OPINION OF MR ADVOCATE GENERAL LENZ
Delivered on 14 May 1985 *

Mr President,
Members of the Court,

A. The proceedings which have resulted in the present reference to the Court for a preliminary ruling relate to the enforceability in France of an instrument drawn up by a German *notary.*

In so far as they are relevant to these proceedings, the contents of the instrument, which was drawn up by a notary in Neuss on 5 April 1972, may be summarized as follows:

1. Grant of a charge on land in the sum of DM 2 000 000 plus interest at the rate of 10%;

2. Consent by Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH (hereinafter referred to as 'DGV') and future owners of the land charged to immediate enforcement in respect of claims arising under the charge;

3. Assumption of personal liability by DGV as against future assignees of the land charge;

4. Consent by DGV to immediate enforcement of that instrument against the whole of its assets.

The land charge, which was created originally as an *Eigentümergrundschuld* (a land charge registered in the name of the property owner), was assigned to the Deutsche Gewerbe- und Landkreditbank AG in January 1976 in a declaration attested by a notary. The assignee's successor in title, Deutsche Genossenschaftsbank, is now seeking enforcement of that instrument. To that end, on 8 February 1982, it instructed the *successor* of the notary in Neuss to provide it with a copy of the instrument which could be used in enforcement proceedings. It then applied to the president of the Tribunal de grande instance (Regional Court), Strasbourg, for an order for enforcement in France.

By an order dated 24 March 1982 the president of the Tribunal de grande instance, Strasbourg, issued an *order for enforcement* of the *French translation* of the notarial instrument. An application was made to the same court for the setting aside of that order by Brasserie du Pêcheur SA, another of DGV's creditors. By an interlocutory order dated 13 October 1983 the president set aside his order of 24 March 1982 and ordered Deutsche Genossenschaftsbank to pay the costs. Deutsche Genossenschaftsbank appealed against that order to the Cour d'appel, Colmar, on the ground that Brasserie du Pêcheur had no right to contest the previous order. It took the view that apart from the right of appeal provided for in Article 36 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters no other, exceptional form of appeal was permissible. Only DGV could have appealed to the Cour d'appel, Colmar, which had jurisdiction under Article 37 of the Convention. Brasserie du Pêcheur, on the other hand, took the view that, in addition to the right of appeal available under Article 36 of the Convention, further exceptional procedures available under French law were permissible.

Considering that the outcome of the appeal depended on the interpretation of Article 36 of the Convention, the Cour d'appel

* Translated from the German.

referred the following question to the Court of Justice for a preliminary ruling:

'Does Article 36 of the Brussels Convention of 27 September 1968, which, in cases where enforcement is authorized, provides for an appeal only by the party against whom enforcement is sought, thereby exclude 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?'

B. My views on that question are as follows:

The Court of Justice could give a theoretical reply to the question whether or not Article 36 of the Convention excludes additional forms of appeal available under domestic law. That is what is proposed by the parties to the main proceedings, by the German and Italian Governments and by the Commission of the European Communities, although with different results.

However, the Court of Justice could also restrict itself to providing the Cour d'appel with the criteria for interpreting Community law to enable it to make a decision in the legal dispute before it. In my opinion, that is what the Court should do.

In order to reply to the question in the manner that I propose, no more is required than a reference to the first paragraph of Article 54 of the Convention. That provision states as follows:

'The provisions of this Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments *after* its entry into force.'

The instrument which is to be enforced clearly states that it was drawn up on 5 April 1972. However, the Brussels Convention, following ratification by the six original members of the Communities, only came into force on 1 February 1973 in accordance with Article 62 thereof (see the first footnote to the Convention, Journal Officiel 1972, L 299, p.32, and Décret No 73/63 of 13 January 1973 concerning publication of the Convention, Journal Officiel de la République Française of 17 January 1973, p. 677, footnote 1).

Since counsel for Deutsche Genossenschaftsbank, surprised by the questions put to him by the Court concerning the applicability of the Brussels Convention, sought to argue that, in reality, the assignment of 1976 and not the instrument of 1972 should be enforced since DGV's liability had not yet arisen in 1972, I consider it necessary to clarify the German legal position briefly. The purpose of that clarification is not to judge the validity of the instrument drawn up in 1972 but to decide the date from which such an instrument, considered in the abstract, can be effective.

The main provision of the instrument of 5 April 1972 was, without doubt, the creation of a charge on land. However, it also contained other matters which are of importance in this case since it is not possible to enforce the charge itself in this case because the land charged is situated in Neuss and not in French territory. Instead the claim that is to be enforced is based on the assumption of personal liability by DGV and the corresponding consent to immediate enforcement.

In German law such an acknowledgement of liability, linked to consent to immediate enforcement, can be made even in respect of

claims that have not yet arisen. [1] If the person who grants a charge on land in an enforceable instrument at the same time accepts personal liability for the payment of the sum charged and if he consents to immediate enforcement, that is to be regarded as an admissible abstract recognition of liability, within the meaning of Paragraph 780 of the Bürgerliches Gesetzbuch [German Civil Code], which is intended to facilitate enforcement of the creditor's claim. [2]

Accordingly, in a case where a charge on land is granted and personal liability is assumed in respect of the claim secured by the charge and where consent is given to immediate enforcement, German law does *not* lay down that the claim to be secured must already exist. To that extent the legal position with regard to a charge on land differs from that relating to a mortgage, which is dependent upon a pre-existing claim. [3]

Since, as has been stated, the instrument to be enforced was drawn up on 5 April 1972, whereas the Brussels Convention only came into force on 1 February 1973, the Convention is not applicable to this case under Article 54 thereof. At the hearing, however, the Commission's representative raised the question whether, in the case of authentic instruments, it was such a serious matter, as it was in relation to court judgments, if it were presumed that the Brussels Convention applied in this case. I consider that that question must be answered in the affirmative because I consider such a result, following from a literal interpretation of the Convention, to be appropriate. Consent to immediate enforcement which is intended to apply initially to the territory of a specific Member State has a different scope if the instrument is subsequently capable of enforcement in the other Member States by means of the simplified procedure provided for by the Brussels Convention. I therefore take the view that the Brussels Convention can only be applied to authentic instruments which are drawn up after its entry into force.

C. In view of the foregoing I propose that the Court of Justice should reply to the question referred to it by the Cour d'appel, Colmar as follows:

'According to Article 54 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the Convention is only applicable to authentic instruments which were drawn up after its entry into force, that is to say after 1 February 1973.'

D. Should the Court none the less consider giving a reply to the substance of the question referred to it by the Cour d'appel, Colmar, — the question is worded generally and does not consider whether or not the Brussels Convention is applicable — I beg leave to add some observations on the forms of appeal available when an order for enforcement is issued.

The parties to the proceedings expressed differing views on the question whether the right of appeal available under Article 36 of the Brussels Convention excludes other forms of appeal available to interested third parties under national law. Deutsche Genossenschaftsbank, the Government of

1 — See the judgment of the Reichsgericht of 9 February 1931 Az IV 320/30, Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 132, p. 6.

2 — Bundesgerichtshof, judgment of 21 January 1976, Az VIII ZR 148/74, Neue Juristische Wochenschrift, p. 567.

3 — See Paragraph 1192 (1) of the Bürgerliches Gesetzbuch, which states as follows: 'The provisions relating to mortgages shall apply to charges on land, unless the contrary is to be inferred from the fact that a charge on land is dependent upon a pre-existing claim'.

the Federal Republic of Germany and the Commission took the view that Article 31 *et seq.* of the Convention provide an exhaustive set of rules concerning possible forms of appeal and that provisions of national law are only available where express reference is made to them, such as in the first paragraph of Article 33 and in Article 35. Brasserie du Pêcheur and the Government of the Italian Republic, however, take the view that procedures available under national law are permissible in addition to the appeal provided for in Article 36 of the Convention; they state that it cannot be supposed that the Convention was intended to provide an appeal solely for the party against whom enforcement is sought and thereby exclude any means of redress for third parties whose rights might be affected.

Since neither the wording of the Convention nor the *travaux préparatoires* indicate clearly how that question is to be answered, it is necessary for me to have recourse to the spirit and purpose of the Convention. In its judgment of 27 November 1984, [4] the Court of Justice recalled that: '... the purpose of the Convention is to limit the number of requirements to which ... enforcement ... may be subjected in another Contracting State. The Convention accordingly provides for a very simple enforcement procedure whilst giving the party against whom enforcement is sought an opportunity to lodge an appeal'. [5]

The Court went on to state as follows:

'The second paragraph of Article 37 provides that the judgment given on the appeal may be contested only by an appeal in cassation and, in the Federal Republic of Germany, by a *Rechtsbeschwerde*. Under the general scheme of the Convention, and in the light of one of its principal objectives which is to simplify procedures in the State in which enforcement is sought, that provision cannot be extended so as to enable an appeal in cassation to be lodged against a judgment other than that given on the appeal, for instance against a preliminary or interlocutory order requiring preliminary inquiries to be made'. [6]

The Court's argument, which leads to the exclusion of all appeals not provided for in the Convention, is applicable *a fortiori* to this case. The aim of simplifying procedures in the State in which enforcement is sought and in particular the aim of harmonizing the laws of the Contracting States in that area would fail to be attained if procedures available under national law were admissible in addition to the appeals provided for in the Convention. Foreign enforceable instruments are to be equated with national enforceable instruments in a speedy, simple and uniform manner. It would be inconsistent with that objective if, in addition to the right of appeal under Article 36 of the Convention, further national appeals against an order for enforcement which differed in each Member State were admissible. If that were the case a party seeking enforcement in another Contracting State of an instrument drawn up in his favour in his own State would be faced in proceedings for enforcement by a multitude of national procedural obstacles in the form of additional forms of appeal. Accordingly, foreign enforceable instruments would not

4 — Case 258/83, *Calzaturificio Brennero sas* v *Wendel Schuhproduktion GmbH*, [1984] ECR 3971.

5 — At paragraph 10.

6 — At paragraph 15.

be equated in an uncomplicated manner with national enforceable instruments.

In Article 220 of the EEC Treaty the Member States undertook to simplify the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals. [7] The extension in intra-Community trade has necessarily led to an increase in the number of legal relationships involving parties in different countries and therefore inevitably in the number of situations where a conflict of laws may arise. For that reason the simplified recognition and enforcement of judgments of courts or tribunals — and authentic instruments — is in fact a necessary legal concomitant of the creation of a common market corresponding as closely as possible to an internal market. [8] Of course, the exclusion of procedures available under national law does not extend beyond the field of application of the uniform rules provided for in the Convention. Those rules simply relate to the issue of an order for enforcement of the foreign instrument and not the levying of execution itself. At that stage the law of the State in which the enforcement is effected is applicable.

If the Court should decide to answer the substance of the question referred to it by the Cour d'appel, Colmar, I propose that the reply be given in the following manner:

'The only permissible procedure for challenging an order for enforcement in one Contracting State of an instrument drawn up in another Contracting State is the right of appeal provided for in Article 36 of the Convention. That principle also applies where the national rules of procedure in one Contracting State provide that interested third parties may contest an order for enforcement.'

7 — That provision is referred to in the preamble to the Convention.

8 — See judgment of 5 May 1982 in Case 15/81, *Schul* v *Inspecteur der Invoerrechten en Accijnzen*, [1982] ECR 1409, at paragraph 33.