OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 27 JANUARY 1982 [1]

Mr President,
Members of the Court,

The Hoge Raad [Supreme Court] of the Netherlands has applied to the Court for a preliminary ruling in the case W. v H.

These are the facts:

I — Proceedings are pending in the Netherlands between Mr H., a Netherlands national residing in Belgium, and his wife (W.), who is also a Netherlands national residing in Belgium, concerning the management by the husband of his wife's separate property. In the proceedings the wife wishes to use as evidence the terms of a "codicil" drawn up by her husband which is now in the possession of her advocate in Rotterdam.

The couple are also suing for divorce in the Netherlands.

The husband applied to the President of the Arrondissementsrechtbank [District Court], Rotterdam, seeking as a matter of urgent interlocutory relief an order requiring the delivery up of that "codicil" and an injunction restraining his wife from using its content against him in legal proceedings or otherwise.

The wife appeared at the interlocutory hearing and challenged the jurisdiction of the President and, in the alternative, contested the substance of the application for protective relief.

The President of the Rotterdam court held that he had jurisdiction but found against the husband on the substance.

The husband then appealed from that judgment to the Gerechtshof [Regional Court of Appeal], The Hague, and the wife cross-appealed on the ground that the President of the Rotterdam court had erred in finding that he had jurisdiction.

The Court of Appeal rejected the cross-appeal and in its decision on the main appeal overturned the interlocutory judgment. It ordered the "codicil" to be delivered up to the husband's advocate and granted an injunction restraining the wife from using the document upon penalty of a fine.

Both the husband and the wife appealed in cassation against that judgment, the wife lodging the main appeal, the husband a cross-appeal.

The main appeal once again raises the question of the jurisdiction of the President of the Rotterdam court to entertain the application for provisional relief to restrain use being made of the "codicil". These, then, are the circumstances in which the Hoge Raad of the Netherlands submits to the Court under Articles 1 and 2 of the Protocol on the interpretation of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters the following questions:

"1. Does the exclusion of 'wills and succession' from the application of the Convention, provided for by the opening words of the second paragraph of Article 1 and subparagraph (1) thereof, apply to

1 — Translated from the French

applications by the person making a codicil held by another person for the delivery up of that codicil, the destruction of photocopies, transcripts and reproductions thereof, and an injunction against holding or using (or causing to be held or used) any photocopy, transcript or reproduction of that document for the purpose of preventing the declarations contained in the codicil from being used against the person making the codicil as evidence in a legal dispute which does not relate to a will or succession?

2. Does the exclusion of 'rights in property arising out of a matrimonial relationship' from the application of the Convention, provided for by the opening words of the second paragraph of Article 1 and subparagraph (1) thereof, apply to applications as described in (a) above if they are made in order to prevent the declarations contained in the codicil from being used against the person making the codicil in a legal dispute about alleged unauthorized or improper management by that person of his wife's separate property, where that management must be regarded as being closely connected with proprietary relationships flowing directly from the marriage bond?

3. Does the concept of 'provisional, including protective, measures' referred to in Article 24 cover the possibility, provided for in the Eighteenth Section of Part 13 of the First Book of the Netherlands Code of Civil Procedure [Wetboek van Burgerlijke Rechtsvordering], of applying for interim relief in interlocutory proceedings? Does the fact that relief is sought in connection with other proceedings pending in the Netherlands affect the answer?

4. Must the entering of appearance by the defendant solely in order to contest the jurisdiction of the court, referred to in the second sentence of Article 18, be taken to cover a case where the defendant contests the court's jurisdiction and at the same time challenges in the alternative the substance of the application in case the court decides that it has jurisdiction?"

II — In civil and commercial matters, within the meaning of Article 1 of the Convention, the ordinary rule laid down in the first paragraph of Article 2 thereof confers jurisdiction on the courts of the State in which the defendant is domiciled. In the present case the wife is domiciled in Belgium.

However, rights in property arising out of a matrimonial relationship, wills and succession are among the matters excluded from the application of the Convention (Article 1 (1)). According to the appeal judgment, that rule means that the courts of the Netherlands have jurisdiction because, although the spouses are domiciled in Belgium, they are both Netherlands nationals and when the husband dies his property will probably devolve in accordance with the laws of the Netherlands.

But there are two exceptions to that exclusion.

First, under Article 18: "Apart from jurisdiction derived from other provisions of this Convention, a court of a

contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16."

Secondly, under Article 24: "Application may be made to the courts of a contracting State for such provisional, including protective, measures as may be available under the laws of that State, even if, under this Convention, the courts of another contracting State have jurisdiction as to the substance of the matter."

The Supreme Court of the Netherlands wonders whether, if either of those provisions is applicable, the President of the Rotterdam Court had jurisdiction to rule upon the husband's interlocutory application.

I think it would be useful to examine the last two questions first.

1. Proceedings relating to rights in property arising out of a matrimonial relationship, wills and succession are expressly *excluded* from the application of the Convention. Article 24 does not have the effect of conferring jurisdiction on the courts of a contracting State to order a provisional or protective measure unless the *substance of the action*, whilst falling within the jurisdiction of a court of another contracting State, concerns matters covered by the Convention. Therefore on no account may that article be used to circumvent the provision of public policy constituted by Article 1 of the Convention.

The Court decided in the *de Cavel* judgment of 27 March 1979 ([1979] ECR 1056) that, in relation to the matters covered by the Convention, no legal basis is to be found therein for drawing a distinction between provisional and definitive measures. Article 24 does not affect that conclusion at all because it expressly envisages cases in which provisional measures are ordered in a contracting State when, *"under the Convention"*, the courts of another contracting State have jurisdiction as to the substance of the matter. That article cannot therefore be relied on to bring within the scope of the Convention the adoption of provisional or protective measures relating to matters which are excluded from it.

2. Even supposing that the jurisdiction of Netherlands courts were excluded under Article 1, the Hoge Raad nevertheless wonders whether they would not still have jurisdiction owing to the fact that the wife has entered an appearance to contest not only the jurisdiction of the President of the Rotterdam court but also, in the alternative, the substance of the application (Article 18).

The question calls for two answers.

First, and by analogy with the observations which I made with regard to Article 24, it appears that, even if the defendant enters an appearance and does so not just to contest the jurisdiction, the conferment of jurisdiction which Article 18 provides for in such a case may not result in bringing within the scope of the

Convention a matter which is basically excluded from it by Article 1. Moreover, the second sentence of Article 18 states that "this rule shall not apply ... where another court has exclusive jurisdiction by virtue of Article 16"; however, the exclusive jurisdiction itself, dealt with by that article, relates only to actions in civil and commercial matters.

Secondly, the second sentence of Article 18 excludes the conferment of jurisdiction on a court of a contracting State other than that in which the defendant is domiciled, before which the defendant appears when he contests not only the jurisdiction of the court but also the substance of the application. In fact the Court has held in Case 150/80 *Elefanten Schuh* [1981] ECR 1671 that the rule on jurisdiction which the first sentence of Article 18 lays down does not operate even if the challenge to jurisdiction is not the primary submission or is not preliminary to any defence as to the substance; it need only precede what under the national law of the court seised is considered to be "the first defence addressed to it". Sir Gordon Slynn was more explicit in his opinion on the case when he stated that "a defendant's act in advancing arguments on the substance of the action does not necessarily indicate that he has submitted to the jurisdiction, if these arguments are *alternative* to his primary submission that the court has no jurisdiction".

In the *Rohr* judgment of 22 October 1981 the Court stated that Article 18 "allows the defendant not only to contest the jurisdiction but to submit at the same time in the alternative a defence on the substance of the action *without, however, losing his right to raise an objection of lack of jurisdiction.*"

3. Therefore the issue confronting the national court is confined to the question whether the substance of the action between the spouses is a matter pertaining to rights in property arising out of a matrimonial relationship or succession in the broad sense, or on the contrary to a "civil and commercial matter".

The first two questions have been put to the Court in a very direct form and it is not for the Court when ruling pursuant to the Protocol on the *interpretation* of the Brussels Convention to determine the nature of the husband's application.

To assist the court which has made the reference I would only wish to stress the following point which was brought out by the Court's decision in *de Cavel* cited above:

It is because of the specific nature of certain matters, in particular "the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession" that disputes relating to such matters are excluded from the scope of the Convention.

The enforced settlement on a provisional basis of "proprietary ... relationships between spouses in the course of proceedings for divorce ... is ... inseparable from questions relating to the status of persons raised by the dissolution of the matrimonial relationship and from the settlement of rights in property arising out of the matrimonial relationship".

Consequently, the term "rights in property arising out of a matrimonial relationship" includes "not only property arrangements specifically and exclusively

envisaged by certain national legal systems in the case of marriage but also any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof" (paragraph 7, p. 1066).

Disputes relating to the property of spouses suing for divorce may, therefore, depending on the circumstances, be closely connected with either:

questions relating to the status of persons; or

proprietary legal relationships resulting directly from the matrimonial relationship or the dissolution thereof; or

proprietary legal relations existing between the spouses which have no connection with the marriage.

The Convention applies only in the last case.

For my part I would point out that, according to the wording of the second question, the management conducted by the husband must be regarded "as being closely connected with proprietary relationships flowing directly from the marriage bond".

4. As to the succession or testamentary aspect of the dispute between the parties, I would merely observe that the rights, in support of which the wife intends to adduce in evidence the "codicil" drawn up by her husband, are only contingent in nature because they are based on future succession. In such circumstances it seems difficult to accept that a court to which an interlocutory application is made can order even a provisional or protective measure: a plaintiff in other proceedings pending may rely on an existent or contingent debt as against the defendant only on the basis of an already existing legal situation; by definition, however, the husband has not yet given rise to any succession.

In answer to the questions raised I submit that the Court should rule:

1. Judgments ordering provisional or protective measures under Article 24 of the Brussels Convention fall within the scope of the Convention as defined in Article 1 thereof provided that the action in connection with which such a measure is sought relates to proprietary relationships independent of the matrimonial relationship of the parties or the dissolution thereof.

2. The rule on jurisdiction laid down in Article 18 of the Convention does not apply where, in a matter falling within the scope of the Convention, the defendant enters an appearance to challenge the jurisdiction and at the same time submits in the alternative a defence as to the substance.