JUDGMENT OF THE COURT (First Chamber)

28 April 2005 *

In Case C-104/03,

REFERENCE for a preliminary ruling pursuant to 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 from the Gerechtshof te Amsterdam (Netherlands), made by decision of 12 December 2002, received at the Court on 6 March 2003, in the proceedings

St. Paul Dairy Industries NV

v

Unibel Exser BVBA

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, N. Colneric, J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-F. Contet, Principal Administrator,

* Language of the case: Dutch.

having regard to the written procedure and further to the hearing on 14 July 2004,

after considering the observations submitted on behalf of:

— St. Paul Dairy Industries NV, by R.M.A. Lensen, advocaat,

— Unibel Exser BVBA, by I.P. de Groot, advocaat,

— the German Government, by R. Wagner, acting as Agent,

— the United Kingdom Government, by K. Manji, acting as Agent, and T. Ward, Barrister,

— the Commission of the European Communities, by E. Manhaeve and A.-M. Rouchaud-Joët, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2004,

gives the following

Judgment

1 The reference for a preliminary ruling relates to the interpretation of Article 24 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of

judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended text — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) (hereinafter 'the Convention').

2 That reference was made in a dispute between St. Paul Dairy Industries NV ('St. Paul Dairy') and Unibel Exser BVBA ('Unibel'), both established in Belgium, relating to the hearing of a witness who is resident in the Netherlands.

Law

The Convention

3 Article 24 of the Convention provides that:

'Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'

National law

4 Article 186(1) of the Wetboek van Burgerlijke Rechtsvordering (Netherlands Code of Civil Procedure) ('the WBR') provides that, in cases where the law allows witness evidence, a court may order a provisional hearing of a witness, on the application of the party concerned, before proceedings are issued.

The main proceedings and the questions referred for a preliminary ruling

5 By order of 23 April 2002, the Rechtbank te Haarlem (Netherlands) ordered, on the application of Unibel, a provisional hearing of a witness resident in the Netherlands.

6 St. Paul Dairy appealed against that order to the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal), claiming that the Netherlands court did not have jurisdiction to hear the application made by Unibel.

7 With regard to the substance of the dispute between Unibel and St. Paul Dairy, the order for reference states that it is common ground that both parties are established in Belgium, the legal relationship at issue in the main proceedings is governed by Belgian law, the court having jurisdiction to hear the matter is the Belgian court and no case on the same subject has been brought in the Netherlands or in Belgium.

8 In those circumstances, the Gerechtshof te Amsterdam decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the provision in Article 186 et seq. of the [WBR] concerning the "preliminary hearing of witnesses prior to the bringing of proceedings" come within the scope of the Brussels Convention in light of the fact also that, as provided for in that legislation, it seeks not only to enable material evidence to be taken from witnesses shortly after the facts in dispute and to prevent evidence from being lost but also, and in particular, to provide an opportunity for persons involved in an action subsequently brought before the civil courts — those considering bringing such an action, those who anticipate that the action will be brought against them, or third parties otherwise concerned by such an action — to obtain advance clarification of the facts (with which they are perhaps not entirely familiar), so as to enable them better to assess their position, particularly also with regard to the issue of identification of the party against whom proceedings must be instituted?

(2) If so, can the provision in that case constitute a measure within the meaning of Article 24 of the Brussels Convention?'

The questions referred for a preliminary ruling

9 The questions posed by the national court, which can be examined together, ask essentially whether an application for a witness to be heard before the proceedings on the substance are initiated, with the aim of enabling the applicant to decide whether to bring a case, falls within the scope of application of the Convention as being a provisional or protective measure as provided for in Article 24 thereof.

10 A preliminary point to note is that Article 24 can be relied on to bring within the scope of the Convention only those provisional, including protective, measures in areas which fall within its scope as defined in Article 1 thereof (see Case 143/78 *De Cavel* [1979] ECR 1055, paragraph 9; Case 25/81 *C.H.W.* [1982] ECR 1189, paragraph 12; and Case C-391/95 *Van Uden* [1998] ECR I-7091, paragraph 30). It is therefore for the national judge to verify whether that is the case in the main proceedings.

11 Article 24 of the Convention authorises a court of a Contracting State to rule on an application for a provisional or protective measure even though it does not have jurisdiction to hear the substance of the case. That provision thus lays down an exception to the system of jurisdiction set up by the Convention and must therefore be interpreted strictly.

12 The jurisdiction laid down by way of derogation by Article 24 of the Convention is intended to avoid causing loss to the parties as a result of the long delays inherent in any international proceedings.

13 In accordance with that aim, the expression 'provisional, including protective, measures' within the meaning of Article 24 of the Convention is to be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case (see Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 34, and *Van Uden*, cited above, paragraph 37).

14 The granting of this type of measure requires on the part of the court, in addition to particular care, detailed knowledge of the actual circumstances in which the measures are to take effect. Generally, the court must be able to make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered (see Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 15, and *Van Uden*, paragraph 38).

15 In the main proceedings, the measure sought, namely the hearing, before a court of a Contracting State, of a witness resident in the territory of that State, is intended to establish facts on which the resolution of future proceedings could depend and in respect of which a court in another Contracting State has jurisdiction.

16 It is clear from the order for reference that that measure, the grant of which, according to the law of the Contracting State in question, is not subject to any particular conditions, is intended to enable the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard.

17 In the absence of any justification other than the interest of the applicant in deciding whether to bring proceedings on the substance, clearly the measure sought in the main proceedings does not pursue the aim of Article 24 of the Convention as set out in paragraphs 12 and 13 of the present judgment.

18 It should be noted that the grant of such a measure could easily be used to circumvent, at the stage of preparatory inquiries, the jurisdictional rules set out in Articles 2 and 5 to 18 of the Convention.

19 The principle of legal certainty, which constitutes one of the aims of the Convention, requires, in particular, that the jurisdictional rules which derogate from the basic principle of the Convention laid down in Article 2, such as the rule in Article 24 thereof, be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued (see, to that effect, Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-6307, paragraphs 23 and 24; Case C-256/00 *Besix* [2002] ECR I-1699, paragraph 24; and Case C-281/02 *Owusu* [2005] ECR I-1383, paragraphs 38 to 40).

20 The grant of a measure such as that at issue in the main proceedings may also lead to a multiplication of the bases of jurisdiction in relation to one and the same legal relationship, which is contrary to the aims of the Convention (Case C-295/95 *Farrell* [1997] ECR I-1683, paragraph 13).

21 Whilst consequences such as those described in paragraphs 18 and 20 of this judgment are inherent in the application of Article 24 of the Convention, they are justifiable only to the extent that the measure sought pursues the aims of that article.

22 As noted in paragraph 17 of this judgment, that is not the case in the main proceedings.

23 Moreover, an application to hear a witness in circumstances such as those in the main proceedings could be used as a means of sidestepping the rules governing, on the basis of the same guarantees and with the same effects for all individuals, the transmission and handling of applications made by a court of a Member State intended to have an inquiry carried out in another Member State (see Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001 L 174, p. 1)).

24 These considerations are sufficient to prevent a measure, the aim of which is to allow the applicant to assess the chances or risks of proceedings, being regarded as a provisional or protective measure within the meaning of Article 24 of the Convention.

25 The answer to the questions referred must therefore be that Article 24 of the Convention must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of 'provisional, including protective, measures'.

Costs

26 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) rules as follows:

Article 24 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of 'provisional, including protective, measures'.

[Signatures]