In Case 133/78

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 Bundesgerichtshof [Federal Court of Justice] for a preliminary ruling in the action pending before that court between

HENRI GOURDAIN, Advocate, residing in Paris, as Liquidator of the Société Fromme France Manutention,

and

FRANZ NADLER, residing at Wetzlar (Federal Republic of Germany),

on the interpretation of subparagraph 2 of the second paragraph of Article 1 of the said Convention which provides that the said Convention shall not apply to bankruptcy and proceedings relating to the winding-up of insolvent companies or other legal persons.

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco 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 course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The German company Fromme Förderanlagen GmbH one of the objects of which is to carry on the business of manufacturing handling equipment had as its manager a Mr Nadler.

In order to market its products in France it formed in 1968 a subsidiary company with limited liability under the name of Fromme France Manutention having a share capital of 2 500 shares of which it owned 2 490.

As a result of the winding-up of the German company the French company found itself in a critical financial situation and the court in a judgment of 7 March 1974, which was upheld on appeal, declared that the conditions existed for the "liquidation des biens [winding-up of the affairs of a person, firm or company not expected to continue in business]"[1] of the French company, the date when it declared itself unable to meet its liabilities being 21 September 1973. Mr Gourdain was appointed "syndic [liquidator or trustee for the creditors]"[1] and Mr Nadler was regarded as *de facto* manager and deprived of his right to direct, manage, conduct or supervise any commercial undertaking.

Furthermore by an order of the Cour d'Appel, Paris, which became final on 15 March 1976 Mr Nadler was ordered to bear the company's debts up to the amount of FF 743 563.15 pursuant to Article 99 of the French Law No 67-563 of 13 July 1967 on the "règlement judiciaire [administration of the affairs of an insolvent person, firm or company expected to continue in business under the supervision of the court]",[1] the "liquidation des biens", the "faillite personnelle [mandatory or optional deprivation or prohibition by the court of the exercise of the rights required to carry on business where the debtor or manager has been imprudent or dishonest]"[1] and "banqueroutes [ordinary and criminal bankruptcies]".[1]

In reliance on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 27 September 1968, the applicant, Mr Gourdain applied to the Landgericht [Regional Court] Limburg for leave to enforce the order of the Cour d'Appel, Paris, in the Federal Republic of Germany.

The President of the Landgericht Limburg by an order of 22 April 1977 granted this application subject to certain terms but the Oberlandesgericht [Higher Regional Court] Frankfurt, by an order of 7 September 1977, set aside this decision as it considered that the order under Article 99 of the French Law of 13 July 1967 against Mr Nadler *in personam* as the *de facto* manager of a commercial company whose affairs are being wound up "is not a decision in a civil and commercial matter but must be regarded from points of view which overlap as forming part of the winding-up, since such an order, which is not known in the German legal system, has its basis in the winding-up of the trading company concerned and is part and parcel of the winding-up proceedings, even if it was the outcome of contentious civil law proceedings".

In answer to these considerations the applicant submitted in his appeal that the opportunity offered by Article 99 of the French Law of 13 July 1967 of proceeding in winding-up proceedings against the *de jure* or *de facto* manager of a legal person is not a legal application inherent in winding-up proceedings but a case of liability under civil law which must be dealt with in a civil action brought by the "syndic".

1 — Translator's note. The English terms given do not purport to be exact equivalents of the French terms, since concepts in the different legal systems are not identical.

Consequently the decision which the Bundesgerichtshof, before which the matter was brought has to give depends upon the interpretation of the first paragraph of Article 1 and of subparagraph 2 of the second paragraph of Article 1 of the Convention which does not apply to bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.

It is in these circumstances that by an order dated 22 May 1978 the Bundesgerichtshof referred to the Court of Justice for a preliminary ruling the following question:

"Is a judgment given by French civil courts on the basis of Article 99 of the French Law No 67-563 of 13 July 1967 against the *de facto* manager of a legal person for payment into the assets of a company in liquidation to be regarded as having been given in bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies or other legal persons and analogous proceedings (subparagraph 2 of the second paragraph of Article 1 of the Convention) or is such a judgment a decision given in a civil and commercial matter (first paragraph of Article 1 of the Convention)?"

The order of the Bundesgerichtshof was entered at the Court Registry on 12 June 1978.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by H. E. Brandner, Advocate at the Bundesgerichtshof, on behalf of the appellant in the main action, by G. Greumer and O. C. Brändel, Advocates at the Bundesgerichtshof, on behalf of the respondent in the main action, by Dr. G. Bebr, acting as Agent, on behalf of the Commission of the European Communities and by M. W. Holtgrave, acting as Agent, on behalf of the Government of the Federal Republic of Germany.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Written observations of the "syndic", Mr Gourdain, the appellant in the main action

It is Mr Gourdain's view that if in winding-up proceedings a French civil court orders the manager of a legal person, pursuant to Article 99, to pay a certain sum into the assets of the company, that is a decision concerning a civil and commercial matter within the meaning of the first paragraph of Article 1 of the Convention.

He argues that, although the rule contained in Article 99, which is regarded as a rule for investigation into the winding-up in order to ascertain the person responsible, is laid down in the French Law of 13 July 1967 it is not however regarded by French learned writers as a legal procedure inherent in winding-up proceedings but as a particular type of action for a declaration as to liability (Schmidt KTS 1976 p. 18).

The question whether such investigation into the winding-up in order to find out who was responsible is not determined in the context of proceedings by the general body of creditors before the "juge commissaire [judge designated to expedite and supervise the various bankruptcy and winding-up proceedings under the authority of the court]"[1] (Article 8 of the French Law) but in the context of contentious proceedings before the court having jurisdiction (Article 5) in which the parties are the "syndic" and the manager proceeded against.

It will not be possible for the European Convention on bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and anal-

1 — See Note 1, p. 735.

ogous proceedings which is still only in the form of a preliminary draft to include a similar rule as to liability.

Although it is true that investigation into the winding-up in order to ascertain the person responsible has a causal connexion with the winding-up of the company it is founded on a system of special liability which falls within general civil and commercial law. It is an additional liability for the debts of the company and the only connexion with the winding-up proceedings, which are designed to ensure a *pro rata* apportionment of the assets of the company between the creditors of the company, is the fact that the right of action vests in the "syndic". The creditors of the company could just as well be given the right to bring direct action themselves; the right to institute proceedings has only been vested in the "syndic" in his capacity as chief executive of the company for practical reasons so that proceeding against the manager who is liable does not depend upon whether or not the creditors of the company accept the risk of a direct action or on their decision to bring this action. All these considerations lead to the conclusion that the action must be classified as an action concerning a civil or commercial matter.

Mr Gourdain therefore submits that the question referred to the Court be answered as follows:

If during winding-up proceedings, a French civil court orders the *de facto* manager of a legal person, pursuant to Article 99 of the French Law of 13 July 1967, to pay a certain sum into the assets of a company, its order is a decision in a civil and commercial matter within the meaning of the first paragraph of Article 1 of the Convention.

B — Written observations of Mr Nadler, the respondent in the main action

First the respondent in the main action requests the court to "set aside the order for reference made by the Bundesgerichtshof as being inadmissible". He in fact takes the view that the answer to the question as formulated would lead to the actual application of the law whereas the Court's only task is to "determine in the abstract the content of Community law by way of interpretation".

Secondly and in the alternative he requests the Court in answer to the question referred to it to rule that the Convention does not apply to court orders

(a) relating to the assets of a legal person which are made in proceedings for the "liquidation des biens" of a company or from which such proceedings must be inferred,

(b) which are directed against *de jure* or *de facto* parts of the legal person and

(c) the purpose of which is to add some funds to the assets of the company with a view to the *pro rata* repayment of the creditors without

(d) the obligation to make a contribution being founded on provisions other than the rules applicable to the "liquidation des biens",

in so far as they fit into the general pattern of bankruptcy and winding-up within the meaning of subparagraph 2 of the second paragraph of Article 1 of the Convention.

The respondent in the main action points out that, so long as the proposed European Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings has not come into being, subparagaph 2 of the second paragraph of Article 1 of the Convention on enforcement must be interpreted with reference to the specific features which are peculiar to insolvency proceedings.

In proceedings for the "liquidation des biens" all measures taken by the "syndic" for the purposes of drawing-up the statement of the company's affairs of necessity form an integral part of the said proceedings.

It is immaterial whether the "syndic" for the purpose of drawing up the statement of the company's affairs relies on a special court concerned with winding-up or applies to an ordinary civil court. On the other hand the decisive factor is that the purpose of the court's decision given on the application of the "syndic" is to complete the list of assets and that in law that decision is founded solely on the legal provisions applicable to "liquidation des biens".

Viewed from this angle all those rights which the "syndic" simply exercises in the place of the insolvent person, firm or company and which are founded on a legal basis (a law or other legal act) other than proceedings for "liquidation des biens" are governed by the Convention.

Similar pre-existing rights, which are not only derived from the rules applicable to the "liquidation des biens" must be enforced by the "syndic" before the ordinary civil and commercial courts. The purpose of exercising rights of this kind pertaining to assets is not to draw up the list of assets but to realise them forthwith with a view to the ultimate satisfaction *(pro rata)* of the creditors. The fact that the "syndic" embarks on the legal enforcement of these rights in the place of the insolvent person, firm or company does not transform such actions into proceedings in "bankruptcy" or "relating to the winding-up of insolvent companies or other legal persons" within the meaning of subparagraph 2 of the second paragraph of Article 1 of the Convention on enforcement.

The application brought pursuant to Article 99 of the French Law of 13 July 1967 is based solely on legal provisions applicable to the "liquidation des biens". It can only be made by the "syndic" and it is used for the purpose of making good, in the interests of the creditors, the deficiency between assets and liabilities caused by the officers of the company. It is therefore a decision in "bankruptcy" or "proceedings relating to the winding-up of insolvent companies or other legal persons" and the Convention on enforcement does not apply to it either.

Furthermore, according to the respondent in the main action, under the Preliminary Draft of a Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings court orders of the kind which are the subject of the main action must be regarded as having been made in "bankruptcy" or "proceedings relating to the winding-up of companies or other legal persons" so that their enforcement is not governed by the provisions of the Convention of 27 September 1968.

C — *Written observations of the Commission*

The Commission takes the view that the Convention must be regarded as forming part of the general agreements and as such must in case of doubt be given a wide interpretation and that in consequence the exceptions specified therein must be interpreted strictly "by referring, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems" (Case 29/76 *LTU Lufttransportunternehmen GmbH & Co KG* v *Eurocontrol* [1976] 2 ECR 1541, at p. 1551, paragraph 3 of the decision; Case 43/77, *Industrial Diamond Supplies* v *Luigi Riza* [1977] ECR 2175, at p. 2188, paragraph 28 of the decision).

The ultimate objective of excluding "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" is to get a simple, centralized procedure which produces its effects in all the Contracting States and, as far as concerns the recognition of the enforcement of

decisions in bankruptcy or proceedings relating to the winding up of insolvent companies or other legal persons to ensure that they produce their effects immediately and can be enforced at once; it is only to this extent that a specific solution is required.

Not every court decision relating to bankruptcy or proceedings relating to the winding-up of insolvent companies or other legal persons is therefore excluded from the scope of the Convention but only those which are directly connected with such proceedings.

Moreover the text of the Preliminary Draft of a Convention on bankruptcy and winding-up confirms this interpretation. Because of the considerable differences found to exist between one Member State and another it does not contain any general definition of bankruptcy and winding-up; on the other hand it lists the various bankruptcy and winding-up proceedings in each Member State and a feature to be noted is that the application provided for in Article 99 of the French Law of 13 July 1967 does not appear among those proceedings to which the future Convention on bankruptcy and winding-up is to be applied.

There is confirmation of this interpretation in Article 61 of the Preliminary Draft of a Convention on bankruptcy and winding-up which provides that the "syndic" may bring actions concerning liability in order to defend the rights of the general body of creditors and expressly provides that these actions fall within the field of application of the general Convention. Moreover this interpretation is confirmed by the objective of Article 99 of the French Law.

A comparison with Article 100 shows that the "syndic" must first make an application, pursuant to Article 99, for compensation for the damage suffered by the company to be paid by the managers of the said company if they have not managed the company with the requisite energy and diligence and it is only when the manager does not discharge his liabilities that Article 100 provides for "règlement judiciaire" or "liquidation des biens". The application made in accordance with Article 99 may therefore be considered as an action concerning liability and is only the first step in bankruptcy or winding-up proceedings which may be brought against the manager involved. Therefore the application made under Article 99 is an action which is only instituted when there is a bankruptcy or winding-up.

With regard to general legal principles it should finally be noted that in general it is civil or company law and not the law of bankruptcy and the law relating to the winding-up of companies which provides for this type of legal application.

For all these reasons the Commission submits that the question referred by the Bundesgerichtshof be answered as follows:

"The decision of a French court based on Article 99 of the French Law No 67-563 of 13 July 1967 which orders the *de facto* manager of a legal person to pay a certain sum of money into the assets of a company is a decision in a civil and commercial matter within the meaning of Article 1 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and there are no grounds for regarding it as having been given in bankruptcy, winding-up or analogous proceedings."

D — Written observations of the Government of the Federal Republic of Germany

The Government of the Federal Republic of Germany is of the opinion that, according to the principles which the Court of Justice laid down in Case 29/76 *LTU Lufttransportunternehmen GmbH & Co KG* v *Eurocontrol* [1976] 2 ECR

1541, at p. 1550, paragraph 3 of the decision, the concepts "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" used in subparagraph 2 of the second paragraph of Article 1 of the Convention on enforcement can be independently interpreted directly on the basis of the objectives and scheme of the Convention without taking into consideration the law of one of the Member States concerned. This is the only appropriate method for obtaining an effective interpretation of the concept "analogous proceedings". Furthermore it is only in this way that any uninterrupted link can be maintained between the Convention on enforcement and the Convention on bankruptcy and winding-up which the Member States are at the present time preparing and likewise it is only in this way that the scope of the Convention on enforcement can similarly be made effective in its entirety and that must apply even before the entry into force of the Convention on bankruptcy and winding-up which is now in draft form.

Subparagraph 2 of the second paragraph of Article 1 of the Convention on enforcement was drawn up so as not to anticipate the preparatory work on a Community convention on bankruptcy and winding-up. Articles 12 and 61 of the Preliminary Draft of a Convention on bankruptcy and winding-up read together prove that the latter is to be applied, the Convention on execution only applying in so far as specific reference is made to its application. This separation of bankruptcy and winding-up matters from civil matters is justified by the circumstance that the recognition of bankruptcy and winding-up decisions is governed by special principles derived in particular from the fact that recognition of the effects of general enforcement in other countries, in the context of bankruptcy and winding-up proceedings, on property situated in national territory would prove an appreciable obstacle to legal proceedings on national territory, which could not be accepted without a specific foundation in law, and to an encroachment on the sovereign powers of the State which has to recognize the decision. This is why several Member States have so far objected to the recognition of the effects which a general enforcement in other countries must have in their own territory.

The delimitation of the basic proceedings in bankruptcy and winding-up is indicated in the Jenard report and in the case of France, in the Schlosser report.

The recognition of individual decisions made in the basic bankruptcy or winding-up proceedings in another Member State is meaningless unless the Member State which has to recognize them also recognizes the bankruptcy or winding-up in its entirety. That is the reason why the exception specified in subparagraph 2 of the second paragraph of Article 1 should, as far as concerns proceedings of a subsidiary nature, be understood as meaning that it refers to all proceedings, but also only to those proceedings "arising directly from the bankruptcy and hence falling within the scope of the Bankruptcy Convention of the European Economic Community" (Jenard Report, Chapter III, IV, B). This interpretation is also supported *inter alia* by the fact that Article 27 of the Convention on enforcement does not contain any provision which, in the case of judgments given in the context of bankruptcy or winding-up proceedings in connexion with a particular application or contentious matter would allow a preliminary review similar to the review provided for in Article 27 (4) of the Convention on enforcement in the case of the exceptions listed in subparagraph 1 of the second paragraph of Article 1.

An examination of French legislation and especially of Article 99 of the French Law No 67-563 admits of the conclusion that the object of the procedure provided

for in that Law, in the event of the winding-up of a commercial company, is in fact to "go beyond the legal person and proceed against its managers, even if they are not themselves business men, in order to penalize them for their mismanagement and in any case in order to make possible a larger distribution to the creditors" (Aubouin).

Thus the "liquidation des biens" exerts in general its influence on this procedure which enables the *de facto* manager's property to be added to the assets of the insolvent company.

It is with this in view that Article 12 of the Preliminary Draft of a Convention of the European Communities on bankruptcy and winding-up gives exclusive jurisdiction to entertain such actions concerning liability brought against managers of companies to the courts of the Contracting State in which a winding-up order (of the legal person) has been made. In accordance with the wishes of the Contracting States which were clearly expressed during the negotiations on the Convention on enforcement the direct connexion with the winding-up of the legal person makes it necessary to link such proceedings, also as far as concerns the recognition of and the leave by way of exequatur to enforce such decisions exclusively, to the — future — field of application of the special Convention on bankruptcy and winding-up.

Any other interpretation of subparagraph 2 of the second paragraph of Article 1 of the Convention on enforcement entails the risk of distorting the law of bankruptcy and winding-up of certain Member States and does not take account of the true nature of the proceedings provided for in Law No 67-563 as indicated in the context of this Law.

In conclusion an order under Article 99 of the French Law 67-563 is directly connected with bankruptcy and winding-up and does not fall within the field of application of the Convention on enforcement. Having regard to the existing wording of the texts it can only be enforced in the other Member States of the Community by virtue of general principles or, if any there be, on the basis of bilateral agreements concluded between Member States, since it can only be enforced on a multilateral basis after the European Convention on bankruptcy and winding-up enters into force.

The question referred for a preliminary ruling by the Bundesgerichtshof should therefore be answered as follows:

"Decisions founded on Article 99 of the French Law No 67-563 of 13 July 1967, which order the *de facto* managers of a legal person to pay a certain sum into the assets of a company do not fall within the field of application of the Convention on enforcement in so far as the decisions in question are made in bankruptcy or winding-up or analogous proceedings within the meaning of subparagraph 2 of the second subparagraph of Article 1 of the Convention."

III — Oral procedure

The respondent in the main action, represented by Mr Jordan, the Government of the Federal Republic of Germany, represented by Dr Pirrung and the Commission of the European Communities, represented by its Legal Adviser, Dr Bebr, acting as Agent, presented oral argument at the hearing on 18 January 1979.

They developed the arguments submitted in their written observations.

The representative of the German Government developed in greater details his arguments concerning the legal classification of Article 99 of the French Law. This article, which relates to the liability of managers, might be regarded, when it has been analysed, as part of civil and commercial law, but in fact it sets up very special machinery concerning liability which only applies in bankruptcy

and winding-up proceedings: it is the bankruptcy or winding-up which is the cause of the claim against the company which in turn is the cause of the application concerning liability provided for in Article 99 of the French Law.

The Commission of the European Communities answered the questions put by the Court.

The Advocate General delivered his opinion on 7 February 1979.

Decision

1 By an order of 22 May 1978 which was received at the Court Registry on 12 June 1978 the Bundesgerichtshof [Federal Court of Justice], pursuant to the Protocol of 3 June 1971 on the interpretation 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"), referred to the Court of Justice for a preliminary ruling a question on the interpretation of subparagraph 2 of the second paragraph of Article 1 which provides that the Convention shall not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings".

2 This question has been referred to the Court following an order by the Cour d'Appel, Paris, dated 15 March 1976, which ordered the *de facto* manager of a French company, in respect of which there had been a previous declaration that the conditions existed for a "liquidation des biens", to bear a part of the company's debts pursuant to Article 99 of the French Law No 67-563 of 13 July 1967 on the "règlement judiciare", the "liquidation des biens", the "faillite personnelle" [1] and "banqueroutes".[1] The "syndic" [1] of the said company has applied for leave to enforce the order in the Federal Republic of Germany submitting that it relates to a special case concerning civil liability which falls within the field of application of the first paragraph of Article 1 of the Convention.

The Oberlandesgericht [Higher Regional Court] Frankfurt, before the matter was brought before the Bundesgerichtshof, refused an application for leave by way of exequatur to enforce the order on the grounds that the order *in personam* under Article 99 of the French Law, which is not known in the German legal system, did not come within the scope of decisions in civil and commercial matters covered by the Convention but was part of the proceedings for the "liquidation des biens".

1 — See Note 1, p. 735.

It is in these circumstances that the Bundesgerichtshof has referred to the Court the following question:

"Is a judgment given by French civil courts on the basis of Article 99 of the French Law No 67-563 of 13 July 1967 against the *de facto* manager of a legal person for payment into the assets of a company in liquidation to be regarded as having been given in bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies or other legal persons and analogous proceedings (subparagraph 2 of the second paragraph of Article 1 of the Convention) or is such a judgment a decision given in a civil and commercial matter (first paragraph of Article 1 of the Convention)?"

3 The Convention, the particular aim of which is to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals and to strengthen in the Community the legal protection of persons who are established there has laid down as a matter of principle that its scope includes "civil and commercial matters" without however defining this expression.

However because of the special nature of certain matters and of the profound differences between the laws of the Contracting States the Convention does not apply to certain fields including "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" without the meaning of these concepts being defined either.

As Article 1 serves to indicate the scope of the Convention it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned.

By providing that the Convention shall apply "whatever the nature of the court or tribunal" the first paragraph of Article 1 shows that the concept of "civil and commercial matters" cannot be interpreted solely in the light of the division of jurisdiction between the various types of courts existing in certain States.

The concepts used in Article 1 must be regarded as independent concepts which must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.

4 As far as concerns bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, according to the various laws of the Contracting Parties relating to debtors who have declared themselves unable to meet their liabilities, insolvency or the collapse of the debtor's creditworthiness, which involve the intervention of the courts culminating in the compulsory "liquidation des biens" in the interest of the general body of creditors of the person, firm or company, or at least in supervision by the courts, it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for the "liquidation des biens" or the "règlement judiciaire".

In order to answer the question referred to the Court by the national court it is therefore necessary to ascertain whether the legal foundation of an application such as that provided for in Article 99 of the French Law is based on the law relating to bankruptcy and winding-up as interpreted for the purposes of the Convention.

5 The application under Article 99, called an application to make good a deficiency in the assets, for which special provision is made in a law on bankruptcy and winding-up is made only to the court which made the order for the "règlement judiciaire" or the "liquidation des biens".

It is only the "syndic" — apart from the court which can make the order of its own motion — who can make this application on behalf of and in the interest of the general body of creditors with a view to the partial reimbursement of the creditors by respecting the principle that they rank equally and by taking account of any preferential rights lawfully acquired.

In this application, which derogates from the general rules of the law of liability, the *de jure* or *de facto* managers of the company are presumed to be liable and they can only discharge this burden by proving that they managed the affairs of the company with all the requisite energy and diligence.

The period of limitation of three years for the application runs from the date when the final list of claims is drawn up and is suspended for the duration of any scheme of arrangement which may have been entered into and begins to run again if such a scheme is terminated or declared void.

If the application directed against the manager of the company succeeds it is the general body of creditors which benefits, some assets being added to the funds to which they are entitled, as happens where the "syndic" establishes a claim which benefits the general body of creditors.

Furthermore, the court may order the "règlement judiciaire" or the "liquidation des biens" of those managers who have been made responsible for part or all of the liabilities of a legal person and who do not discharge the said liabilities, without having to verify whether the said managers are business men and whether they are unable to meet their liabilities.

6 It is quite apparent from all these findings that the legal foundation of Article 99, the object of which, in the event of the winding-up of a commercial company, is to go beyond the legal person and proceed against its managers and their property is based solely on the provisions of the law of bankruptcy and winding-up as interpreted for the purpose of the Convention.

A decision such as that of a French civil court based on Article 99 of the French Law No 67-563 of 15 July 1967 ordering the *de facto* manager of a legal person to pay a certain sum into the assets of a company must be considered as given in the context of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons or analogous proceedings within the meaning of subparagraph 2 of the second paragraph of Article 1 of the Convention.

Costs

7 The costs incurred by the Commission of the European Communities and by the Government of the Federal Republic of Germany, which have submitted observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Bundesgerichtshof, the decision as to costs is a matter for that Court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Bundesgerichtshof by an order of 22 May 1978, hereby rules:

A decision such as that of a French civil court based on Article 99 of the French Law No 67-563 of 15 July 1967, ordering the *de facto* manager of a legal person to pay a certain sum into the assets of a company must

be considered as given in the context of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons or analogous proceedings within the meaning of subparagraph 2 of the second paragraph of Article 1 of the Convention.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 22 February 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 7 FEBRUARY 1979 [1]

Mr President,
Members of the Court,

In March 1974 proceedings were begun for the winding-up of the French limited liability company "Fromme France Manutention", Paris, after the German parent company had become insolvent. The applicant and appellant on a point of law in the main proceedings, in which the present request for a preliminary ruling originated, was appointed "syndic [liquidator or trustee for the creditors]".[2] Since the assets of the French company were not sufficient to pay its debts, in June 1974, on application by the "syndic", the defendant and respondent on a point of law in the main action, who had been managing director of the German parent company and — apparently since 1971 — also managing director of the French company, was as *de facto* manager of the French company made a party to the proceedings for the winding-up of that company. This was done pursuant to French Law No 67-753 of 13 July 1967 on the "règlement judicaire [administration of the affairs of an insolvent person, firm or company expected to continue in business under the supervision of the court]", [2] the "liquidation des biens [the winding-up of an insolvent person, firm or company not expected to continue in business]", [2] the "faillite personnelle [mandatory or optional deprivation or prohibition by the Court of the exercise of rights required to carry on business when the

1 — Translated from the German.

2 — Translator's note. The English terms given do not purport to be exact equivalents of the French terms, since concepts in the different legal systems are not identical.