OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 4 JULY 1984

My Lords,

In the course of proceedings brought before the District Court at Verona, in Italy, by an Italian company ("Brennero") against a German company ("Wendel"), the former sought and obtained what has been described as a "protective seizure order".

The Court has been told that, under Italian law, such an order may be made either before proceedings have commenced or pending judgment when it is considered necessary in order to ensure enforcement of the judgment. It must be executed within 30 days and takes the form of a seizure of the debtor's goods. The creditor cannot actually enforce the seizure by selling the goods and keeping the proceeds. The goods are under the control of the court making the protective seizure order. If the creditor's action is upheld, he can enforce the order immediately by seizing the goods. If his action is dismissed, the order ceases to have effect automatically.

The order made in this case covered the movable and immovable propery and assets in Wendel's possession up to an amount of LIT 700 000 000 plus interest. It is not disputed that it was made *inter partes* and that, for this reason, it is in principle, enforceable under the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereafter "the Convention"): see Case 125/79 *Denilauler* v *Couchet Frères* 1980 ECR 1553 at para. 17. According to counsel for Brennero, Wendel had no property or assets in Italy and it was necessary to enforce the order in Germany. To this end the Italian court declared for the purposes of Article 47 of the Convention that the order was enforceable in Italy. Pursuant to Article 32 of the Convention, Brennero applied to the President of the Fourth Civil Chamber of the Landgericht at Detmold in Germany, Wendel's domicile, for an order for the enforcement of the protective seizure order. The order for enforcement was made on 7 July 1983 and notified to Brennero under Article 35 of the Convention.

Article 36 provides that, if enforcement is authorized, as it was here, "the party against whom enforcement is sought may appeal against the decision" (i.e. the decision authorizing enforcement) "within one month of service thereof". By 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".

For this reason, the present order authorizing enforcement contained the proviso that enforcement should not go beyond "protective measures" until Brennero produced a certificate showing that enforcement could proceed without limit. Due to the protective nature of the order made by the Italian court, it does not seem that Brennero could produce such a certificate until final judgment in its action against Wendel.

On 12 July 1983, Wendel lodged an appeal under Article 36 with the Oberlandesgericht against the order authorising enforcement. At the same time, Wendel sought an interim order that enforcement of the Italian court order should be made conditional on the lodgment by Brennero of a security which, so the Court has been informed, was to be equal in amount to the sum covered by the Italian court's order.

Wendel based its application on Article 38 of the Convention, which provides that the court with which an appeal against an order authorizing enforcement has been 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". So far as can be seen, Wendel did not appeal against the order of the Italian court — indeed, the Court has been informed that no appeal against it is possible under Italian law. That order may be revoked by the trial judge and is, it seems, superseded by the final judgment delivered in the action. Wendel did not apply for a stay under Article 38 and if no appeal is possible under Italian law there is no room for the application of the first paragraph of Article 38 which depends on there being an appeal, or at any rate the possibility of an appeal.

By decision dated 15 July 1983, the Oberlandesgericht made enforcement of the Italian court's order conditional on provision of the security requested by Wendel, in the event DM 1 200 000. The order for reference made by the Bundesgerichtshof, to which Brennero appealed on a point of law, states that this was an interim order. The Oberlandesgericht had not given judgment on Wendel's appeal by the time that the order for reference was made. Brennero decided that it could not give the security required because of the time it would take to transfer funds from Italy. It therefore appealed to the Bundesgerichtshof against the decision of the Oberlandesgericht by way of a *Rechtsbeschwerde.* In the order for reference it is stated that Brennero would not, under German law, have a right of appeal against the decision of the Oberlandesgericht. Article 37 of the

Convention, however, states that a judgment given on the appeal against the decision authorizing enforcement may be contested in the Federal Republic of Germany by and only by a *Rechtsbeschwerde.*

Two questions are referred, though they are interrelated. The first is as follows:

"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?"

The provisions of Article 31 et seq. of the Convention envisage that a foreign judgment may only be reviewed as to its substance in the State in which it was given, not that in which it is to be enforced. The role of the courts in the enforcing State is correspondingly limited. Articles 38 and 39 affect the immediate enforceability of the judgment in two specific cases. In the first place, when the judgment sought to be enforced is not final in the sense that it is still subject to an ordinary appeal, the court in the enforcing State may stay the proceedings under Article 38; there is a discretion. In the second case, when an appeal is made against the authorization of enforcement (or the time for making such an appeal is still running) the court of the enforcing State can only issue protective measures; it has neither the discretion nor the power to do more. I do not accept the view put forward by counsel for Wendel that Article 38 applies to judgments which do not have the force of *res judicate,* Article 39 to judgments which do have such force, and that Article 38 takes precedence over Article 39. In my view Article 39 applies whether or not the judgment sought to be enforced is final.

By "protective measures" Article 39 of the Convention envisages those forms of relief available under the law of the enforcing State to prevent the judgment debtor from removing the assets on which execution is to be levied (see the Jenard Report at page 52). By "measures of enforcement" which may not be taken, Article 39 means, in consequence, all other measures of enforcement, which usually take the form of the sequestration of the judgment debtor's property.

The present case does not concern a judgment which is enforced by sequestration. The furthest it goes is to place the judgment debtor's property under the control of the court making the order. It does not entitle the judgment creditor to seize the property. It follows that such a judgment could not be validly enforced in another Contracting State by an order for enforcement enabling the judgment creditor to seize the property. It could only be enforced by the appropriate protective measure available under the law of the enforcing State to assist what is itself a protective measure adopted in the original judgment. The object of Article 39 is "to ensure at the enforcement stage a balance between the rights and interests of the parties

concerned, in order to avoid either of them suffering any loss as a result of the operation of the rules of procedure" (the Jenard Report at page 52). That balance may be safeguarded, not threatened, by the adoption of protective measures. Article 39, thus, does not exclude protective measures which have the same effect as an order for protective measures in the judgment sought to be enforced merely because they do give effect to that order. These are not the sort of measures which are prohibited by Article 39.

Whereas Article 39 is dealing with the period before the time for lodging an appeal in the enforcing State has expired, or the appeal has been determined, Article 38 is dealing with the period before the time for lodging an appeal in the State where the judgment has been given has expired, or by implication the appeal has been determined. In the latter case proceedings in the enforcing State may be stayed, as I see it, before the hearing of the appeal or on the hearing of the appeal in that State. Whether and when proceedings should be stayed under Article 38, may depend on whether protective measures are required under Article 39; it does not seem to me, however, that a stay under Article 38 deprives the court of the power to grant protective measures under Article 39.

The second paragraph of Article 38, after giving power to grant a stay, provides that the court may "also" make enforcement conditional on the provision of security. It is curious that this paragraph should follow on the provision for grant of a stay in this way, since it seems to me plain that it is not intended that a court should, when it grants a stay, at the same time make enforcement (which *ex hypothesi* it is not at that stage ordering) in the future dependent on the provision of security. On the other hand it seems to me equally plain that the provision of security is not to be treated as part of or as the corollary of protective measures being granted under Article 39. Protective measures merely freeze the assets in the enforcing State; they do not amount to enforcement. There is no provision that security may be made a condition of protective measures. "Enforcement" is the carrying out of the original judgment. It is only when the court hearing the appeal decides that enforcement may proceed that it has power to require security. That decision is only taken on the final hearing of the appeal; only on the final determination of the appeal can security be ordered. It is a protection to the debtor alternative to granting a stay, so that if an appeal is allowed in the State where the judgment is given, the debtor may have a remedy if his goods have been taken and used or dispersed.

The power to order security exists, as does the power to grant a stay, only where an appeal has been lodged or the time for appealing is still running in the State where the judgment was granted.

In the case of judgments which constitute protective measures, the question has been raised as to whether

enforcement may ever be made conditional on provision of security even as part of the final decision on the appeal. It is argued that it may not. Although this question is not expressly included in the order for reference, it is relevant to the present case and it seems desirable to deal with the argument. It does not seem to me that as a matter of interpretation a judgment ordering protective measures is excluded from the scope of what the courts of the enforcing State can do on the final hearing of the appeal. It is not excluded expressly and I do not think that it should be regarded as excluded by necessary implication. On the contrary, it is clear that an order freezing assets on the application of a creditor may cause loss to the debtor, even if the goods cannot be used or dissipated. If the court making the original order has considered and rejected an application for security, then the policy of the Convention would seem to indicate that, in the normal way, the enforcing court should not review that decision in the absence of a change in circumstances. It has, however, power to do so. Where there has been a change in circumstances the enforcing court may order security where an appeal has been lodged even if the security has been refused. These considerations, however, apply as well to cases where the order is not for protective measures as to where it is. Accordingly, subject to the court of the enforcing State taking into account, when it exercises its discretion, the fact that the court giving the judgment has refused security, I would reject the suggestion that security cannot be ordered if the judgment is only for protective measures.

The second question referred is as follows:

"May a *Rechtsbeschwerde* 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?"

Article 37 provides for a further appeal against "the judgment given on the appeal" against the decision authorizing enforcement. There is no express reference to interim decisions delivered by the Court under Article 37 pending "the judgment given on the appeal". From this, Wendel, the German Government and the Commission have inferred that "the judgment given on the appeal" means the final judgment determining the appeal and that there is no possibility of appealing against an interim decision.

If, as in my view was the case, the draftsmen of the Convention precluded the making of an interim decision allowing enforcement subject to provision of security pending the outcome of the appeal by providing that Article 39 should govern the position, the words in Article 37, "judgment given

on the appeal", must be construed starting from the premise that the only decision "given on the appeal", is the final decision determining the appeal, not an interim decision of this nature. Article 37 does not, therefore, apply where such an interim decision is made. This means that the position is covered by the normal remedies available under the domestic law of the enforcing State in cases where a court purports to make an interim order although it has no jurisdiction to do so, whether by way of appeal if an appeal exists, or on application to the court which made the original order if there is no right of appeal.

The fact that there ist no provision in the Convention for such an appeal in my view supports the conclusion reached in answer to the first question that there is no jurisdiction under the Convention to make such an interim order.

For these reasons it is my opinion that the questions referred should be answered on the following lines:

1. 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 cannot issue an order under the second paragraph of Article 38 of the Convention making enforcement conditional on the provision of security as an interim measure during the appeal proceedings;

2. The second paragraph of Article 37 of the Convention does not apply to interim orders of this kind purporting to be made during appeal proceedings on the basis of the second paragraph of Article 38; in such a situation the parties are entitled to rely on those remedies normally available, in the national jurisdiction, where an interim order is made in the absence of jurisdiction to do so.

The costs of the parties to the proceedings before the Bundesgerichtshof fall to be dealt with by that court and no order should be made as to the costs of the German and Italian Governments and the Commission.