Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters if such management is closely connected with the relationship resulting directly from the marriage bond.

2. Article 24 of the Convention of 27 September 1968 may not be relied on to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded from it.

3. Article 18 of the Convention of 27 September 1968 must be interpreted as meaning that it 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 the right to raise an objection of lack of jurisdiction.

In Case 25/81

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 Hoge Raad der Nederlanden [Supreme Court of the Netherlands] for a preliminary ruling in the action pending before that court between

C. H. W., residing at Ekeren, Belgium, appellant in cassation against a judgment of the Gerechtshof [Regional Court of Appeal], The Hague, delivered between the parties and pronounced on 14 December 1979 and respondent in the cross-appeal in cassation, represented by O. de Savornin Lohman, Advocate at the Hoge Raad,

and

G. J. H., residing at Brasschaat, Belgium, respondent in the appeal in cassation and appellant in the cross-appeal in cassation against the said judgment, represented by P. Mout, also an Advocate at the Hoge Raad,

on the interpretation of Articles 1, 18 and 24 (possibly in conjunction with Article 6) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters concluded in Brussels on 27 September 1968.

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

According to the judgment making the reference for a preliminary ruling Mr H. and Mrs W., a married couple of Netherlands nationality who reside in Belgium and were married on 29 February 1972 under a marriage contract providing for a community of profit and loss between them, have started divorce proceedings in the Netherlands.

On 6 September 1978 shares owned by Mr H. in a private limited company registered in Rotterdam were attached on the application of his wife. The attachment was to secure a debt which Mrs W. claimed to have against her husband for his alleged unauthorized and therefore improper management of her separate property.

On 13 September 1978 Mrs W. summoned her husband before the Arrondissementsrechtbank [District Court], Rotterdam, seeking an order that he should pay damages to be determined upon inquiry, a declaration validating the attachment and a further declaration that the principle of profit and loss applied in the matrimonial relations between the parties.

By a writ of 18 October 1978 Mr H. summoned his wife before the President of the Arrondissementsrechtbank, Rotterdam, also, in order to have the attachment effected against him lifted. That application was subsequently withdrawn after the hearing. By the same summons Mr H. applied for the grant of

interlocutory relief and in substance asked the court to order his wife to deliver up to his counsel a document described as a codicil, to destroy any copy or reproduction of that document which might exist and to restrain Mrs W. from using the document in any proceedings or in any other manner whatsoever upon penalty of a fine. That document, written and signed by Mr H. in March 1978 bore the words: "Codicil G. J. H. To be opened after my death" and was placed in the safe at the couple's second home in Switzerland from which it was taken by the wife during an absence of her husband in July 1978.

The content of the codicil, which was known to Mrs W., was as follows:

"I hereby declare that all transactions in futures in silver, dollars and Dutch currency, which were entered into by me during 1977 and 1978, were concluded without the knowledge of my wife. I hereby direct that all eventual losses incurred on those transactions up to and including 5 January 1979 shall fall on my bank deposits. I hereby instruct my heir to ensure that my wife does not suffer any financial loss as a result of the transactions which I have entered into in those years for her and in her name."

In support of his application Mr H. claimed that the manner in which his wife had obtained possession of the document in issue was unlawful and he argued that while he was alive the document belonged to him alone. He also contended that because it was against his will the wife's action in taking possession of and retaining the document was unlawful as against him and that the document was incorrect in part, thus rendering any use thereof by Mrs W. unlawful.

Mrs W. made submissions on the substance although she claimed that the President of the Arrondissementsrechtbank did not have jurisdiction to entertain the dispute.

By judgment of 7 May 1979 the President of that court accepted that he had jurisdiction and found against Mr H. on the substance.

On 18 May 1979 Mr H. appealed against that judgment to the Gerechtshof, The Hague, seeking in substance that his application at first instance should be upheld. Mrs W. cross-appealed contending that the President had erred in considering he had jurisdiction to entertain her husband's applications.

By judgment of 14 December 1979 the Gerechtshof dismissed the cross-appeal. It accepted that the codicil, which was in issue in the proceedings and to which the applications related, was located in the Netherlands, namely with Mrs W's counsel, and that he intended to use the codicil as evidence in proceedings pending between the parties before the Rotterdam court; in those circumstances, especially since the parties were Netherlands nationals and therefore after his death the husband's estate would in all likelihood devolve according to Netherlands law, the husband could apply to the President of the Rotterdam court for urgent interlocutory relief and that the President had jurisdiction to decide the application. As regards the main appeal the Gerechtshof overturned the judgment of the President and in a new ruling ordered the delivery up of the document in issue to Mr H's counsel,

restrained Mrs W. from making any use thereof, and made the breach of its judgment subject to a fine.

Mrs W. appealed in cassation and Mr H. cross-appealed in cassation.

The issue which arose in the main appeal was whether the Gerechtshof was right to hold that the President of the Arrondissementsrechtbank, Rotterdam, had jurisdiction to entertain Mr H's application relating to the codicil in issue in the proceedings. The Hoge Raad considered that in order to resolve that issue it was necessary to determine whether or not the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters concluded in Brussels on 27 September 1978 was applicable.

According to the Hoge Raad, if the Convention is not applicable then the Gerechtshof's opinion that the urgent interim relief applied for in this case must be ordered in Rotterdam means that the President of the Rotterdam court has jurisdiction to entertain the applications for those measures. If the Convention does have application, however, the Hoge Raad believes that the question arises whether the effect of Article 24 or of Article 18 of the Convention is that the President of the Rotterdam court must be considered to have jurisdiction in the matter.

By judgment of 6 February 1981 the Hoge Raad therefore asked the court to give a preliminary ruling on the following questions in accordance with Articles 2 and 3 of the Protocol on the interpretation of the Convention by the Court of Justice:

(a) 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 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?

(b) 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?

(c) 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 ap-

plying for interim relief in interlocutory proceedings? Does the fact that the relief is sought in connection with other proceedings pending in the Netherlands affect the answer?

(d) 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?

The judgment making the reference for a preliminary ruling was registered at the Court on 17 March 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court written observations were submitted by the Commission of the European Communities, represented by A. McClellan acting as Agent and assisted by J. C. Schultsz, by Mr H., the respondent in the main action, represented by his Counsel, P. Mout, and by the Italian Government represented by its Agent, Arnaldo Squillante, and Oscar Fiumara, Avvocato dello Stato.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court asked the Netherlands Government, the Commission of the European Communities and the parties to answer the following questions:

"(a) What is the legal nature of a codicil under Netherlands law? Is it deemed to form part of the will in the law of succession or is it an independent disposition?

(b) In Netherland's legal theory, where the spouses live under joint matrimonial property arrangements does a document which is apparently intended to establish a balance between profit and loss in favour of the wife after the death of one of the parties come under proprietary rights arising out of a matrimonial relationship?

(c) Why should interlocutory applications for interim relief referred to in the Netherlands Code of Civil Procedure be considered or not be considered to be "provisional, including protective, measures" within the meaning of Article 24 of the Convention?".

The Commission, the Netherlands Government and the defendant in the main action have answered those questions within the time allowed.

II — Observations submitted pursuant to Article 20 of the Statute of the Court of Justice

1. The Commission takes the view in its observations that as far as the first question is concerned the exclusion of "wills and succession" does not arise in this case. It argues in particular that neither the nature nor the intended use of the document entitled "Codicil" enable that document to be considered as expressing a last will and, in any event, the nature of the document in question is not crucial for the purpose of answering the first question. The succession aspect should be left in the background rather

than brought to the fore especially since it is not the main subject-matter of the dispute and in any case no question of succession can arise until somebody dies.

It therefore submits that the second question of the Hoge Raad should be answered in the negative because it considers that the exclusion of "rights in property arising out of a matrimonial relationship" does not arise either in this case. After studying the relevant Netherlands law the Commission is led to the conclusion that as far as the management of the wife's property is concerned the husband is no different from a third party acting as agent. Any agent would be just as liable if he had exposed the principal's property to the risk of transactions in futures; the special relationship between husband and wife plays no part in the matter.

As regards the third question the Commission first of all observes that it in fact consists of two questions, namely whether the "provisional, including protective, measures" referred to in Article 24 of the Convention cover the procedure under Netherlands law for the grant of interim relief and whether it is material to that question that the interim relief is sought in conjunction with other proceedings pending in the Netherlands.

It first recalls the case-law of the Court on the need to construe the basic concepts of the Convention independently. After examining Netherlands legal theory and laws on proceedings for the grant of interlocutory relief it comes to the conclusion that the operative parts of interlocutory orders vary a good deal in nature and similarly the notion of jurisdiction is very wide. It accordingly submits that the answer to this question should not be restricted to Article 24 but should cover the whole Convention in particular with regard to Articles 16, 21 and 24.

Furthermore the Commission believes that the question how proceedings for the grant of interim relief are treated may not depend on such an unpredictable factor as the commencement of other proceedings and therefore the fact that the relief is sought in conjunction with proceedings pending in the Netherlands has no special significance for the purposes of the main question as to whether Article 24 of the Convention applies to such proceedings.

However the Commission submits that the interlocutory proceedings in this case for the lifting of attachment are covered by Article 24 of the Convention since they are closely related to protective and similar measures covered by that article.

In conclusion the Commission submits that the third question should be answered as follows:

"Except in cases concerning the lifting of attachment or other closely related applications the term "provisional, including protective, measures" appearing in Article 24 of the Convention does not cover the interlocutory proceedings referred to in Article 289 et seq. of the Netherlands Code of Civil Procedure. The fact that the interim relief is applied for in conjunction with other proceedings pending in the Netherlands is immaterial."

As regards the fourth question, as to the effect of a defendant's entering appearance and pleading in the alternative on the substance of the matter, the Commission repeats its view, previously submitted to the Court in connection with Case 150/80 *Elefanten Schuh GmbH* v *Jacqmain*, that it is for the domestic law of the State of origin to determine whether the "appearance" of a defendant, whose main submission to the court is that it has no jurisdiction and who makes his submissions on the substance only in the alternative, is entered solely in order to contest the jurisdiction within the meaning of Article 18 of the Convention.

2. The respondent, Mr H., contends that the first question should be answered in the affirmative as he believes that the dispute is essentially over a will. In his opinion the word "codicil" may be taken to mean a will and the crucial fact in this matter is that the legal character indicated by the person making it is determinative in regard to the outcome of the dispute.

The respondent submits that the second question should be answered in the affirmative as well. He contends that the proceedings for interlocutory relief in this case are directly connected to the proceedings concerning the management of property and therefore may be considered as forming part of those proceedings so that, together with the proceedings concerning the management of property, the proceedings for interim relief are one of the matters excluded from the application of the Convention on Jurisdiction and the Enforcement of Judgments.

As regards the third question he believes that owing to their legal nature and provisional character the proceedings under Netherlands law for interlocutory relief ought always to be regarded as falling under the "provisional measures" referred to in Article 24 of the Brussels Convention. In case a distinction must be made between interlocutory judgments which fall under the term provisional measures and those which do not, which in his view cannot be the case owing to the practical and legal problems which would arise, he submits in the alternative that, in view of the connection existing between the interlocutory proceedings for interim relief and the other proceedings pending in the Netherlands, the proceedings for interim relief in this case fall under the term "provisional measures" appearing in Article 24 of the Convention.

Finally, the respondent, Mr H., takes the view that, where a defendant enters an appearance in order to plead in the alternative on the substance of the case, it cannot be said that the sole purpose of that appearance is to contest the court's jurisdiction. Where he does so, the parties put arguments to the court not only as to its jurisdiction but also on the substance.

3. The Italian Government makes observations only on the fourth question asked by the Hoge Raad concerning the second sentence of Article 18 of the Convention.

It refers to the observations which it submitted in Case 27/81 in which a similar question was asked by the Court of Appeal, Versailles.

In its view the second sentence of Article 18 of the Convention does not prevent a defendant who contends that the court has no jurisdiction from submitting in the alternative other objections or grounds of defence and whether those submissions are compatible with the challenge to jurisdiction referred to in

the second sentence of Article 18 must be appraised in accordance with the provisions of procedural law of the contracting States.

It observes that it is accepted both in Italian law and that of other contracting States that they are compatible.

The Italian Government believes that the difference in wording of the French text on the one hand and the Italian, Dutch and German texts on the other, which use the words "soltanto", "uitsluitend" and "nur", cannot result in any other interpretation. In the case of the latter three texts the words in question have no other purpose than to reinforce the idea of appearance being justified by the need to challenge the jurisdiction more effectively, without at the same time cloaking any defect.

The Italian Government argues that any contrary view would be illogical because it would compel the defendant either not to appear and run the risk of the court, whose jurisdiction he refuses, deciding that it does have jurisdiction and hearing only the plaintiff's arguments, or to appear and restrict himself to contending that the court has no jurisdiction, thereby compelling the court to rule on its jurisdiction in any case, thus slowing down the proceedings. That, it claims, would open the door to serious abuse since any defendant wishing to prolong the proceedings could enter an appearance to challenge the jurisdiction of the court seised, even where that challenge is clearly unfounded, thereby extending the time required to resolve the dispute by forcing the court in any event to decide the issue of jurisdiction.

The Italian Government accordingly suggests that the answer to the question referred by the Hoge Raad should be that Article 18 of the Brussels Convention permits a defendant to make submissions on the substance at the same time as, but in the alternative, to, the challenge to jurisdiction envisaged in that article so that the court before which the matter is brought may, if necessary, rule on the substance and the challenge to jurisdicion in the same judgment.

III — Answers to the questions asked by the Court

1. In reply to the first question the Commission states that what in common parlance is called a "codicil" is governed by Article 982 of the Netherlands Civil Code in the part concerning the form of last wills which contains provisions as to the form of wills in general. Strictly speaking a codicil is not treated as part of the will but as a testamentary disposition. The Commission refers to Article 922 of the Civil Code which provides that "a testament" or "last will" is a document wherein is stated what a person wishes to happen after his death and which may be revoked by that person.

As regards the second question, the Commission observes that it mentions a "document which is apparently intended to establish a balance between profit and loss in favour of the wife after the death of one of the parties". Where, the

Commission continues, the case concerns a document which governs only matters which will arise or take effect only on a person's death it is necessary to be mindful on the one hand of Article 978 (a last will may be made only by a document in holograph or handwritten, by public document, or by secret or sealed disposition) and Article 1370 on the other (future interests may be the subject of an agreement). It adds that it is not possible to renounce a testamentary gift which has not taken effect or to deal with such gift even with the consent of the person whose estate is at issue, save as stipulated in Article 146 of Book I of the Civil Code. That article deals with gifts between spouses which may be made only where a marriage contract exists.

On the other hand, the question describes the case as one "where the spouses live under joint matrimonial property arrangements". In the Commission's view it is difficult to imagine a husband and wife living under matrimonial property arrangements which are not joint. It wonders here whether the matrimonial property arrangements are in fact the financial situation as between the spouses, and thus by definition joint, as regards their joint or their private property. It therefore believes that Question (b) is referring to matrimonial property arrangements under which there is some kind of joint ownership of property. From that it follows that to find a place for the document referred to in the question is not easy in Netherlands law. It has the impression that such a document ought in any event to come under either one of the articles cited above (Articles 146, 978 or 1370), which lay down requirements as to form or other conditions which are not fulfilled here, or under the chapter on the duties of agents which the Commission dealt with in its previous written observations.

As to the third question, the Commission refers to its written observations which basically deal with the issues raised in that question.

2. The Netherlands Government, in answer to the first question, states that Article 982 of the Netherlands Civil Code contained in the Fourth Section (on the form of wills) of Part 12 (Wills) of Book III of that Code provides for the possibility of making a codicil. That article reads as follows:

"1. A testator may by a single, handwritten document, dated and signed under hand make, without any other formality, dispositions for after his death but only for the purpose of appointing executors, making funeral arrangements, bequeathing clothes, personal effects, jewels and specific pieces of furniture.

2. Such a document may be revoked by a document under hand in the same way."

According to the Netherlands Government a document under hand, as referred to in Article 982 of the Civil Code, must be understood to mean a will within the meaning of Article 922 of the Civil Code (contained in the First

Section of Part 12 of Book III). That article reads: "A testament or last will is a document wherein is stated what a person wishes to happen after his death and which may be revoked by that person".

In its opinion, therefore, the questions may be answered as follows:

Under Netherlands law a codicil is a last will or testament even if it does not contain any testamentary dispositions. It should also be observed that only a limited number of dispositions, which are listed in detail, may be made by codicil.

As regards the second question, the Netherlands Government states that for the purpose of its reply it assumes that the document in question has been drawn up unilaterally by one of the spouses and also that the marriage is one in which there is no joint ownership of property. It considers that under Netherlands law such a document does not fall within matrimonial property rights. It may well have importance in connection with the management of property which is not jointly owned by the spouses and it cites here Article 91 of the Netherlands Civil Code:

"Where one of the spouses confers the management of his or her property on the other, or where the court has directed the other spouse to manage that property, that spouse's liability for his or her management shall be that of an agent, bearing in mind the special relationship between the spouses and the nature of the property."

It points out that this provision does not fall within matrimonial property rights however but is contained in Part 6 of Book I of the Civil Code: "Rights and duties of spouses".

As regards the third question, the Netherlands Government states that interlocutory proceedings for interim relief are special arrangements for urgent cases which, if not protective in nature, are at all events provisional. The provisional nature of decisions on interlocutory applications referred to in Article 289 of the Netherlands Code of Civil Procedure finds expression in Article 292 of that Code which provides that: "interlocutory judgments shall not affect the outcome of the main action". The Netherlands Government concludes that a decision on an interlocutory application may therefore be regarded as a "provisional or protective measure" within the meaning of Article 24 of the Convention.

3. As regards the first question, the respondent in the main action, Mr H., observes that the word "codicil" does not appear in Dutch legislation. In Netherlands legal terminology it means the document referred to in Article 982 of the Netherlands Civil Code. He states with reference to that article and the position it occupies in that Code that a codicil is a specific kind of last will. He invokes academic opinion according to which the rules on testamentary capacity or succession and those relating to revocation or invalidity of wills are likewise applicable to these dispositions.

Mr H. takes the view that codicils are also covered by the unwritten rule

whereby a document which the person who wrote it calls a "last will" or something similar is considered in general and by lawyers to be a last will for as long as that person is alive, even if its content may not be valid for some reason or other.

As far as the Court's second question is concerned, the respondent thinks that the answer must be in the affirmative owing to the fact that the document referred to in the question contains an amendment of the terms of the marriage contract. He observes that under Netherlands law the amendment of the terms of a marriage contract is dealt with within matrimonial property rights (Article 118, Book I of the Civil Code).

He adds, however, that his answer to the second question does not mean that he believes that the codicil in question is a document as referred to in the question. In so answering the question Mr H. still maintains his view that as long as he is alive the document which he calls a codicil must be treated as a codicil in law. Others may properly take cognizance of the document, use it or decide its legal nature only after his death.

As regards the third question, the respondent thinks that interlocutory applications for interim relief as referred to in Article 189 of the Netherlands Code of Civil Procedure must be regarded as provisional or protective measures within the meaning of Article 24 of the Brussels Convention because Article 292 of the Code states that "interlocutory judgments shall not affect the outcome of the main action" and because a judgment granting interlocutory relief does not decide the dispute.

He observes that any interlocutory proceedings may be followed by main proceedings although that rarely happens in practice and that according to academic opinion it may be unlawful to enforce an interlocutory judgment.

IV — Oral procedure

At the hearing on 18 November 1981 oral argument was presented by the Commission of the European Communities represented by Anthony McClellan, acting as Agent, and J. C. Schultsz, of the Amsterdam Bar.

The Advocate General delivered her opinion at the sitting on 27 January 1982.

Decision

By judgment dated 6 February 1981 which was received at the Court on 17 March 1981 the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] referred to the Court for a preliminary ruling 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 (hereinafter referred to as "the Convention") four questions as to the interpretation of Articles 1, 18 and 24 of that Convention.

2 Those questions were raised in the context of proceedings between a married couple of Netherlands nationality domiciled in Belgium concerning the husband's management of his wife's separate property. Because the wife wished to produce in evidence a document drawn up by the husband marked "codicil" the terms of which were intended to exempt the wife's separate property from the liabilities resulting from his management of that property, the husband made an application to the President of the Arrondissementsrechtbank [District Court], Rotterdam, for an order requiring the document to be returned to him and an injunction against its being used as evidence.

3 The jurisdiction of the President of the Arrondissementsrechtbank to order delivery up of the document was challenged and the case was brought before the Gerechtshof [Regional Court of Appeal], The Hague, and then before the Hoge Raad which decided that an interpretation of the Convention was needed to resolve the dispute and referred the following questions to the Court:

"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 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 Convention, provided for by the opening words of the second paragraph of Article 1 and subparagraph (1) thereof, apply to applications as described in 1. 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 the 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?"

The first and second questions

4 The issue raised by the first and second questions is whether an application for a provisional measure for the return of a document marked "codicil" which is likely to be used as evidence in an action relating to a husband's management of his wife's separate property should be excluded from the scope of the Convention in accordance with the second paragraph of Article 1 thereof because it is related to either "wills and succession" or "rights in property arising out of a matrimonial relationship".

5 The second question, relating to "rights in property arising out of a matrimonial relationship" within the meaning of Article 1 of the Convention, should be examined first.

6 As the Court held in its judgment of 27 March 1979 in Case 143/78 *de Cavel* [1979] ECR 1055 that term 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.

7 By its very wording the second question has in view a case in which the management of the wife's property in question must be considered as being closely connected with the proprietary relationship between the spouses flowing directly from their marriage bond.

8 Therefore an application for provisional measures to secure the delivery up of a document in order to prevent the statements which it contains from being used as evidence in an action concerning the management of the wife's property must also be considered to be connected with rights in property arising out of a matrimonial relationship within the meaning of the Convention because of its ancillary nature.

9 Therefore the answer to the second question must be that an application for provisional measures to secure the delivery up of a document in order to prevent it from being used as evidence in an action concerning a husband's management of his wife's property does not fall within the scope of the Convention if such management is closely connected with the proprietary relationship resulting directly from the marriage bond.

10 In view of that answer there is no need to reply to the first question.

The third question

11 The foregoing conclusion is not affected by Article 24 of the Convention which states 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".

12 That provision in fact has in view cases in which provisional measures are ordered in a contracting State where "under this Convention" a court of another contracting State has jurisdiction as to the substance of the matter. Therefore it may not be relied on to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded from it. That is how the third question must be answered.

The fourth question

13 As to the fourth question, it suffices to recall that in its judgments of 24 June 1981 in Case 150/80 *Elefanten Schuh GmbH* [1981] ECR 1671 and of 22 October 1981 in Case 27/81 *Rohr* [1981] ECR 2431 the Court held that Article 18 of the Convention must be interpreted as meaning that it 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.

Costs

14 The costs incurred by the government of the Italian Republic and the Commission of the European Communities which have submitted observations to the Court 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 national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question submitted to it by the Hoge Raad der Nederlanden by judgment of 6 February 1981, hereby rules:

1. An application for provisional measures to secure the delivery up of a document in order to prevent it from being used as evidence in an action concerning a husband's management of his wife's property does not fall within the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters if such management is closely connected with the proprietary relationship resulting directly from the marriage bond.

2. Article 24 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters may not be relied on to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded from it.

3. Article 18 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that it 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 the right to raise an objection of lack of jurisdiction.

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 31 March 1982.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President