On those grounds,

THE COURT

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

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

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 21 May 1980.

A. Van Houtte
Registrar

H. Kutscher
President

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

Mr President,
Members of the Court,

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

1 — Translated from the French.

Mr Denilauler. The questions put by the court making this reference concern the interpretation of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Since the report for the hearing by the Judge-Rapporteur has fully described the facts surrounding the dispute and the different procedural stages it has gone through, there is no need to waste the Court's time by recapitulating them here. So I take leave to come straight to the important problems raised by the Frankfurt Regional Court.

The first two questions submitted by that court concern the interpretation of Articles 27 (2), 46 (2) and 47 (1) of the Convention.

Article 27 (2) provides that "a judgment shall not be recognized ... where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence". This provision is made applicable to enforcement as a result of the second paragraph of Article 34 by which the application for such enforcement must be refused if it could not be recognized under Articles 27 and 28.

Article 46 (2) pursues the matter as regards evidence by requiring that a party seeking recognition or applying for enforcement of a judgment shall produce, in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings.

Article 47 (1) deals with the actual judgment to be enforced. It makes it compulsory for the party applying for enforcement to produce "documents which establish that, according to the law of the State in which it has been given, a judgment is enforceable and has been served". The court making the reference asks whether these provisions apply where the judgment in the State of origin authorizes a provisional or protective measure pursuant to proceedings which, in accordance with the law of that State, have been conducted *ex parte*. Is this the case here, especially when we are confronted with a decision such as an order of the President of a French court authorizing a creditor to freeze the account of his debtor in Germany without the debtor's having been notified of the application and the decision which resulted therefrom, under Article 48 of the old Code de Procédure Civile [Code of Civil Procedure]?

I — In dealing with this question I shall concentrate first on the words actually used in the provisions requiring construction.

I think that it is necessary here to distinguish between Article 47 (1) on the one hand and Articles 46 (2) and 27 (2) on the other.

Article 47 (1) uses the word "judgment" without any restriction. As may be seen from Article 25, this word was selected to cover all the possible forms of judicial decisions including those authorizing provisional or protective measures at the conclusion of *ex parte* proceedings.

Unless the word "judgment" is used in Article 47 (1) with a different meaning from that in Article 25, subparagraph (1) does apply to the judgments I have mentioned.

Whether Articles 27 (2) and 46 (2) apply to provisional or protective measures may on the other hand still be in some doubt inasmuch as the French text of the provisions contains the phrases "défendeur défaillant" [defendant in default of appearance] and "décision par défaut" [judgment given in default] respectively. As the court which made the reference points out, default proceedings are, in the technical meaning of the term, proceedings "which are not, in their legal nature, *ex parte*, but which envisage the participation of the defendant".

From an analysis of Article 46 (2) the Commission comes to the same conclusion. It is true that default proceedings [procédure par défaut] are adversary proceedings for, in such a case, although he has not responded to them, the defendant has been notified of the action in which he is involved.

It is however far from certain that the terms used in Articles 27 (2) and 46 (2) of the Convention can apply only to default proceedings as understood *stricto sensu* in certain national legal systems.

I do not think it right to construe Article 27 (2) as referring only to specific proceedings known to certain national legal systems. In my view such a construction would be too narrow and would fail to recognize the independent nature of the Convention, which is an instrument of international law, in relation to the multiplicity of proceedings under the national legal systems of the Contracting States.

This is confirmed by the English text of Article 27 (2) which, by using the expression "judgment ... given in default of appearance", is careful to avoid terminology calling to mind certain national proceedings and those alone. There can be no doubt that according to the ordinary meaning of the words any judgment given against a defendant without his having been heard is a judgment "in default of his appearance". The English term refers simply to the absence of the defendant from the course of the proceedings for whatever reason. It therefore covers not only the case of the defendant upon whom the document instituting the proceedings has been served and who does not respond to it, but also the case of the defendant upon whom, under the national rules of procedure, it has not been necessary to serve such a document.

Even though the English text of Article 47 (2) uses the shorter expression "given in default", we must not overlook the fact that this provision is secondary to Article 27 (2) of which, as I have indicated, it is an extension from the point of view of evidence. Because of this link, "given in default" can only mean "given in default of appearance".

As the court making the reference itself points out, the view that Articles 27 (2) and 46 (2) apply to any decision in proceedings of an *ex parte* nature is also supported by Bülow and Böckstiegel, the eminent specialists on the Convention (Der Internationale Rechtsverkehr in

Zivil- und Handelssachen, commentary on Article 27, III, 2, p. 606-208.209 — commentary on Article 46, II, 2, p. 606-276.277).

In short, from this textual analysis of the provisions in question I gain the impression that the argument that they apply to provisional or protective measures adopted at the conclusion of *ex parte* proceedings is more sound than the reverse argument. I must however admit that, except in the case of Article 47 (1), I cannot find sufficient support for this to strengthen my belief.

II — I feel therefore that I can find a satisfactory solution to the important problem raised by the Oberlandesgericht Frankfurt only by examining it in the light of the object and purpose of the Convention.

The Convention is meant to strengthen legal protection and legal certainty in the Common Market and abolish obstacles which prevent it from working properly.

1. On the basis of that idea the plaintiff in the main action, Italy and the Commission are in favour of excluding the application of Article 27 (2) to judgments ordering a provisional or protective measure at the conclusion of *ex parte* proceedings. They claim that judgments of this sort may be made at the national level in all Contracting States. It is also true, at the national level, for the United Kingdom, Ireland and Denmark in which the Convention is not yet in force. Since the object of the Convention is to make possible at Community level what is already possible at national level, they come to the conclusion that the recognition and enforcement of such measures must be possible at Community level.

For all its impeccable logic, it seems to me that this argument completely disregards the special character of *ex parte* provisional or protective measures.

That the authors of the Convention were aware of the specific features of these measures is clear from the special jurisdiction to deal with them provided in Article 24. According to that provision: "Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter."

We should give particular attention to the all-embracing nature of this jurisdiction, indicated by the words "even if". Under the normal rules of the Convention conferring jurisdiction, a court has no jurisdiction to entertain disputes which, in substance, concern a court of another Contracting State. To my way of thinking the special jurisdiction in Article 24 would have been quite superfluous if the authors of the Convention had intended that judgments given in a State other than the State of the court having jurisdiction under Article 24 should automatically become enforceable within the territorial jurisdiction of the latter court.

I therefore draw some comfort in thinking that provisional and protective measures have a special nature from the text of The Hague Convention of 1 February 1971 drawn up under the auspices of The Hague Conference on Private International Law of which all the Community States are members. According to Article 2 (2), that Convention does not apply to judgments ordering provisional or protective measures. The preparatory studies show that that provision was already included in the preliminary draft adopted by the commission charged with the drafting of the text and was not questioned thereafter. According to the rapporteur of the Convention that provision is in accord with the prevailing opinion to the effect that such measures must be considered as coming within the exclusive jurisdiction of the country in which they are to be applied.

However, it would not be right to conclude from the foregoing that I am adopting the opinion, expressed during the oral procedure by the United Kingdom representative, that under the Brussels Convention no provisional or protective measure, whether adopted in *ex parte* or in adversary proceedings, can have extra-territorial effect.

In my view it all depends on the nature of the judgment concerning the measure. If, on the one hand, the judgment by the court of origin is enforceable, it would be a clear breach of the universally recognized principle of the territoriality of the enforcement of judicial decisions. In the Convention, such territoriality takes the form of the exclusive jurisdiction laid down in Article 16 (5) under which: "The following courts shall have exclusive jurisdiction, regardless of domicile: ... in proceedings concerned with the enforcement of judgments, the courts of the Contracting State in which the judgment has been or is to be enforced".

If, on the other hand, the judgment is just a declaration by which a court authorizes the plaintiff to apply to a court in another Contracting State to have it enforced under the enforcement procedures provided for in that court's own law, then the jurisdiction of the court addressed seems to me to be respected.

In short, the special nature of provisional and protective measures calls for the adoption of an intermediate opinion. I think that if they have been adopted in the form I have just indicated and, in addition, at the conclusion of adversary proceedings, they may have extra-territorial effect by virtue of the rules of the Brussels Convention on enforcement. Conversely, this same special nature leads me to say that similar measures adopted at the conclusion of *ex parte* proceedings do not come under the rules of the Convention.

It is therefore this *ex parte* nature of the proceedings which, to my way of thinking, justifies this difference in treatment.

2. This is not however the opinion of those who contend that Article 27 (2) does not apply to *ex parte* provisional and protective measures. In their view, requiring proof of service of the document instituting the proceedings to obtain an order for enforcement of those measures is tantamount to robbing them of all practical effect.

This is an argument which the Oberlandesgericht had in mind, too. It expresses its fear by stating that "the surprise effect, obviously intended, of the protective measure decreed by the President of the Tribunal de Grande Instance, Montbrison, ... which in all probability would be decisive for the success of the enforcement of that measure, would be lost if, in that case too, the plaintiff's application ... instituting the proceedings and the judgment of the same date of the French court applied to were subject to the requirement of prior service in order to obtain an order for enforcement".

It cannot be denied that speed and the surprise effect are essential for the success of measures of this type. However, I do not think that this is the only consideration to be taken into account; in international relations it is second in importance to the observance of the rights of the defence. Even in national legal systems judgments ordering *ex parte* provisional or protective measures have far-reaching effects. They are a seriously disturbing factor in the normal judicial order, of which the adage *audi alteram partem* is a cornerstone. In the field of commercial relationships the freezing of a bank account may result in serious consequences for the undertaking affected.

Moreover, third parties who are in a business relationship with the defendant are affected by the repercussions of such a measure. For example, a defendant's customers to whom a refused cheque or bill was payable may suffer serious injury owing to the impossibility of obtaining immediate payment. These risks seem to me to be particularly acute in certain international commercial sectors where very large sums or goods of great value may change hands several times within a short space of time.

Acting solely on the basis of the plaintiff's assertions, the court of origin will have no means of checking whether the goods whose seizure is sought still in fact belong to the defendant when they may have been sold just a moment before, or whether third parties have prior claim to them. If serious prejudice to the rights of third parties is to be prevented and if the risk of increasing the uncertainty of commercial transactions is not to be accepted, it is essential that measures such as "saisie conservatoire" [attachment] in French law should rapidly be brought to the notice of all concerned and that they should have the opportunity to take immediate counter-action.

A defendant wanting to obtain the release of his goods from the measures taken against them must be in a position to put forward his arguments in the shortest possible time. Can this be possible when a measure has been auth-

orized by a court of one State and made enforceable by a court of another State?

I do not think so.

What then can the debtor do?

He may go to the court of origin. Let us imagine — the most favourable case — in order to highlight this, that he is domiciled in the State to which that court belongs. This will make his task easier from the linguistic and legal point of view. But one must not forget that since the measure was *ex parte*, the defendant will get to know of its enforcement through the foreign court which has ordered it, which may be the first cause of delay. Even if he obtains a rapid lifting of the measures against his goods, he will still have to contend with the transmission of that judgment to the country of enforcement, which may be a second cause of delay.

But the most frequent case will be the one where a defendant is not domiciled in the same State as the court of origin. For obvious practical reasons he will need a certain amount of time to make his application to it.

Can the defendant challenge the measure before the court of the place of enforcement? Article 29 of the Convention certainly does not allow him to rely on substantive arguments. No doubt he will be able to prove, as Jenard suggests in his commentary to Article 37 (Reports on the Convention (Official Journal of the European Communities C 59 of 5 March 1979, p. 51)), that he has paid his debt since the foreign judgment was delivered. But that possibility is indeed minimal and does not go very far towards ensuring appropriate protection in all cases.

If, for example, the debtor denies that he is the owner of the goods seized because he has just sold them, the exclusion of substantive review, which is justified in other circumstances, will prevent him from assessing that argument. Similarly, the third party acquiring the goods will have no right of access to the court.

It follows that a quick and effective appeal is not possible either in the court of origin or in the court addressed. To be effective, an appeal against enforcement of a preventive measure requires that the court which is to take cognizance of it shall have jurisdiction both in regard to the justification for this measure and the form it must take and it must also be able to give immediate effect to the decision at which it arrives, whatever it may be. I think that I have shown that these conditions are not met either in the court of origin or in the court of the place of enforcement.

3. This inability of a defendant to take quick and effective counter-action against a judgment from a foreign court at the conclusion of *ex parte* proceedings for a provisional or protective measure against him, is, I feel, an unjustified infringement of the rights of the defence.

However, the Brussels Convention is founded upon the strict observance of such rights. This is evidenced by Article 2 which is a straightforward application

of the maxim *actor sequitur forum rei.* As Jenard explains, that the court of the defendant should in principle have jurisdiction "is even more relevant in the international sphere than it is in national law. It is more difficult, generally speaking, to defend oneself in the courts of a foreign country than in those of another town in the country where one is domiciled" (Report on the Convention, Official Journal of the European Communities C 59 of 5 March 1979, p. 18).

Similarly, the second paragraph of Article 20 of the Convention which stipulates that "the court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end", is also designed to safeguard the rights of the defendant, by recognizing the international importance of the service of judicial documents (Jenard, Report on the Convention, p. 39).

This strictness of the requirement that the rights of the defence must be observed is not without purpose. It is the counterpart to the extreme liberality of the Convention as regards the recognition and enforcement of judgments. It is possible to accept this liberality only if the court addressed can have full confidence in the judgment of the court of origin. The same thought is expressed by Jenard when he writes, at the start of his general considerations on recognition and enforcement (Report on the Convention, p. 42) that "as a result of the safeguards granted to the defendant in the original proceedings, Title III of the Convention is very liberal on the question of recognition and enforcement".

Consequently the scheme of the Convention in my opinion rules out the possiblility of the defendant's being taken by surprise by the enforcement of a judgment which has not been served on him and when he did not even know that the court had given it. The importance of observing the rights of the defence also makes me think that if the authors of the Convention had intended that a refusal of recognition and enforcement on the ground given in Article 27 (2) should not apply in the case of decisions such as those in question in the main action, they would have said so expressly.

The possibility cannot even be excluded that courts in certain States which have a particularly strict concept of the rights of the defence would refuse to grant an enforcement order for judgments ordering a provisional or protective measure at the conclusion of *ex parte* proceedings on the ground that such judgments are contrary to national public policy.

III — Are we then to conclude that under the Brussels Convention it is not possible for a creditor to protect his interests by obtaining from a court an urgent measure taking his debtor by surprise?

1. Such a conclusion would overlook Article 24, referred to earlier, a

corresponding provision to which is found in nearly all enforcement conventions (Jenard Report, at p. 42). The terms of this provision do not in any way prevent provisional or protective measures which are sought from the courts of another Contracting State, even when a court of another Contracting State has jurisdiction as to the substance of the matter, from being granted at the conclusion of *ex parte* proceedings if the internal law of the court applied to makes provision for them.

The advantage of an application under Article 24 is that the court applied to not only has full power as far as the procedure is concerned; it also has cognizance of the facts of the case. Even if it makes only a cursory and provisional inquiry, it does in fact need to inquire into the circumstances of the case in order to decide upon the expediency of granting the measure which is sought. From the procedural point of view the choice of measure which it regards as the most appropriate from those available under national law of course is a matter for that court alone. The comprehensive view which it thus has of a case puts it alone in a position to adjudicate, in the full knowledge of the facts of the case, on any objections which the defendant may put forward against the measure which it has taken.

Clearly, a further necessary requirement enabling Article 24 to be actually used in a case such as the one in the main action is that all Contracting States should have a procedure of the "saisie conservatoire" type under French law. The Commission has told us that is the case as regards the States between which the Convention is now in force.

The United Kingdom representative told us during the oral procedure about the "Mareva injunction" named after a case decided by the Court of Appeal in 1975. By an injunction of that type a court restrains a defendant from taking the funds concerned out of its jurisdiction following proceedings which may be *ex parte*. The Agent of the British Government also informed us that under the legislation which his country is preparing with a view to its accession to the Convention the benefit of the "Mareva injunction" will be extended to cases in which a court of another Contracting State has jurisdiction as to the substance of the matter.

In Denmark a measure similar to the French "saisie conservatoire" may be obtained by virtue of the combined provisions of Articles 612 and 628 of the Law on the administration of justice ("Lov om rettens pleje").

According to my information it seems that the possiblility also exists in Ireland of obtaining from the court the freezing of bank assets, to take the case here, without the defendant's being given prior notice.

There is therefore no practical obstacle preventing Article 24 from being invoked in bilateral relations between all States now members of the Community, once the Convention is also in force in the United Kingdom, Ireland and Denmark.

2. During the oral procedure the Commission pointed out a drawback to Article 24 which arises particularly when

a defendant has assets in several countries. A plaintiff wishing to seize them would therefore be obliged to seek urgent measures in each of these.

Practical difficulties would result out of all proportion to those arising from the solution advocated by the Commission. In the case of the latter solution the plaintiff's obligation is limited to seeking enforcement of the foreign judgment ordering a provisional or protective measure following *ex parte* proceedings under the summary procedure laid down by the Convention. On the other hand, under Article 24, every application for urgent measures would necessitate on the part of the court addressed the fuller inquiry of which I spoke.

It is true that this is a difficulty which the defendant must accept. But I regard it as a fair price to pay for obtaining from the court the extraordinary measures he is seeking and, conversely, an expression of the consideration which must be shown to the debtor. Moreover it may be thought that in practice the creditors having to resort to these measures will in most cases have an organization enabling them to overcome this drawback.

Above all I am not sure that plaintiffs will obtain an order for an enforcement as easily as the Commission thinks. Even with regard to relations between the six original members of the Community this case illustrates the hesitations of certain national courts. What will the position be in regard to the three States which have not yet ratified the Brussels Convention?

The novelty of the "Mareva" injunction, which, moreover, does not seem to have been accepted without some reticence, leads me to believe that the ordering of the enforcement of a judgment authorizing a provisional or protective measure following *ex parte* proceedings will not be a straightforward matter for courts in Common Law countries, quite apart from the fact that, as their law now stands, the direct enforcement of foreign judgments is unknown.

In Denmark, even within the privileged context of the Nordic Council, a decision may not in principle be recognized and enforced by virtue of Law No 300 of 8 June 1977 unless it is definitive. It is true that the operation of that Law is extended, by way of exception, to a few judgments which are not definitive and are listed therein but judgments given pursuant to *ex parte* proceedings do not figure in the list.

In these circumstances I see some justification for fearing that, looking ahead to the welcome accession to the Convention of the United Kingdom, Ireland and Denmark, certain courts which are applied to may refuse to recognize or enforce judgments such as those which have given rise to this request for a preliminary ruling. Far from strengthening legal certainty and promoting the free movement of judgments within the Common Market, an effect contrary to that sought by the Brussels Convention would be the unfortunate outcome.

For these reasons I propose that the Court should rule that Articles 27 (2), 46 (2) and 47 (1) apply to proceedings in which the adoption of provisional and protective measures is ordered without the other party's having been heard.

IV — In its third question the Oberlandesgericht Frankfurt asks the Court whether the first paragraph of Article 36 of the Convention enables a debtor, in his appeal against the order of the court authorizing the enforcement of a provisional and protective measure, to plead objections to the claim itself irrespective of the time at which the grounds for the objections arose.

In particular can the debtor, in cases of this sort, set off a claim which he already possessed against the plaintiff before the provisional measure was adopted in the State of origin?

As the court making the reference itself points out, an objection based upon the set-off of two debts is an objection of substance or, to put it another way, a matter of substantive law. However the whole essence of the Convention is not to allow the court addressed to have jurisdiction as to the substance of the case.

As the Jenard Report says (commentary on Article 37, at p. 51), this principle clearly applies to courts to which objections are made against judgments authorizing enforcement.

Indeed one surely has to agree with Jenard that "the appellant could, however, effectively adduce grounds which arose after the foreign judgment was given. For example, he may establish that he has since discharged the debt". (Commentary on Article 37, at p. 51). But the scope of this exception cannot be extended. It cannot cover objections based on facts arising prior to the foreign judgment which is to be enforced.

If the Court which is asked to order enforcement were to take into account an objection as to the substance, there is no doubt that it would thereby encroach on the power of decision of the original court, which has jurisdiction to give a definite judgment on the claim in question. The courts with such jurisdiction are the courts having jurisdiction as to the substance which are therefore, by virtue of Article 29, the only courts of origin. As the Italian Government points out in its observations, it is inconceivable that the appeal provided for in Article 36 should have the effect of altering the normal criteria as regards jurisdiction between the courts of the various Contracting States.

Under the scheme of the Convention its object can be no more than ascertaining whether the conditions laid down by the Convention for issuing an order for enforcement are fulfilled and consequently ordering recourse to enforcement procedures.

To these cogent observations, whatever the nature of the judgment of the court of origin, it is necessary to add a comment specifically concerning judgments relating to measures of a provisional or protective nature. In any event new objections as to the substance could only be taken into consideration if the foreign proceedings were at an end.

However, where a provisional or protective measure has been ordered in a judicial decision, then, by definition, there has not yet been any definitive inquiry as to the claim concerned by this measure.

Moreover, taking the special case of the enforcement in Germany of a foreign judgment of this type, to admit an objection as to the substance would give the debtor more chance of resisting enforcement of the foreign judgment than of resisting enforcement of the same type of judgment given in Germany, as may be seen from Articles 916 and 917 (1) of the Zivilprozeßordnung [Code of Civil Procedure]. Such a result is unacceptable.

For all these reasons the answer to the third question put by the court making the reference should, in my opinion, be in the negative.

V — In these circumstances, I regard its last question to be in the alternative, requiring an answer only should the previous question be answered in the affirmative. The question is based on the assumption that the court seised of the appeal against enforcement has jurisdiction to hear objections as to the substance and is concerned with whether the defendant can submit to the court objections which he has already raised in the proceedings instituted in the State of origin against the judgment ordering a provisional or protective measure against him.

It is clear that the rules on *lis pendens* stated in Article 21 of the Convention completely rule this out. According to that provision: "Where proceedings involving the same cause of action and between the same parties are brought in the courts of differing Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court".

There is no reason for not applying that provision to the particular case described by the Oberlandesgericht in its question. The risk will thereby be avoided that the court seised of the appeal in the State of origin and the court in the country of enforcement will give conflicting rulings on the same question.

In conclusion I propose that the questions referred to the Court by the Oberlandesgericht Frankfurt am Main be answered as follows:

1. Articles 27 (2) and 46 (2) apply to proceedings in which the adoption of provisional and protective measures is ordered without the other party's having been heard.

2. Article 47 (1), in stipulating that the party seeking enforcement must produce the documents establishing that the judgment to be enforced has

been served, also applies to judgments ordering a provisional or protective measure following *ex parte* proceedings.

3. A defendant in enforcement proceedings is not allowed to rely in those proceedings on a set-off arising before the judgment was given by the court of origin.

4. The same applies *a fortiori* if he has already raised that objection during an appeal against the judgment given in the State of origin.