JUDGMENT OF THE COURT (Fifth Chamber)
2 July 1985 *

In Case 148/84

REFERENCE to the Court under the Protocol of 3 June 1971 by the Cour d'appel [Court of Appeal], Colmar, for a preliminary ruling in the action pending before that court between

Deutsche Genossenschaftsbank,

and

SA Brasserie du Pêcheur,

on the interpretation of Article 36 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: C. O. Lenz
Registrar: H.A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

the plaintiff in the main proceedings, by J. Imbach and C. Imbach, both of the Strasbourg Bar;

the defendant in the main proceedings, by R. Garnon, A. Garnon and P. Kempf, all of the Strasbourg Bar;

the Commission of the European Communities, by J. Delmoly, a member of its Legal Department, acting as Agent;

* Language of the Case: French.

the Government of the Federal Republic of Germany, by Christof Böhmer, Ministerialrat [Principal] at the Federal Ministry of Justice;

the Government of the Italian Republic, by A. Squillante, President of Section at the Consiglio di Stato [State Council], Head of the Department for Contentious Diplomatic Affairs and Legislative Matters, assisted by O. Fiumara, Avvocato dello Stato;

after hearing the Opinion of the Advocate General delivered at the sitting on 14 May 1985,

gives the following

JUDGMENT

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

Decision

1 By a judgment of 16 May 1984, which was received at the Court on 14 June 1984, the Cour d'appel [Court of Appeal], Colmar, referred to the Court 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'), a question concerning the interpretation of Article 36 of that Convention.

2 That question was raised in the context of proceedings between Deutsche Genossenschaftsbank, whose registered office is at Frankfurt am Main (Federal Republic of Germany), and Brasserie du Pêcheur, whose registered office is at Schiltigheim (France). Those proceedings relate to the question whether Brasserie du Pêcheur, in its capacity as an interested third party, is entitled to apply for the setting aside of an order for the enforcement of an instrument attested by a German notary. The enforcement order was obtained in France by Deutsche Genossenschaftsbank against its debtor, Deutsche Getreideverwertung und Rheinische Kraftfutterwerke (hereinafter referred to as 'DGV'), whose registered office is at Frankfurt am Main.

3 It appears from the documents forwarded by the Cour d'appel that, by an authentic instrument drawn up by a German notary on 5 April 1972, DGV created an *Eigentümergrundschuld* (a land charge registered in the name of the property owner) in the sum of DM 2 000 000 plus interest at the rate of 10% from the date the instrument was drawn up. DGV consented thereby to immediate enforcement against the land charged by future assignees of the land charge. It also consented to immediate enforcement, if necessary, by such assignees against all its property. By a declaration dated 11 January 1976, attested by a German notary, DGV assigned the land charge and the additional guarantee therein contained to Deutsche Gewerbe- und Landkreditbank AG, whose registered office is at Frankfurt am Main, and whose direct successor in title is Deutsche Genossenschaftsbank.

4 On 8 February 1982 Deutsche Genossenschaftsbank gave instructions for a copy of the instrument of 5 April 1972 to be delivered to it for the purpose of enforcement in the Federal Republic of Germany. Since it also wished to enforce it against DGV's assets in France, it applied to the president of the Tribunal de grande instance [Regional Court], Strasbourg, for an order for the enforcement of the translation into French of the instrument of 5 April 1972. By an order dated 24 March 1982 the president of the Tribunal de grande instance granted the application and in doing so relied, in particular, on Article 50 of the Convention.

5 Brasserie du Pêcheur, another of DGV's creditors, then also applied to the president of the Tribunal de grande instance in an attempt to have that order set aside. The procedural basis for its application was Article 496 of the new French Code of Civil Procedure, which permits any person affected by a judicial decision given *ex parte* to make an application to the court which made the decision.

6 As regards the substance of its application, Brasserie du Pêcheur contended, with reference to Articles 31 and 50 of the Convention, that the enforcement order had wrongly been granted in respect of a translation of the authentic instrument in question rather than the instrument itself. The president of the Tribunal de grande instance upheld that argument and, by an order dated 13 October 1983, set aside his previous order.

7 Deutsche Genossenschaftsbank appealed against that decision to the Cour d'appel, Colmar, arguing that Article 36 of the Convention provided for no appeal against an enforcement order except on the part of the party against whom enforcement was sought.

8 The Cour d'appel stayed the proceedings and requested the Court of Justice to give a preliminary ruling 'on the interpretation of Article 36 of the Convention and in particular on the question whether Article 36, which, in cases where enforcement is authorized, provides for an appeal only by the party against whom enforcement is sought, thereby excludes any redress for interested third parties, even where the domestic law of one of the Contracting States allows such parties to challenge an order for enforcement'.

9 Since it appears from the documents before the Court that the authentic instrument in respect of which an enforcement order was initially granted under Article 50 of the Convention was drawn up before the Convention came into force, it is necessary to state first that the Court's reply to the question referred to it by the Cour d'appel is without prejudice to the question whether the Convention is in fact applicable to that authentic instrument in view of the terms of Article 54 of the Convention.

10 As regards the question of interpretation referred to the Court, the parties to the main proceedings, the Commission and two Member States adopted the following positions.

11 Deutsche Genossenschaftsbank states that the Convention is complete in itself and may not be supplemented by provisions of national law. In its opinion, Article 36 only makes provision for an appeal by the defendant against whom an order for enforcement is granted. It is true that that provision derogates from domestic provisions which also allow interested third parties to contest such an order. However, the Convention governs the order for enforcement, not execution itself. The interests of third parties may be safeguarded in an appropriate case at the latter stage of the procedure.

12 Brasserie du Pêcheur contends that Article 36 of the Convention provides for an ordinary appeal by the party against whom an order for enforcement is granted. It does not exclude the possibility that an enforcement order may be challenged under domestic law by means of exceptional procedures, such as an objection raised by a third party.

13 The Commission considers that the Convention constitutes a complete system which seeks to place a foreign instrument on an equal footing with a domestic instrument in order that it may be executed in the same manner as a domestic instrument. The issue of an enforcement order is governed directly and exclusively by the provisions of the Convention, whilst execution, in the narrow sense, is governed by the domestic law of the court where execution is sought. The effect of Article 36 of the Convention is that domestic law may not be relied upon to supplement the right of appeal provided for by that provision. Any action by a third party would only prolong the enforcement procedure, which would be contrary to the spirit of the Convention.

14 The German Government takes the view that the exclusive nature of the appeals provided for by the Convention may be inferred from the objective of Article 31 *et seq.*, which is to ensure in a speedy, simple and uniform manner that foreign enforceable instruments are equated with domestic enforceable instruments. There is no means of challenging an enforcement order apart from the right of appeal provided for by Article 36 of the Convention. Nevertheless, the German Government emphasizes that all remedies provided for by domestic law remain available in relation to the measures to be taken by the competent authority to execute an enforcement order, since such measures are governed exclusively by the law of the State where execution is levied.

15 The Italian Government states that the wording of Article 36 of the Convention does not exclude procedures whereby enforcement orders may be challenged under domestic law by persons other than the party against whom enforcement is ordered. In its opinion, the Convention could not logically provide guarantees solely in favour of the party against whom enforcement is sought without taking account of the protection of the rights of third parties who might be affected.

16 It is appropriate to recall first that in its judgment of 27 November 1984 (Case 258/83, *Calzaturificio Brennero sas* v *Wendel GmbH Schuhproduktion International*, [1984] ECR 3971) the Court stated that the Convention 'provides for a very simple enforcement procedure whilst giving the party against whom enforcement is sought an opportunity to lodge an appeal'. It also stated that the principal objective of the Convention 'is to simplify procedures in the State in which enforcement is sought'.

17 In order to attain that objective the Convention established an enforcement procedure which constitutes an autonomous and complete system, including the matter of appeals. It follows that Article 36 of the Convention excludes procedures whereby interested third parties may challenge an enforcement order under domestic law.

18 The Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is sought, so that interested third parties may contest execution by means of the procedures available to them under the law of the State in which execution is levied.

19 For those reasons, the reply to the preliminary question raised by the Cour d'appel, Colmar, must be that Article 36 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters excludes any procedure whereby interested parties may challenge an enforcement order, even where such a procedure is available to third parties under the domestic law of the State in which the enforcement order is granted.

Costs

20 The costs incurred by the Governments of the Federal Republic of Germany and of the Italian Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Cour d'appel, Colmar, by a judgment of 16 May 1984, hereby rules:

Article 36 of the Convention of 27 September 1986 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters excludes any procedure whereby interested third parties may challenge an enforcement order, even where such a procedure is available to third parties under the domestic law of the State in which the enforcement order is granted.

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 2 July 1985.

P. Heim
Registrar

O. Due
President of the Fifth Chamber