In Case 43/77

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 Rechtbank van Eerste Aanleg (Court of First Instance) of the judicial district of Antwerp for a preliminary ruling in the action pending before that court between:

INDUSTRIAL DIAMOND SUPPLIES, a partnership with limited liability having its registered office in Antwerp,

and

LUIGI RIVA, a commercial representative residing in Turin,

on the interpretation of Articles 30 and 38 of the Convention of 27 September 1968,

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts of the case, the procedure and the observations submitted 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 may be summarized as follows:

I — Facts and written procedure

By a judgment of 23 September 1976, which is provisionally enforceable, given on appeal from a decision of the Pretore of Turin of 14 and 17 November 1975, the Tribunale Civile e Penale, Turin (Turin Civil and Criminal Court),

Industrial Section, ordered Industrial Diamond Supplies, a partnership with limited liability having its registered office in Antwerp, to pay Mr Luigi Riva, a commercial representative residing in Turin, a sum of Lit 53 052 980 together with interest at 8 % per annum from 14 November 1965 and to pay the costs of the action.

By application of 16 November 1976, Mr Riva requested the Rechtbank van Eerste Aanleg (Court of First Instance), Antwerp, under Article 31 *et seq.* 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', to authorize the enforcement in Belgium of the judgment of the Turin court of 23 September 1976.

By judgment of 25 November 1976, the First Chamber for Civil Matters of the Rechtbank van Eerste Aanleg, Antwerp, granted that request.

On 15 December 1976, Industrial Diamond Supplies lodged an appeal against that decision under Article 36 of the Convention before the Rechtbank van Eerste Aanleg, Antwerp. That appeal asked the Court in essence to stay the proceedings in accordance with Article 30 of the Convention, which provides that:

'A court of a Contracting State in which recognition is sought of a judgment given in another Contracting State may stay the proceedings if an ordinary appeal against the judgment has been lodged,'

and in accordance with the first paragraph of Article 38 of the Convention, which provides that:

'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.'

In fact, on 27 December 1976, Industrial Diamond Supplies lodged an appeal in cassation against the judgment of the Tribunale Civile e Penale, Turin, before the Corte di Cassazione (Supreme Court of Appeal), Rome; that appeal constitutes an ordinary appeal within the meaning of Articles 30 and 38 of the Convention.

By judgment of 7 April 1977, the First Chamber of the Rechtbank van Eerste Aanleg of the judicial district of Antwerp stayed the proceedings under Articles 2 (3) and 3 (2) of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 until the Court of Justice had given a preliminary ruling on the following questions:

1. What appeals are regarded as 'ordinary' appeals in Articles 30 and 38 of the Convention of 27 September 1968 or, in other words, to what judgments are Articles 30 and 38 of the Convention applicable? or
2. Is the nature of the appeal lodged against the judgment in the State in which that judgment was given to be determined solely in accordance with the law of that State?

The judgment of the Rechtbank van Eerste Aanleg, Antwerp, was entered in the Court Register on 18 April 1977.

In accordance with Article 5 (1) of the Protocol of 3 June 1971 and Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 21 June 1977 by the Commission of the European Communities, on 1 July 1977 by the Government of the Federal Republic of Germany and on 7 July 1977 by the Government of the United Kingdom.

After 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. At the request of the Court, the Commission however lodged on 18 August 1977 a synopsis on the distinction between ordinary and extraordinary appeals and the significance thereof in the law of the Member States on civil procedure.

II — Written observations submitted to the Court

The *Government of the Federal Republic of Germany* considers that all appeals which must be lodged within short prescribed periods of time from the delivery or notification of the judgment and which may lead to the amendment of a judgment with effect for the parties must be considered as ordinary appeals within the meaning of Article 38 of the Convention.

(a) The report on the amendments to be made to the Convention having regard to the accession of the new Member States notes the total absence of a clear rule on the distinction between ordinary appeals and extraordinary appeals.

There is no doubt that *Berufung* (appeal to a higher court from a judgment of first instance) and *Einspruch* (appeal against a default judgment to the court which gave that judgment) are considered in all the Continental Member States to be ordinary appeals. In addition, *Revision* (second appeal or accelerated appeal on a point of law) and *Beschwerde* (appeal against an order of a court) in Germany, *Kassationsbeschwerde* (appeal in cassation *Zuständigkeitsbeschwerde* (appeal on a question of jurisdiction) and two cases of *Wiederaufnahme* (revision) in Italy and *Kassationsbeschwerde* and *Revision* of decisions at first instance of the Hoge Raad (Supreme Court of the Netherlands) in the Netherlands are considered to be ordinary appeals.

An analogous distinction does not seem possible with regard to Ireland and the United Kingdom. Thus the authors of the draft Convention of Accession to the Convention of 1968 laid down special provisions applicable to the judgments given in those two countries (Articles 13 and 17).

(b) The objective of the Convention is to facilitate the enforcement of judgments, in particular by enabling judgments which are provisionally enforceable in the State in which they were given to be enforced in another State. The judgment debtor must however be protected against the risk of irreparable damage caused by the enforcement of a judgment which is not yet absolute and which has been given in another State. The concept of ordinary appeal contained in Article 38 of the Convention must therefore be given a broad interpretation. The court must be in a position to decide in each individual case whether it is necessary to take measures for the protection of the judgment debtor.

(c) It is impossible to make a direct decision on the question whether an appeal provided for by the law of another State must be considered as ordinary on the basis of the law of the State in which enforcement is sought. At most, reference may be made to the law of that State in order to ascertain whether an appeal provided for by the law of the State in which the judgment was given must be equated with an ordinary appeal under the law of the State in which enforcement is sought.

The classification of an appeal as an ordinary appeal may be based on various criteria, in particular the effects of that appeal or whether the legal system in question wishes to give preference to the interests of the judgment creditor or those of the judgment debtor. The legal system of the State in which enforcement is sought does not, in particular in the case of atypical appeals, supply either a

clear interpretation or an interpretation which is identical for all the Contracting States. Moreover, the question whether under the law of a State the class of 'ordinary' appeals is small or large depends upon considerations which are not necessarily valid with regard to foreign judgments.

The classification of an appeal according to the law of the State in which enforcement is sought should not therefore be adopted as a criterion of interpretation.

(d) It would be possible to appraise the nature of an appeal exclusively according to the law governing the lodging of that appeal and the procedure relating thereto in the State in which the judgment was given. The fact that it is in any case necessary to classify an appeal as ordinary or extraordinary by reference to the characteristics which it bears in the State in which the judgment was given (admissibility, periods within which appeals must be lodged, scope of the examination by the court before which the appeal is brought) confirms this argument. When the law of the State in which the judgment was given does not classify the appeal, the decisive factor might be the fact that the appeal does or does not prevent the judgment against which it is lodged from formally acquiring the force of *res judicata.*

The disadvantage of such an interpretation is that it makes it impossible to take into account the objective of Article 38 of the Convention and its protective aim. The protection of the judgment debtor against the danger of definitive enforcement before judgment has been given on his appeal in the State in which the original judgment was given depends in fact on the rules laid down in the law of that State which, as a general rule, take into account the interests of the parties only in so far as they are resident within that country. Because of the differences which exist between the Member States concerning in particular the classification in German law of *Kassation* and of that of *Revision,* with which it has close affinities, the extent of the protection given to the judgment debtor varies from one group of Member States to another.

(e) The effect to interpreting the concept of an ordinary appeal directly on the basis of the actual wording of the Convention would be to make the protection given to the judgment debtor within the Community to a large extent uniform. It would be in complete accordance with the basic idea upon which Article 38 of the Convention is based. At the same time, the necessary freedom in the actual application of that provision would be guaranteed by the discretionary power given to the court. Such an interpretation would take into account the law of the State in which the judgment was given in the classification of appeals but would not however grant it exclusive authority for this purpose.

The fact that the concept of ordinary appeal in the Convention would thereby have a different meaning from that which it has in the legal systems of certain Member States should not stand in the way of such an interpretation because of the variety of the scope and of the protective aims underlying the concepts. Moreover, it follows from the case-law of the Court of Justice that in the same way the concept of 'civil and commercial matters' within the meaning of the first paragraph of Article 1 of the Convention must be understood for the purposes of that Convention as having a different meaning from that which it has in national law.

(f) The direct interpretation of the concept of an ordinary appeal should not be based solely on the concept of *res judicata,* as understood by the law of the State in which the judgment was given. It is necessary rather to have recourse to the idea, expressed in the second half of the first paragraph of Article 38, that only appeals which must be lodged within a

relatively short period of time after the judgment has been given may be considered as ordinary appeals against judgments. It is possible to give a final decision as to their admissibility very rapidly. These appeals are in particular *Berufung* and *Einspruch* lodged against a default judgment which are generally considered to be ordinary appeals. The period to be selected should be the longest period prescribed in the Member States for the lodging of an appeal in cassation (three months from the date on which the judgment was notified).

From the point of view of legal protection, only appeals which directly concern the rights and duties of the parties in relation to one another come into consideration. There is no reason to give the court the possibility of protecting the judgment debtor by a stay of the proceedings unless the decision of the court of appeal may establish that the enforcement of the contested judgment was not justified with regard to the defendant. *Cassation dans l'intérêt de la loi* (appeal in cassation in the interests of the law) does not therefore constitute an ordinary appeal.

Besides, only appeals lodged before courts of the same class may be considered as ordinary. This is not so in the case of a *Verfassungsbeschwerde* (constitutional complaint) under German law, which must be considered as a separate procedure.

Those appeals which, in accordance with the law of the State in which the judgment was given, may only be lodged within a short period of time (not exceeding three months) after the judgment has been given or notified and which may result in the annulment of the judgment by the same court or by a higher civil court, with effect for the parties to the procedure for enforcement, must be considered as ordinary appeals which may be brought against judgments given by courts of civil jurisdiction.

(g) An interpretation of the concept of ordinary appeal by reference to the State in which the judgment was given, in the same way as a direct interpretation of the Convention, result in the conclusion that a *Kassationsbeschwerde* under Italian law must be considered as an ordinary appeal. A direct interpretation of the Convention however results in actual and not only formal uniformity of the legal situation in all the Member States. It is more in accordance with the meaning of the Convention as an important step towards the harmonization of international procedural law within the EEC. It seems to be a necessary extension of the case-law of the Court of Justice on the Convention.

(h) It is necessary to give the following reply to the questions submitted by the Antwerp court:

An 'ordinary appeal' within the meaning of Article 38 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is an appeal which, regardless of its classification in this respect in the State in which the judgment was given, may only be lodged within a period of three months at the most after the judgment has been given or notified and which may lead to the annulment of that judgment with effect for the parties to the procedure for the enforcement of that judgment.

The *Government of the United Kingdom* is of the opinion that the answer to these problems must be found solely in the law of the State in which the appeal has been or can be lodged.

(a) Under Articles 30 and 38 of the Convention it falls to the court in one Member State to determine the nature of an appeal in another. The issue will arise in a procedural context and require to be decided speedily. The tests to be applied to determine the issue should, therefore, be as simple and clear as possible.

(b) In Luxembourg, France and Belgium, the distinction between ordinary and extraordinary appeals appears in the Codes of Civil Procedure, so that the appropriate appeals can be readily identified by reference to known classifications. In the three other States which are parties to the 1968 Convention no such distinction appears in legislative texts, but the differentiation is well known in legal literature which classifies certain types of appeal as ordinary appeals usually on account of the fact that they prevent a judgment from becoming *res judicata,* while the rest are considered to be extraordinary.

(c) With regard to the three other Member States of the Community which are obliged under Article 63 of the Convention to accede thereto, the position in Denmark is believed to be similar to that in the other States where no distinction is found in legislative texts. No distinction between different types of appeals is drawn in the legal systems of the United Kingdom and Ireland, nor has any such division so far been the subject of discussion in the legal text books.

Yet these legal systems know a wide variety of different appeals. The appeals do not normally suspend enforcement but the courts have wide discretion to order a suspension. There would appear to be no basis for a distinction between ordinary appeals and others among these various appeals. Proposals for adaptations of the Convention are contained in a draft Convention for Accession of the New Member States.

(d) In relation to the present States which are parties to the 1968 Convention and to Denmark it is a relatively easy matter to ascertain the ordinary or extraordinary nature of the appeal from the law of the Member States concerned, and in relation to the United Kingdom and Ireland the Convention itself can readily provide the necessary guidance.

(e) On the other hand, it would prove difficult, and perhaps even impracticable, to find a Community criterion of simple application. It would first be necessary to ascertain the objectives which the distinction between ordinary and extraordinary appeals seeks to achieve in Articles 30 and 38 and then to formulate a test which could be trusted to achieve these objectives. To state that the purpose of Article 30 is to avoid an obligation to accord recognition to a judgment which has not yet become *res judicata* and, if the appeal is successful, may never do so and that the object of Article 38 is to protect the judgment debtor against a loss which he could suffer as a result of the enforcement of a judgment which has not yet become *res judicata* and might yet be upset may be an over-simplification, since extraordinary appeals would also sometimes satisfy these tests and yet they are outside Articles 30 and 38.

(f) A Community criterion which distinguished ordinary and extraordinary appeals on the ground that pending the outcome of an ordinary appeal the conclusive effects of the judgment are suspended would not work satisfactorily. Article 30, which is only concerned with appeals actually lodged, will practically always apply to a judgment which is not yet considered to be conclusive in the State from which it originated. That criterion would be inoperative in relation to Article 38 and would clearly encompass some appeals of a very exceptional nature and at present categorized as extraordinary.

It is difficult to see any other Community criterion which would achieve the objectives more satisfactorily.

(g) The existing distinctions drawn in the national laws between ordinary and extraordinary appeals achieve roughly the right result because as a general rule ordinary appeals either have suspensory effect or have them unless enforcement is provisionally authorized, while

extraordinary appeals do not have suspensory effect unless suspension is ordered.

A further important characteristic of ordinary appeals in the present context is that in most cases they are available only within a relatively short time, whereas an extraordinary appeal may be available, sometimes subject to special authorization, very much longer. The discretion to suspend enforcement under Article 38 of the Convention should not be maintained too long. The distinction between existing ordinary and extraordinary appeals in the Member States appears to produce the right result in this respect without undue rigidity. Any Community criterion making the classification of an appeal as ordinary dependent on its being available only for a stated length of time would operate much more arbitrarily.

(h) The only satisfactory answer to the questions posed by the Antwerp court is that the nature of the appeal for the purposes of Articles 30 and 38 of the Convention must be determined solely in accordance with the classification of that appeal in the law of the State where the appeal has been or may be lodged.

The *Commission of the European Communities* considers that several important advantages would be obtained by deducing a meaning of the concept of 'ordinary appeal' peculiar to the Convention and not referring to the concepts existing in the various Contracting States.

(a) The main advantage would be that, as regards the Convention and the recognition and enforcement of judgments, the consequences of lodging an appeal which is classified as ordinary within the meaning of the definition given by the Convention itself would always be the same. If the definition of that concept depended upon the national law of the Contracting States, the fate of a decision against which an appeal in cassation had been lodged would vary according to the States, since an appeal in cassation is considered as an ordinary appeal in Italy and in the Netherlands and as an extraordinary appeal in France, Belgium and Luxembourg.

One of the essential rules of the Convention is that the court giving judgment on an application for recognition or enforcement no longer decides as to the jurisdiction of the court which has given the original decision. Such a system is possible because the procedure in the State in which the judgment was given involves all sorts of guarantees for the person concerned, one of which is the duty for certain of the highest courts to refer to the Court of Justice questions on the interpretation of the Convention. If certain appeals were considered as extraordinary, such as an appeal in cassation, a decision could be enforced without that guarantee's coming into operation, since Article 38 would not be applicable.

The effect of a *pourvoi en révision* (revision) and a *pourvoi en cassation* (appeal in cassation), to which the questions which have been submitted in the present case essentially refer is that, if they are successful, they annul in law the situation created by the decision against which they were lodged. One might wonder whether it is desirable for the Convention to offer no means of suspending in the meantime enforcement of the judgment which has been given. An independent interpretation of the Convention might perhaps provide a solution in this respect.

(b) However, it is difficult to find in the wording of Article 38, or, likewise, in that of Article 30 of the Convention, support upon which it might be possible to base an independent interpretation of those provisions. Nor does the aim of the Convention supply any arguments in favour of such an interpretation.

Certain national legal systems consider an appeal the lodging of which suspends the enforcement of a decision to be an 'ordinary appeal'.

This interpretation is not supported either by the wording of Article 38 or by the structure and objective of the Convention. Article 38 appears in the section of the Convention dealing with enforcement. Article 31, the first provision in that section, makes enforcement in another country subject to the condition that the judgments in question are enforceable in the State in which they have been given. In the same way, Article 38 refers only to enforceable decisions. It is impossible therefore to state that as a whole this provision attributes to 'ordinary appeal' the meaning of 'appeal suspending the enforcement of a judgment' without making that provision purposeless.

Nor is there any indication that the concept of 'ordinary appeal' may be linked to the criterion of *'res judicata'*.

Not only does the wording of Articles 30 and 38 conflict with such an interpretation but it might in addition have undesirable consequences. Since in several Contracting States the judgment continues to have the force of *res judicata* in the event of an appeal there would be no ordinary appeal within the meaning of the Convention in those States. Actions such as an *appel* would therefore be classified quite abnormally and that classification would not appear in any of the legal systems of the Contracting States.

Nor is it possible to understand an ordinary appeal as meaning an appeal the lodging of which does not affect the fact that a decision has the force of *res judicata*. There is no confirmation of this in the wording of Articles 30 and 38 and therefore that criterion is inappropriate for the purpose of determining whether the appeal is an ordinary appeal. In addition, it would be difficult to apply since it does not have the same meaning in all the Contracting States.

The legal systems of the Contracting States frequently attribute to ordinary appeals the characteristic that the plaintiff is not, in lodging such appeals, limited to certain submissions which must result in the annulment of the decision. This criterion does not however provide any help with regard to the interpretation of Articles 30 and 38. Thus a *pourvoi en cassation* (appeal in cassation), an ordinary appeal in Italy and in the Netherlands, would have to be considered as an extraordinary appeal within the meaning of the Convention.

So far as the objective of Articles 30 and 38 is concerned, it is necessary to emphasize that there is no doubt that the purpose of the Convention is to give litigants wide opportunities of having decisions which concern them recognized or enforced. It is therefore desirable to interpret the concept of 'ordinary appeal' in a restrictive sense, so as to restrict the powers available to courts to stay the proceedings. However, the result of a restrictive interpretation of the words used in Article 30, departing from the terminology of the legal system within which the judgment was given, might be that a judgment settling a dispute between parties would not create rights in the country in which it was given because under national law the appeal which had been lodged would be considered as ordinary whilst the judgment would be recognized abroad because, possibly as a result of a restrictive interpretation, that appeal would be classified as extraordinary within the meaning of the Convention. This result seems undesirable. It would go beyond the objective pursued by the Convention which is to give judgments the authority and effect which they have in the country in which they have been given.

The distinction between 'ordinary appeal' and 'extraordinary appeal' does not raise

any insurmountable problem in the various legal systems of the Contracting States. In the national legal systems it is possible to determine sufficiently precisely to what these two expressions apply.

With a view to the accession to the Convention of the United Kingdom and Ireland, it is planned to supplement Article 38 by a provision which confirms that it has been impossible to deduce a concept of 'ordinary appeal' which is particular to the Convention.

(c) With regard to the application of the Convention, from the point of view both of uniformity and of legal certainty, it must be considered an advantage to be able to rely upon terminology which has a precise meaning in the various Member States rather than to have to use criteria which cannot be based clearly on the wording of the Convention and which, moreover, may be applied differently by the courts.

(d) It is therefore necessary to reply as follows to the question submitted by the Rechtbank van Eerste Aanleg, Antwerp:

An 'ordinary appeal' within the meaning of Articles 30 and 38 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters means an appeal considered to be an ordinary appeal in the Contracting State in which the original judgment was given.

III — Oral procedure

Industrial Diamond Supplies, the plaintiff in the main action, represented by Christine Spaas, Advocate, of Antwerp, Luigi Riva, represented by Eduard Van Vliet, Advocate, of Antwerp, and the Commission, represented by Hendrik Bronkhorst, a member of its Legal Department, presented oral argument and replied to questions put by the Court at the hearing on 28 September 1977.

Industrial Diamond Supplies stated that an 'ordinary appeal' within the meaning of Articles 30 and 38 of the Convention means an appeal considered to be an ordinary appeal in the Contracting State in which the original judgment was given.

According to *Mr Riva,* a judgment which is enforceable in one Contracting State must also be enforceable in another Contracting State.

The *Advocate-General* delivered his opinion at the hearing on 19 October 1977.

Decision

1 By judgment of 7 April 1977, which was received at the Court on 18 April 1977, the Rechtbank van Eerste Aanleg (Court of First Instance), Antwerp, referred to the Court of Justice under Articles 2 (3) and 3 (2) of the Protocol of 3 June 1971 two questions on the interpretation of the expression 'ordinary appeal' used in Articles 30 and 38 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').

2 The file shows that Industrial Diamond Supplies, the plaintiff in the main action, having its registered office in Antwerp, was ordered by the Tribunale Civile e Penale (Civil and Criminal Court), Turin, to pay to Luigi Riva, the defendant in the main action, a commercial representative residing in Turin, the sum of Lit 53 052 980, as commission owed by the plaintiff to the defendant in the context of a contractual relationship between the parties, together with interest and legal costs.

3 The judgment, which was given on 23 September 1976 by the Turin court on appeal from a decision of the Pretore of the same city, is at present enforceable.

4 On 25 November 1976 Mr Riva obtained from the Antwerp court a judgment authorizing the enforcement in Belgium of the judgment of the Turin court, in accordance with the provisions of Article 31 *et seq.* of the Convention.

5 On 15 December 1976, Industrial Diamond Supplies lodged an appeal against the order for enforcement before the Antwerp court under Articles 36 and 37 of the Convention.

6 On 27 December 1976 Industrial Diamond Supplies lodged an appeal in cassation before the Italian Corte Suprema di Cassazione (supreme court of appeal) against the judgment given on appeal by the Turin court.

7 It is not in dispute that that appeal does not have the effect of suspending the enforceability of the judgment given by the Turin court.

8 It is also established that Industrial Diamond Supplies has not sought a stay of execution in Italy.

9 Industrial Diamond Supplies requested the Antwerp court principally to suspend the proceedings relating to the enforcement of the judgment given by the Turin court until final judgment has been delivered between the parties in Italy.

10 So as to be able to reach a decision on that request, the Antwerp court submitted to the Court of Justice the following two questions on the interpretation of Articles 30 and 38 of the Convention:

'1. What appeals are regarded as 'ordinary' appeals in Articles 30 and 38 of the Convention of 27 September 1968 or, in other words, to what judgments are Articles 30 and 38 of the Convention applicable? or

2. Is the nature of the appeal lodged against the judgment in the State in which that judgment was given to be determined solely in accordance with the law of that State?'

11 These questions ask in substance whether the expression 'ordinary appeal' used in Articles 30 and 38 of the Convention must be understood as a reference to national law or as an independent concept, the interpretation of which must be sought within the Convention itself.

12 In the second case, the questions submitted by the court ask what the meaning of that expression is within the context of the Convention.

13 During the procedure the view was expressed that Article 30 of the Convention, which relates to the recognition and not the enforcement of judgments, is not relevant to the proceedings and that the interpretation requested concerns only the meaning of the expression 'ordinary appeal' within the context of Article 38, which relates to enforcement.

14 There is no need to examine this question, especially since the connexity of the provisions of Title III of the Convention make it necessary to interpret the expression in question in the two abovementioned articles in the same way.

The nature of the expression 'ordinary appeal' as a reference to national law or as an independent concept

15 Under Article 30 of the Convention, 'A court of a Contracting State in which recognition is sought of a judgment given in another Contracting State may stay the proceedings if an ordinary appeal against the judgment has been lodged'.

16 Under the first paragraph of 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'.

17 According to Industrial Diamond Supplies, it is necessary to classify any appeal considered to be an ordinary appeal in the Contracting State in which the judgment the recognition or enforcement of which is sought was given as an 'ordinary appeal' within the meaning of the abovementioned provisions.

18 Under the law of the Italian Republic, the State in which the judgment in question was given, there is no doubt that an appeal in cassation *(ricorso per cassazione)* must in fact be considered as an ordinary appeal.

19 This view has been supported by the Government of the United Kingdom and by the Commission, which both agree that the nature of an appeal for the purposes of Articles 30 and 38 must be determined by reference to the national law of the Contracting State in which the original judgment was given.

20 Mr Riva, without contesting the fact that in Italy an appeal in cassation is considered to be an ordinary appeal, takes the view that in any case a judgment which is enforceable in Italy must also be considered as enforceable in Belgium so long as the enforceability of that judgment has not been suspended in the State in which the judgment was given.

21 Finally, it is necessary to note that the Government of the Federal Republic of Germany expressed the opinion that the expression 'ordinary appeal' used in Articles 30 and 38 must be interpreted within the context of the Convention itself, regardless of the classification of appeals by the national law of the State in which the judgment was given.

22 It follows from a comparison of the legal concepts of the various Member States of the Community that although in some States the distinction between 'ordinary' and 'extraordinary' appeals is based on the law itself, in

other legal systems the classification is made primarily or even purely in the works of learned authors while in a third group of States this distinction is completely unknown.

23 It is established moreover that in the legal systems in which the distinction between 'ordinary' and 'extraordinary' appeals is acknowledged by legislation or by learned authors, the classification of the various appeals for the purposes of that distinction gives rise to varying classifications.

24 It seems therefore that if the concept of 'ordinary appeal' were interpreted by reference to a national legal system, whether the legal system of the State in which the judgment was given or that of the State in which enforcement or recognition is sought, it would in certain cases be impossible to classify a specific appeal with the required degree of certainty for the purposes of Articles 30 and 38 of the Convention.

25 Moreover, reference to a particular national legal system might perhaps oblige the court required to make a decision under Articles 30 and 38 of the Convention to classify appeals of the same type inconsistently according to whether they belonged to the legal system of one or other of the Contracting States.

26 The effect of the application of that criterion of interpretation would therefore be to create even greater legal uncertainty since Article 38 requires the Court before which an order for enforcement of the judgment is sought to take into consideration not only appeals which have been lodged at present but in addition appeals which may be lodged within specific periods.

27 It follows from these considerations that the interpretation of the concept of 'ordinary appeal' may only be usefully sought within the framework of the Convention itself.

28 It is therefore necessary to reply to the national court that the expression 'ordinary appeal' within the meaning of Articles 30 and 38 of the Convention must be determined solely within the framework of the system of the Convention itself and not according to the law either of the State in which the judgment was given or of the State in which the recognition or enforcement of that judgment is sought.

The meaning of the expression 'ordinary appeal' within the framework of the Convention

29 The meaning of the expression 'ordinary appeal' may be deduced from the actual structure of Articles 30 and 38 and from their function in the system of the Convention.

30 Although, as a whole, the Convention is intended to ensure the rapid enforcement of judgments with a minimum of formalities when those judgments are enforceable in the State in which they were given, the specific purpose of Articles 30 and 38 is to prevent the compulsory recognition or enforcement of judgments in other Contracting States when the possibility that they might be annulled or amended in the State in which they were given still exists.

31 For this purpose Articles 30 and 38 reserve to the court before which a request for recognition or an appeal against a decision authorizing enforcement has been brought in particular the possibility of staying the proceedings where, in the State in which the judgment was given, the judgment is being contested or may be contested within specific periods.

32 According to the Convention, the Court before which recognition or enforcement is sought is not under a duty to stay the proceedings but merely has the power to do so.

33 This fact presupposes a sufficiently broad interpretation of the concept of 'ordinary appeal' to enable that court to stay the proceedings whenever reasonable doubt arises with regard to the fate of the decision in the State in which it was given.

34 It is possible by applying this criterion alone to decide the outcome of a request for recognition or enforcement based on a judgment which, in the State in which the judgment was given, is at present the subject of an appeal which may lead to the annulment or amendment of the judgment in question.

35 A court may be required to make a more difficult appraisal whenever a request for a stay of the proceedings is lodged before it under Article 38 of

the Convention when the periods for lodging appeals have not yet expired in the State in which the judgment was given.

36 In that case, it is also necessary to bear in mind, in addition to the criterion based on the possible effect of an appeal, all the relevant considerations arising from the nature and conditions for the application of the judicial remedies in question.

37 Considered from this point of view, the expression 'ordinary appeal' must be understood as meaning any appeal which forms part of the normal course of an action and which, as such, constitutes a procedural development which any party must reasonable expect.

38 It is necessary to consider that any appeal bound by the law to a specific period of time which starts to run by virtue of the actual decision whose enforcement is sought constitutes such a development.

39 Consequently it is impossible to consider as 'ordinary appeals' within the meaning of Articles 30 and 38 of the Convention in particular appeals which are dependent either upon events which were unforeseeable at the date of the original judgment or upon the action taken by persons who are extraneous to the case, and who are not bound by the period for entering an appeal which starts to run from the date of the original judgment.

40 It is for a court before which a request is submitted under Article 36 at a date on which the period for entering an appeal in the State in which the judgment was given has not yet expired to exercise its discretion in this respect.

41 This freedom of discretion is implicit in the actual system of Article 38 which gives the court before which an order for enforcement is sought the power to specify with regard to a party which is opposed to enforcement, although it has not yet taken advantage of the possibility of lodging an appeal in the State in which the judgment was given, a time within which its appeal is to be lodged.

42 It is therefore necessary to reply that, within the meaning of Articles 30 and 38 of the Convention, any appeal which is such that it may result in the

annulment or the amendment of the judgment which is the subject-matter of the procedure for recognition or enforcement according to the Convention and the lodging of which is bound, in the State in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment constitutes an 'ordinary appeal' which has been lodged or may be lodged against a foreign judgment.

Costs

43 The costs incurred by the Government of the Federal Republic of Germany, the Government of the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

44 Since the proceedings are, so far as the parties to the main action are concerned, 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,

in answer to the questions referred to it by the Rechtbank van Eerste Aanleg of the judicial district of Antwerp by judgment of 7 April 1977, hereby rules:

1. **The expression 'ordinary appeal' within the meaning of Articles 30 and 38 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be defined solely within the framework of the system of the Convention itself and not according to the law either of the State in which the judgment was given or of the State in which recognition of enforcement of that judgment is sought.**

2. **Within the meaning of Articles 30 and 38 of the Convention, any appeal which is such that it may result in the annulment or the amendment of the judgment which is the subject-matter of the procedure for recognition or enforcement under the Convention and the lodging of which**

is bound, in the State in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment constitutes an 'ordinary appeal' which has been lodged or may be lodged against a foreign judgment.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 22 November 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 19 OCTOBER 1977 [1]

Mr President,
Members of the Court,

The defendant in the proceedings which have given rise to the reference for a preliminary ruling which I must discuss today, an Italian commercial representative, obtained on 23 September 1976 from the Tribunale Civile e Penale (Civil and Criminal Court), Turin, a judgment ordering the plaintiff in the main action, a Belgian limited liability company, to pay a certain sum. On 27 December 1976 a *Kassationsbeschwerde* (appeal in cassation) was lodged against that judgment before the Corte Suprema di Cassazione (supreme court of appeal) in Rome; under Italian law such an appeal does not suspend the execution of the contested judgment. Apparently no recourse was had to the possibility of applying to the Italian court which delivered the contested judgment for a stay of execution.

The defendant in the main action wishes to enforce in Belgium the judgment of the Tribunale Civile e Penale, Turin. For this purpose he obtained from the Rechtbank van Eerste Aanleg (Court of First Instance) in Antwerp an order for its enforcement in accordance with Article 31 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention on Jurisdiction').

The plaintiff in the main action appealed against this decision, which was made on 25 November 1976, in accordance with Article 36 of the Convention on

1 — Translated from the German.