European Court of Justice, 17 November 1998, Van Uden v Deco-Line

PRIVATE INTERNATIONAL LAW

Jurisdiction

- **Jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.**

It must therefore be concluded that where, as in the case in the main proceedings, the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

- **Conditional on the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.**

In that regard, it must be remembered that 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 (Reichert and Kockler, cited above, paragraph 34).

38. The granting of this type of measure requires particular care on the part of the court in question and detailed knowledge of the actual circumstances in which the measures sought are to take effect. Depending on each case and commercial practices in particular, the court must be able to place a time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered (**Case 125/79 Denilauler v Couchet Frères [1980] ECR 1553, paragraph 15**). In that regard, the Court held at paragraph 16 of Denilauler that the courts of the place — or, in any event, of the Contracting State — where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised. It follows that the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.

- **It further follows that a court ordering measures on the basis of Article 24 must take into consideration the need to impose conditions or stipulations such as to guarantee their provisional or protective character.**

- **Interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 unless, first, repay-ment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.**

Here, it must be noted that it is not possible to rule out in advance, in a general and abstract manner, that interim payment of a contractual consideration, even in an amount corresponding to that sought as principal relief, may be necessary in order to ensure the practical effect of the decision on the substance of the case and may, in certain cases, appear justified with regard to the interests involved (see, in the context of Community law, Case C-393/96 P(R) Antonissen v Council and Commission [1997] ECR I-441, paragraph 37).

6. However, an order for interim payment of a sum of money is, by its very nature, such that it may preempt the decision on the substance of the case. If, moreover, the plaintiff were entitled to secure interim payment of a contractual consideration before the courts of the place where he is himself domiciled, where those courts have no jurisdiction over the substance of the case under Articles 2 to 18 of the Convention, and thereafter to have the order in question recognised and enforced in the defendant's State, the rules of jurisdiction laid down by the Convention could be circumvented. Consequently, interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

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European Court of Justice, 17 November 1998
(G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch, P. Jann G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray,

D.A.O. Edward, H. Ragnemalm L. Sevón and M. Wathelet)
JUDGMENT OF THE COURT
17 November 1998 (1)
(Brussels Convention — Arbitration clause — Interim payment — Meaning of 'provisional measures‘)
In Case C-391/95,
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 for a preliminary ruling in the proceedings pending before that court between
Van Uden Maritime BV, trading as Van Uden Africa Line,
and
Kommanditgesellschaft in Firma Deco-Line and Another
on the interpretation of Article 1, second paragraph, point 4, Article 3, Article 5, point 1, and Article 24 of the Convention of 27 September 1968, cited above (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended text — p. 77), and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1),
THE COURT,
composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch, P. Jann (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm (Rapporteur), L. Sevón and M. Wathelet, Judges,
Advocate General: P. Léger,
Registrar: D. Louterman-Hubeau, Principal Administrator,
after considering the written observations submitted on behalf of:
— Van Uden Maritime BV, trading as Van Uden Africa Line, by L. Ebbekink, of the Hague Bar,
— Kommanditgesellschaft in Firma Deco-Line and Another, by J.L. de Wijkerslooth, of the Hague Bar,
— the German Government, by J. Pirrung, Ministerialrat in the Federal Ministry of Justice, acting as Agent,
— the United Kingdom Government, by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by V.V. Veeder QC, and
— the Commission of the European Communities, by B.J. Drijber, of its Legal Service, acting as Agent,
having regard to the Report for the Hearing,
after hearing the oral observations of the German Government, the United Kingdom Government and the Commission at the hearing on 22 April 1997,
after hearing the Opinion of the Advocate General at the sitting on 10 June 1997,
gives the following
Judgment

1. By judgment of 8 December 1995, received at the Court on 14 December 1995, 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
eight questions on the interpretation of Article 1, second paragraph, point 4, Article 3, Article 5, point 1, and Article 24 of the Convention of 27 September 1968, cited above (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended text — p. 77), and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (hereinafter 'the Convention‘).
2. Those questions were raised in the context of a dispute between Van Uden Maritime BV ('Van Uden‘), established at Rotterdam, the Netherlands, and Kommanditgesellschaft in Firma Deco-Line and Another ('Deco-Line‘), of Hamburg, Germany, concerning an application for interim relief (in kort geding proceedings) relating to the payment of debts arising under a contract containing an arbitration clause.
3. Under the first paragraph of Article 1, the Convention is to apply in civil and commercial matters. The second paragraph provides, however, under point 4, that it is not to apply to arbitration.
4. Under Article 2 of the Convention, the general rule of jurisdiction is that persons domiciled in a Contracting State are, whatever their nationality, to be sued in the courts of that State.
5. Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in the Convention. The second paragraph of Article 3 lists the rules of exorbitant jurisdiction which are not to be applicable against persons domiciled in another Contracting State, including Articles 126(3) and 127 of the Netherlands Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering, hereinafter 'the Code of Civil Procedure‘).
6. Under Article 5, point 1, of the Convention, a person domiciled in a Contracting State may, in matters relating to a contract, be sued, in another Contracting State, in the courts for the place of performance of the obligation in question.
7. Article 24 of the Convention, which deals specifically with provisional and protective measures, provides:
'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.‘
8. In March 1993 Van Uden and Deco-Line concluded a 'slot/space charter agreement‘, under which Van Uden undertook to make available to Deco-Line cargo space

on board vessels operated by Van Uden, either on its own account or
in association with other shipping lines, on a liner service between northern or western parts of Europe and west Africa. In return, Deco-Line was to pay charter hire in accordance with the rates agreed between the parties.
9. Van Uden instituted arbitration proceedings in the Netherlands pursuant to the agreement, on the ground that Deco-Line had failed to pay certain invoices submitted to it by Van Uden.
10. Van Uden also applied to the President of the Rechtbank (District Court), Rotterdam, for interim relief on the grounds that Deco-Line was not displaying the necessary diligence in the appointment of arbitrators and that non-payment of its invoices was disturbing its cash flow. In its application, it sought an order against Deco-Line for payment of DM 837 919.13 to cover four debts due under the agreement.
11. In those proceedings, Deco-Line objected, first, that the Netherlands court had no jurisdiction to entertain the claims. Being established in Germany, it could be sued only before the German courts.
12. The President of the Rechtbank dismissed that objection on the ground that an order sought as interim relief must be regarded as a provisional measure within the meaning of Article 24 of the Convention.
13. Referring to Article 126(3) of the Code of Civil Procedure, he decided that, as court of the plaintiff's domicile, he had jurisdiction to entertain an application made by a plaintiff residing in the Netherlands against a defendant with no known domicile or recognised place of residence there. He further concluded that the case had the requisite minimum connection with Netherlands law, for two reasons: (i) Deco-Line was engaged in international trade and would thus become a creditor in the Netherlands, so that any judgment against it could be enforced there, and (ii) such a judgment could also be enforced in Germany.
14. Finally, the President of the Rechtbank took the view that his jurisdiction was in no way affected by the fact that the parties had agreed to have their dispute determined by arbitration in the Netherlands since, under Article 1022(2) of the Code of Civil Procedure, an arbitration clause cannot preclude a party's right to seek interim relief.
15. By provisionally enforceable judgment of 21 June 1994, the President of the Rechtbank, Rotterdam, therefore ordered Deco-Line to pay Van Uden the sum of DM 377 625.35, together with interest at the statutory rate.
16. On appeal by Deco-Line, the Gerechtshof te s'-Gravenhage (Regional Court of Appeal, The Hague) quashed that order. In its view, the fact that the case had to have a sufficient connection with Netherlands law meant, in the context of the Convention, that it must be possible for the interim order applied for to be enforced in the Netherlands. The mere fact that Deco-Line could acquire assets there in the future was, it considered, insufficient for that purpose.
17. A further appeal against that decision was brought before the Hoge Raad der Nederlanden, which stayed proceedings and requested a preliminary ruling by the Court on the following questions:
'(1) Where an obligation to pay a sum or sums due under a contract must be performed in a Contracting State — so that, under Article 5, point 1, of the Brussels Convention, the creditor is entitled to sue his defaulting debtor in the courts of that State with a view to obtaining performance, even though the debtor is domiciled in another Contracting State — do the courts of the first-mentioned State (for that same reason) have jurisdiction also to hear and determine a claim brought by the creditor against his debtor in interim [kort geding] proceedings for an order requiring the debtor, by provisionally enforceable judgment, to pay a sum which, in the view of the court hearing the interim application, is very probably due to the creditor, or do additional conditions apply in relation to the jurisdiction of the court hearing the interim application, for example the condition that the relief sought from that court must take effect (or be capable of taking effect) in the Contracting State concerned?
(2) Does it make any difference to the answer to Question 1 whether the contract between the parties contains an arbitration clause and, if so, what the place of arbitration is according to that clause?
(3) If the answer to Question 1 is that, in order for the court hearing the interim application to have jurisdiction, the relief sought from it must also take effect (or be capable of taking effect) in the Contracting State concerned, does that mean that the order applied for must be capable of enforcement in that State, and is it then necessary for this condition to be fulfilled when the interim application is made, or is it sufficient that it can be reasonably expected to be fulfilled in the future?
(4) Does the possibility, provided for in Article 289 et seq. of the Netherlands Code of Civil Procedure, of applying on grounds of pressing urgency to the President of the Arrondissementsrechtbank for a provisionally enforceable judgment constitute a ”provisional” or ”protective” measure within the meaning of Article 24 of the Brussels Convention?
(5) Does it make any difference to the answer to Question 4 whether substantive proceedings on the main issue are, or may become, pending and, if so, is it material that arbitration proceedings had started in the same case?
(6) Does it make any difference to the answer to Question 4 that the interim relief sought is an order requiring performance of an obligation of payment, as referred to in Question 1?
(7) If Question 4 must be answered in the affirmative, and ”the courts of another Contracting State have jurisdiction as to the substance of the matter”, must Article 24, and in particular the reference therein to ”such provisional ... measures as may be available under the law of [a Contracting] State”, be interpreted as meaning that the court hearing the application for interim measures has (for that same reason) jurisdiction if it has jurisdiction under provisions of its national law, even

where those provisions are referred to in the second paragraph of Article 3 of the Brussels Convention, or is its jurisdiction in the latter case conditional on the fulfilment of additional conditions, for example that the interim relief sought from that court must take effect, or be capable of taking effect, in the Contracting State concerned?

(8) If the answer to Question 7 must be that, in order for the court hearing the application for interim relief to have jurisdiction, it is also required that the relief sought from it must take effect (or be capable of taking effect) in the Contracting State concerned, does that mean that the order applied for must be capable of enforcement in that State, and is it then necessary for this condition to be fulfilled when the application for interim relief is made, or is it sufficient that it can reasonably be expected to be fulfilled in the future?'

18. The questions raised relate to the jurisdiction, under the Convention, of a court hearing applications for interim relief. The national court wishes to know both whether such jurisdiction could be established on the basis of Article 5, point 1, of the Convention (Questions 1 to 3) and whether it could be established on the basis of Article 24 (Questions 4 to 8). In both cases, the national court's questions relate to

— first, the relevance of the fact that the dispute in question is subject, under the terms of the contract, to arbitration,

— next, whether the jurisdiction of the court hearing the application for interim relief is subject to the condition that the measure sought must take effect or be capable of taking effect in the State of that court, in particular that it must be enforceable there, and whether it is necessary that such a condition should be met at the time when the application is made, and

— finally, the relevance of the fact that the case relates to a claim for interim payment of a contractual consideration.

19. The first point to be made, as regards the jurisdiction of a court hearing an application for interim relief, is that it is accepted that a court having jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention also has jurisdiction to order any provisional or protective measures which may prove necessary.

20. In addition, Article 24, in Section 9 of the Convention, adds a rule of jurisdiction falling outside the system set out in Articles 2 and 5 to 18, whereby a court may order provisional or protective measures even if it does not have jurisdiction as to the substance of the case. Under that provision, the measures available are those provided for by the law of the State of the court to which application is made.

21. Article 5, point 1, of the Convention provides that in matters relating to a contract a defendant may be sued, in a Contracting State other than that in which he is domiciled, in the courts for the place of performance of the obligation in question.

22. Thus, the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the Convention also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions, such as that mentioned in the national court's third question.

23. However, in the present case, the contract signed between Van Uden and Deco-Line contains an arbitration clause.

24. Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention. Consequently, a party to such a contract is not in a position to make an application for provisional or protective measures to a court that would have jurisdiction under the Convention as to the substance of the case.

25. In such a case, it is only under Article 24 that a court may be empowered under the Convention to order provisional or protective measures.

26. In that connection, Deco-Line and the German and United Kingdom Governments agreed that, since the parties have agreed to submit their dispute to arbitration, interim proceedings also fall outside the scope of the Convention. The German Government argues in particular that measures sought in interim proceedings, when they are intrinsically bound up with the subject-matter of an arbitration procedure, fall outside the scope of the Convention. In the United Kingdom Government's view, the measures sought in the present case may be regarded as ancillary to the arbitration procedure and are thus excluded from the scope of the Convention.

27. Van Uden and the Commission, however, contend that the existence of an arbitration clause does not have the effect of excluding an application for interim measures from the scope of the Convention. The Commission points out that the subject-matter of the dispute is decisive and that the issue underlying the interim proceedings concerns the performance of a contractual obligation — a matter which falls within the scope of the Convention.

28. It must first be borne in mind here that Article 24 of the Convention applies even if a court of another Contracting State has jurisdiction as to the substance of the case, provided that the subject-matter of the dispute falls within the scope ratione materiae of the Convention, which covers civil and commercial matters.

29. Thus the mere fact that proceedings have been, or may be, commenced on the substance of the case before a court of a Contracting State does not deprive a court of another Contracting State of its jurisdiction under Article 24 of the Convention.

30. However, Article 24 cannot be relied on to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded from it (Case 143/78 De Cavel v De Cavel [1979] ECR 1055, paragraph 9).

31. Under Article 1, second paragraph, point 4, of the Convention, arbitration is excluded from its scope. By that provision, the Contracting Parties intended to ex-

clude arbitration in its entirety, including proceedings brought before national courts (Case C-190/89 Rich v Società Italiana Impianti [1991] ECR I-3855, paragraph 18).

32. The experts' report drawn up on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention (OJ 1979 C 59, p. 71, at pp. 92-93) specifies that the Convention does not apply to judgments determining whether an arbitration agreement is valid or not or, because it is invalid, ordering the parties not to continue the arbitration proceedings, or to proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. Also excluded from the scope of the Convention are proceedings ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time-limit for making awards.

33. However, it must be noted in that regard that provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect (see Case C-261/90 Reichert and Kockler v Dresdner Bank [1992] ECR I-2149, paragraph 32).

34. It must therefore be concluded that where, as in the case in the main proceedings, the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

35. Next, as regards the conditions set out in the Convention for the grant of an application under Article 24, Van Uden submits that no further condition need be fulfilled for the court hearing such an application to have jurisdiction provided that it has jurisdiction under provisions of its national law even where those provisions are among those listed in the second paragraph of Article 3 of the Convention. Deco-Line, however, maintains that the imposition of stricter conditions is clearly justified and that, in any event, the fact that Article 24 refers to national rules on jurisdiction implies that the court in question is free to hold that its jurisdiction is subject to such conditions.

36. In the German Government's view, Article 24 does not authorise a court acting on the basis of one of the rules of jurisdiction listed in the second paragraph of Article 3 of the Convention to order provisional measures unless the rule of jurisdiction in question is subject to the urgency of the decision or based upon that reasoning and unless the provisional measure, at the time when it is ordered, has a sufficient connecting link with the State of that court. The latter condition is satisfied when the provisional measure can be enforced in that State.

37. In that regard, it must be remembered that 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 (Reichert and Kockler, cited above, paragraph 34).

38. The granting of this type of measure requires particular care on the part of the court in question and detailed knowledge of the actual circumstances in which the measures sought are to take effect. Depending on each case and commercial practices in particular, the court must be able to place a time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered (**Case 125/79 Denilauler v Couchet Frères [1980] ECR 1553, paragraph 15**).

39. In that regard, the Court held at paragraph 16 of Denilauler that the courts of the place — or, in any event, of the Contracting State — where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised.

40. It follows that the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.

41. It further follows that a court ordering measures on the basis of Article 24 must take into consideration the need to impose conditions or stipulations such as to guarantee their provisional or protective character.

42. With regard more particularly to the fact that the national court has in this instance based its jurisdiction on one of the national provisions listed in the second paragraph of Article 3 of the Convention, it must be borne in mind that, in accordance with the first paragraph of that article, persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of Title II, that is to say Articles 5 to 18, of the Convention. Consequently, the prohibition in Article 3 of reliance on rules of exorbitant jurisdiction does not apply to the special regime provided for by Article 24.

43. Finally, with regard to the question whether an interim order requiring payment of a contractual consideration may be classified as a provisional measure within the meaning of Article 24 of the Convention,

Deco-Line and the Government of the United Kingdom argue that it cannot. The German Government considers that the main proceedings appear to fall outside the definition of provisional or protective measures.

44. Van Uden and the Commission do not share that view. In the Commission's view, provisional measures must be taken to mean those whose validity lapses when the main issue is determined or on the expiry of a specified period. They may comprise positive measures, that is to say an order to perform some act such as the handing-over of property or the payment of a sum of money.

45. Here, it must be noted that it is not possible to rule out in advance, in a general and abstract manner, that interim payment of a contractual consideration, even in an amount corresponding to that sought as principal relief, may be necessary in order to ensure the practical effect of the decision on the substance of the case and may, in certain cases, appear justified with regard to the interests involved (see, in the context of Community law, Case C-393/96 P(R) Antonissen v Council and Commission [1997] ECR I-441, paragraph 37).

6. However, an order for interim payment of a sum of money is, by its very nature, such that it may preempt the decision on the substance of the case. If, moreover, the plaintiff were entitled to secure interim payment of a contractual consideration before the courts of the place where he is himself domiciled, where those courts have no jurisdiction over the substance of the case under Articles 2 to 18 of the Convention, and thereafter to have the order in question recognised and enforced in the defendant's State, the rules of jurisdiction laid down by the Convention could be circumvented.

47. Consequently, interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

48. In the light of the foregoing considerations, the answer to the first and second questions must be that

— on a proper construction of Article 5, point 1, of the Convention, the court which has jurisdiction by virtue of that provision also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions, and

— where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, no provisional or protective measures may be ordered on thebasis of Article 5, point 1, of the Convention.

The answer to the fifth question must be that

— where the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

Finally, the answer to the fourth, sixth, seventh and eighth questions must be that

— on a proper construction, the granting of provisional or protective measures on the basis of Article 24 of the Convention is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought, and

— interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 of the Convention unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

Costs

49. The costs incurred by the German and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 8 December 1995, hereby rules:

1. On a proper construction of Article 5, point 1, 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, Ireland and the United Kingdom of Great Britain and Northern Ireland, and by the Convention of 25 October 1982 on the accession of the Hellenic Republic, the court which has jurisdiction by virtue of that provision also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions.

2. Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, no provisional or protective measures may be ordered on the basis of Article 5, point 1, of the Convention of 27 September 1968.

3. Where the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention of 27 September 1968, that Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of

the case and even where those proceedings are to be conducted before arbitrators.

4. On a proper construction, the granting of provisional or protective measures on the basis of Article 24 of the Convention of 27 September 1968 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.

5. Interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 of the Convention of 27 September 1968 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.