

European Court of Justice, 21 May 1980, Denilauler

LITIGATION

Brussels Convention – Article 24

- National courts are 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 ordered

The granting of provisional and protective measures requires particular care on the part of the court and detailed knowledge of the actual circumstances in which the measure is 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 authorization subject to all conditions guaranteeing the provisional or protective character of the measure ordered. 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 ordered

- Convention is fundamentally concerned with decisions which have been the subject of an inquiry in adversary proceedings

The convention is fundamentally concerned with judicial decisions which, before the recognition and enforcement of them are sought in a state other than the state of origin, have been, or have been capable of being, the subject in that state of origin and under various procedures, of an inquiry in adversary proceedings.

These provisions were clearly not designed in order to be applied to judgments which, under the national law of a contracting state, are intended to be delivered in the absence of the party against whom they are directed and to be enforced without prior service on him.

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European Court of Justice, 21 May 1980

IN CASE 125/79

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 Oberlandesgericht (higher regional court) Frankfurt Am Main, for a preliminary ruling in proceedings pending before that court between Bernard Denilauler, 26 Spessartstrasse, 6204 Taunusstein 2

Defendant and appellant,

And

S.N.C. Couchet Freres, Andrezieux-Boutheon (France)

Plaintiff and respondent,

Subject of the case

On the interpretation of articles 24, 27, 34, 36, 46 and 47 of the convention of 27 September 1968 (official journal 1978, I 304, p. 36),

Grounds

1 By an order of 25 July 1979 received at the court on 6 August 1979 the Oberlandesgericht (higher regional court) Frankfurt Am Main referred to the court under the protocol 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) (official journal 1978, I 304, p. 36) four questions relating to the interpretation of articles 24, 27 (2), the second paragraph of article 34, the first paragraph of articles 36 and articles 46 (2) and 47 (1) of the convention.

2 In 1978 a dispute between a creditor, Couchet Freres, and its debtor, Denilauler, was brought before the Tribunal de Grande Instance (regional court), Montbrison (France). On 7 February 1979 the president of that court, exercising the powers conferred on him by article 48 of the French code of civil procedure at the request of the creditor and without the other party's having been summoned to appear, made an order which was declared provisionally enforceable, authorizing the creditor to freeze the account of the debtor at a bank in Frankfurt Am Main as security for a debt estimated at FF 130 000. Under French law such freezing of assets ("saisie conservatoire") which the creditor was thus authorized to carry out may be affected without prior service of the order on the debtor whose assets are seized.

3 The questions before the court have been referred to it pursuant to proceedings before German courts for the issue of an order for the enforcement of the French order and also for a "pfandungsbeschluss" (attachment order) seizing the funds in the bank's possession. These proceedings were first before the president of the Landgericht (regional court) Wiesbaden who ordered enforcement on 23 March 1979 resulting in seizure of the funds on 28 March, all without the debtor's having been a party to the proceedings. It seems that the order by the president of the Landgericht Wiesbaden was not served on the debtor until 3 May 1979; the debtor immediately appealed against it before the Oberlandesgericht Frankfurt Am Main which referred to the court the questions now under consideration.

4 These questions first seek to know whether decisions of the judicial authorities of a contracting state ordering provisional and protective measures, where the party against whom they are directed has not been summoned to appear and does not become aware of them until after their enforcement, may be recognized and made enforceable in another contracting state without prior service on the party against whom they are directed (questions 1 and 2). They secondly seek clarification of

the objections which the party against whom enforcement is sought may raise when lodging the appeal against the enforcement order as provided by article 36 of the convention (questions 3 and 4).

Questions 1 and 2

5 Questions 1 and 2, which should be answered together, read as follows:

"1. Do articles 27 (2) and 46 (2) also apply to proceedings in which provisional protective measures are taken without the opposite party's being heard?

2. Is article 47 (1) of the convention to be interpreted as meaning that the party applying for enforcement must also produce the documents which establish that the judgment of which enforcement is sought has been served, even if that judgment concerns a provisional and purely protective measure?"

6 The commission, the Italian government and the plaintiff in the main action express the opinion in their observations that such judgments must be recognized as enforceable in the contracting state addressed without prior service on the party against which they are directed.

The specific object of this type of provisional or protective measure is thought to be to produce a surprise effect intended to safeguard the threatened rights of the party seeking them by preventing the party against whom they are directed from removing the assets in its possession, whether they be the subject-matter of the dispute or constitute the creditor's security. To stipulate that the recognition and the enforcement of such types of judgments must be subject to their prior service on the other party and from the stage of the proceedings in the contracting state of origin would, it is said, make them totally meaningless.

The United Kingdom government, on the other hand, is of the opinion that the recognition and the enforcement of these judgments must be subject to the conditions set out in articles, 27, 46 and 47 as regards service on the other party. It acknowledges that this requirement removes the surprise effect peculiar to such decisions and destroys all their practical value so that it virtually amounts to a refusal to recognize and enforce the decisions in question. However, it feels that the effect of this is not so serious as what it regards the intolerable risks which would have to be run by undertakings having assets in different contracting states as a result of a procedure which obliges the courts of the state addressed to authorize measures freezing assets located in that state without the owner of those assets having ever had the opportunity to put forward his version of the case either before the court of the state of origin or before the court of the state addressed when such assets may have been legitimately intended to meet other obligations. Only the court having jurisdiction in the state in which the assets are located is in a position to determine, in the full knowledge of the facts of the case, the necessity to authorize this type of provisional or protective measure. The United Kingdom government further contends that its point of view does not create a lacuna in the scheme of the convention because article 24 enables any party to apply to the courts of a contracting

state for such provisional or protective measures as may be available under the law of that state, even if the courts of another contracting state have jurisdiction as to the substance of the matter.

7 Article 27 of the convention sets out the conditions to be fulfilled for the recognition in a contracting state of judgments given in another contracting state. Under article 27 (2) a judgment shall not be recognized "if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence". Article 46 (2) stipulates that a party seeking recognition or applying for enforcement of a judgment given in default in another contracting state must produce amongst other documents the document which establishes that the party in default was served with the document instituting the proceedings or notice thereof.

8 These provisions were clearly not designed in order to be applied to judgments which, under the national law of a contracting state, are intended to be delivered in the absence of the party against whom they are directed and to be enforced without prior service on him.

It is apparent from a comparison of the different language versions of the words in question and in particular from the terms used to describe the party who does not appear that these provisions are intended to refer to proceedings in which in principle both parties participate but in which the court is nevertheless empowered to give judgment if the defendant, although duly summoned, does not appear.

9 The same applies to article 47 (1) of the convention under which the party seeking enforcement must produce documents which establish that, according to the law of the state in which it has been given, the judgment is enforceable and has been served. This provision which relates to judgments in cases in which both parties participate as well as to judgments in default delivered in the state of origin cannot by definition apply to judgments such as the type in dispute, which have a different character.

10 However, it cannot be inferred from the fact that articles 27 (2), 46 (2) and 47 (1) cannot apply to decisions of the type in question, save by distorting their substance and scope, that such decisions must nevertheless be recognized and enforced in the state addressed. It is necessary to consider whether judicial decisions of this type, having regard to the scheme and objects of the convention, may be dealt with under the simplified procedure for recognition and enforcement provided by the convention.

11 In favour of an affirmative answer, the commission and the Italian government maintain that, according to article 25, the convention covers all decisions given by the courts of the contracting states without distinguishing between those involving adversary proceedings and those given without the other party's being summoned to appear. As is apparent from article 24 the field of application of the convention embraces protective and provisional measures which, under the law of the different contracting states and by reason of their very nature or their urgency are often adopted without the

opposite party's having first been heard. The contracting states cannot have intended to restrict the field of application of the convention to such an extent without express mention being made to that effect. Finally, it may clearly be seen from article 34 of the convention, which states that in the proceedings for an enforcement order "the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application", that the convention itself recognizes that proceedings in which only one party is heard are, where circumstances justify them, in keeping with the basic principle of the rights of the defence.

12 These arguments cannot prevail over the scheme of the convention and the principles underlying it.

13 All the provisions of the convention, both those contained in title II on jurisdiction and those contained in title III on recognition and enforcement, express the intention to ensure that, within the scope of the objectives of the convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed. It is because of the guarantees given to the defendant in the original proceedings that the convention, in title III, is very liberal in regard to recognition and enforcement. **In the light of these considerations it is clear that the convention is fundamentally concerned with judicial decisions which, before the recognition and enforcement of them are sought in a state other than the state of origin, have been, or have been capable of being, the subject in that state of origin and under various procedures, of an inquiry in adversary proceedings.** It cannot therefore be deduced from the general scheme of the convention that a formal expression of intention was needed in order to exclude judgments of the type in question from recognition and enforcement.

14 Nor is the argument by analogy, based on article 34 of the convention, of such a nature as to turn the scale. Although enforcement proceedings may be unilateral - but only provisionally so - this fact has to be brought into accord with the liberal character of the convention as regards the procedure for enforcement, which is justified by the guarantee that in the state of origin both parties have either stated their case or had the opportunity to do so. Whilst another reason for the unilateral character of the enforcement procedure under article 34 is to produce the surprise effect which this procedure must have in order to prevent a defendant from having the opportunity to protect his assets against any enforcement measures, the surprise effect is attenuated since the unilateral proceedings are based on the assumption that both parties will have been heard in the state of origin.

15 An analysis of the function attributed under the general scheme of the convention to **article 24**, which is specifically devoted to provisional and protective measures, leads, moreover, to the conclusion that, where these types of measures are concerned, special rules were contemplated. **Whilst it is true that procedures of the type in question authorizing provisional and protective measures may be found in the legal sys-**

tem of all the contracting states and may be regarded, where certain conditions are fulfilled, as not infringing the rights of the defence, it should however be emphasized that the granting of this type of measure requires particular care on the part of the court and detailed knowledge of the actual circumstances in which the measure is 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 authorization subject to all conditions guaranteeing the provisional or protective character of the measure ordered.

16 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 ordered.** The convention has taken account of these requirements by providing in article 24 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 the convention, the courts of another contracting state have jurisdiction as to the substance of the matter.

17 Article 24 does not preclude provisional or protective measures ordered in the state of origin pursuant to adversary proceedings - even though by default - from being the subject of recognition and an authorization for enforcement on the conditions laid down in articles 25 to 49 of the convention. On the other hand the conditions imposed by title III of the convention on the recognition and the enforcement of judicial decisions are not fulfilled in the case of provisional or protective measures which are ordered or authorized by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party. It follows that this type of judicial decision is not covered by the simplified enforcement procedure provided for by title iii of the convention. However, as the government of the United Kingdom has rightly observed, article 24 provides a procedure for litigants which to a large extent removes the drawbacks of this situation.

18 The reply to questions 1 and 2 should therefore be that judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by title III of the convention.

Questions 3 and 4

19 In view of the answer to questions 1 and 2 there is no longer any reason to examine questions 3 and 4 which now have no purpose.

Costs

20 The costs incurred by the government of the Italian republic, the government of the United Kingdom 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 questions referred to it by the Oberlandesgericht Frankfurt Am Main by order of 25 July 1979 received at the court on 6 August 1979, hereby rules :

Judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by title iii of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.
