allow a *Rechtsbeschwerde* to be lodged against an interim order concerning the provision of security would, in the Commission's opinion, be incompatible with the objective that the proceedings in the State of enforcement should be conducted swiftly.

The *Italian Government* considers that while the Convention does not provide for the possibility of lodging an appeal in cassation against an interim order issued during the appeal proceedings, it does not rule out that possibility in so far as an appeal in cassation is provided for by each national system.

In the *German Government's* opinion, there is no need for the second paragraph of Article 37 to be applied by analogy to interim orders. In certain national legal systems there is sometimes no right of appeal against interim orders. Increasing the number of means of redress merely enhances the risk of delays in proceedings and thus constitutes an obstacle to the "free movement" of judgments which is the objective of the Convention.

III — Oral procedure

At the sitting on 29 May 1984 oral argument was presented by the following: Alberto Miele, advocate at the Italian Court of Cassation, for Brennero, the appellant in the main action; F. Rössler, of the Detmold Bar, for Wendel, the respondent in the main action; Oscar Fiumara, Avvocato dello Stato, for the government of the Italian Republic; and W.-D. Krause-Ablass, of the Düsseldorf Bar, for the Commission of the European Communities.

At the sitting, the representative of the *Italian Government* pointed out — whilst acknowledging that there was no reference to this problem in the questions submitted — that the seizure order issued by the Tribunale, Verona, is an interim protective measure and cannot therefore be contested by an appeal under Italian law. Since that interim measure is definitive as such, Article 38 of the Convention is inapplicable.

Wendel, which did not submit any written observations, contended at the sitting that the need to afford the debtor sufficient protection in the manner

provided for by Article 38 even before final judgment is given on the appeal stems from the scheme of Articles 38 and 39 of the Convention. Those two articles apply to two quite distinct situations. Article 38 applies to cases where an appeal has been lodged against a decision authorizing enforcement of a foreign judgment which can still be contested by an appeal in the State in which that judgment was given; Article 39, for its part, applies only to cases where the foreign judgment is final and it is necessary simply to ascertain whether that judgment can be recognized and declared enforceable. Therefore, since the reference to Article 39 is not relevant in this case, the possibility of issuing an order concerning the provision of security under the second paragraph of Article 38 must be available even during the appeal proceedings against the decision authorizing enforcement.

Furthermore, a right to lodge a *Rechtsbeschwerde* against an interim measure of that kind which does not exist under German national law cannot be founded on the Convention.

The Advocate General delivered his opinion at the sitting on 4 July 1984.

Decision

1 By order of 12 October 1983, which was received at the Court Registry on 18 November 1983, the Bundesgerichtshof [Federal Court of Justice] referred to the Court of Justice for a preliminary ruling 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") two questions concerning the interpretation of Articles 37 and 38 of the Convention.

2 Those questions arose in a dispute between two shoe manufacturers, Brennero and Wendel, which have their registered offices in Italy and the Federal Republic of Germany respectively. Brennero obtained judgment against Wendel in an Italian court and is now seeking to have that judgment enforced in the territory of the Federal Republic of Germany, in accordance with the provisions of the Convention.

3 The President of the Fourth Civil Chamber of the Landgericht [Regional Court], Detmold, issued an order for the enforcement of the judgment in

question and, at the same time, authorized the adoption of protective measures covering the assets of the German undertaking. Wendel appealed against that decision under the first paragraph of Article 36 of the Convention whereupon the Oberlandesgericht [Higher Regional Court], Hamm, before giving judgment on the appeal, made enforcement of the Italian judgment conditional on Brennero providing security even if enforcement was restricted to the adoption of protective measures.

4 Brennero lodged a *Rechtsbeschwerde* (appeal on a point of law) against the Oberlandesgericht's order under the second paragraph of Article 37 of the Convention. It contended that a court with which an appeal has been lodged against a decision authorizing enforcement cannot require security to be provided without at the same time giving judgment on the appeal.

5 The Bundesgerichtshof, before which the *Rechtsbeschwerde* was brought, held that the Oberlandesgericht had not given judgment on the appeal against the decision authorizing enforcement but had instead, in accordance with Wendel's suggestion, given a preliminary decision concerning the provision of security. Since, in those circumstances, the decision given by the Oberlandesgericht was an interim order, it was uncertain whether it could be contested by a *Rechtsbeschwerde.* Under the German law of civil procedure, an appeal of that kind is inadmissible if its purpose is to challenge an interim order issued by an Oberlandesgericht. It can therefore be reviewed by the Bundesgerichtshof only if the Convention provides for such an appeal.

6 Taking the view that in that regard an interpretation of Articles 37 and 38 of the Convention was necessary to enable it to give judgment, the Bundesgerichtshof referred the following questions to the Court for a preliminary ruling:

"1. May the Oberlandesgericht in the Federal Republic of Germany with which an appeal against a decision authorizing enforcement has been lodged by a debtor under Articles 36 and 37 of the Convention issue an order under the second paragraph of Article 38 of the Convention making enforcement conditional on the provision of security only as part of its final judgment on the appeal or may it also issue the order as an interim measure during the appeal proceedings?

2. May a *Rechtsbeschwerde* (appeal on a point of law) be lodged with the Bundesgerichtshof either directly under the second paragraph of Article 37 of the Convention, or by analogy therewith, against an order concerning the provision of security issued by the Oberlandesgericht on the basis of the second paragraph of Article 38 of the Convention as an interim measure during the appeal proceedings?"

First question (Article 38)

7 Brennero, the Italian Government and the Commission of the European Communities consider that under Article 38 of the Convention a court with which an appeal has been lodged against a decision authorizing enforcement could not make an interim order requiring security to be provided without giving judgment on the appeal. The power to make an order of that kind excluded by the wording of Article 38 which states that the court with which the appeal was lodged could make "enforcement" conditional on the provision of security, such enforcement being possible only after the dismissal of the appeal. Moreover, in their view, the exercise by the court with which the appeal had been lodged of the power to make an interim order requiring security to be provided is contrary to one of the objectives of the Convention which is intended precisely to render the procedure for the enforcement of a judgment given in another Contracting State as straightforward and as rapid as possible.

8 The German Government considers that the power of the court with which the appeal had been lodged to make an order for the provision of security during the appeal proceedings was such as to prevent the debtor from being exposed to risks inherent in the uncertainty surrounding the outcome of the proceedings in the State in which the original judgment was given, since Article 38 applied only where the judgment to be enforced did not yet have the force of *res judicata* in the State in which it was given.

9 At the hearing, Wendel expressed its agreement with that view particularly on the ground that although Article 38 applies to cases where the judgment to be enforced could still be contested by an appeal in the State in which that judgment was given, Article 39, which authorizes the adoption of interim protective measures, applies only in cases where that judgment had become final under the law of the State in which it was given. In cases such as the present, therefore, only Article 38 is relevant whilst Article 39 is inapplicable.

10 It is appropriate to recall in the first place that the purpose of the Convention is to limit the number of requirements to which the enforcement of a judgment may be subjected in another Contracting State. The Convention accordingly provides for a very simple enforcement procedure whilst giving the party against whom enforcement is sought an opportunity to lodge an appeal. Unlike the initial proceedings concerning the decision authorizing enforcement, the proceedings on the appeal are adversary proceedings.

11 Article 39 of the Convention governs the rights of the party who obtained the decision authorizing enforcement which is contested by the appeal. Until judgment is given on that appeal, that party may, according to that provision, take only "protective measures . . . against the property of the party against whom enforcement is sought." It follows that no enforcement measures may be taken until the court with which the appeal has been lodged gives judgment thereon.

12 That is the context in which the second paragraph of Article 38 of the Convention, under which the court with which the appeal has been lodged may "make enforcement conditional on the provision of such security as it shall determine", must be set. The whole significance of that provision lies in the fact that, as soon as the court gives judgment on the appeal, the restrictions provided for by Article 39 cease to be applicable. Enforcement measures may therefore be taken while that judgment can still be contested by an appeal in cassation or by a *Rechtsbeschwerde,* in accordance with the second paragraph of Article 37, and while even the original judgment given in the first State can still be contested by an appeal, which is a possibility expressly provided for by Article 38. That is the time when the protection of the debtor's interests may require enforcement to be made conditional on the provision of security.

13 It follows that the second paragraph of Article 38 of the Convention must be interpreted as meaning that a court with which an appeal has been lodged against a decision authorizing enforcement, given pursuant to the Convention, may make enforcement conditional on the provision of security only when it gives judgment on the appeal.

Second question (Article 37)

14 Brennero observes that the uniform interpretation of the Convention would be jeopardized if an interim or interlocutory order issued by the court with which the appeal has been lodged could not be contested by an appeal in cassation or by a *Rechtsbeschwerde*. However, according to the Commission and the German Government, the second paragraph of Article 37 of the Convention states categorically that a *Rechtsbeschwerde* can be lodged only against the final judgment given on the appeal.

15 The second paragraph of Article 37 provides that the judgment given on the appeal may be contested only by an appeal in cassation and, in the Federal Republic of Germany, by a *Rechtsbeschwerde*. Under the general scheme of the Convention, and in the light of one of its principal objectives which is to simplify procedures in the State in which enforcement is sought, that provision cannot be extended so as to enable an appeal in cassation to be lodged against a judgment other than that given on the appeal, for instance against a preliminary or interlocutory order requiring preliminary inquiries to be made.

16 Therefore, the answer to the second question must be that the second paragraph of Article 37 of the Convention must be interpreted as meaning that an appeal in cassation and, in the Federal Republic of Germany, a *Rechtsbeschwerde* may be lodged only against the judgment given on the appeal.

17 If, in the present case, the answer to the second question should lead the Bundesgerichtshof to declare the *Rechtsbeschwerde* lodged against the Oberlandesgericht's order inadmissible, while the order should be regarded as unlawful in the light of the answer to the first question, it is for the Oberlandesgericht, when the case again comes before it, to revoke the interim order in so far as it required security to be provided without giving judgment on the appeal.

Costs

18 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Italian Republic and the Commission of the Euro-

pean Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber)

in reply to the questions submitted to it by the Bundesgerichtshof by order of 12 October 1983 hereby rules:

1. **The second paragraph of Article 38 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that a court with which an appeal has been lodged against a decision authorizing enforcement, given pursuant to the Convention, may make enforcement conditional on the provision of security only when it gives judgment on the appeal;**

2. **The second paragraph of Article 37 of the Convention of 27 September 1968 must be interpreted as meaning that an appeal in cassation and, in the Federal Republic of Germany, a *Rechtsbeschwerde* may be lodged only against the judgment given on the appeal.**

Bosco Pescatore

O'Keeffe Koopmans Bahlmann

Delivered in open court in Luxembourg on 27 November 1984.

For the Registrar

D. Louterman

Administrator

G. Bosco

President of the Fourth Chamber