

JUDGMENT OF THE COURT (Fifth Chamber)

26 March 1992 *

In Case C-261/90,

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 Cour d'Appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence) for a preliminary ruling in the proceedings pending before that court between

Mario Reichert,

Hans-Heinz Reichert,

Ingeborg Kockler

and

Dresdner Bank AG,

on the interpretation of Articles 5(3), 16(5) and 24 of the Brussels Convention of 27 September 1968,

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of Chamber, F. Grévisse, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: C. Gulmann,
Registrar: J. A. Pompe, Deputy Registrar,

* Language of the case: French.

after considering the written observations submitted on behalf of:

- Dresdner Bank AG, by Egbert Jestaedt and Otto Steinmann, Rechtsanwälte, Saarbrücken;
- the Commission of the European Communities, by Étienne Lasnet, Legal Adviser, acting as Agent, assisted by Hervé Lehman, of the Paris Bar;

having regard to the Report for the Hearing,

after hearing the oral observations of Dresdner Bank AG and the Commission at the hearing on 6 December 1991,

after hearing the Opinion of the Advocate General at the sitting on 20 February 1992,

gives the following

Judgment

- 1 By judgment of 7 May 1990, received at the Court Registry on 28 August 1990, the Cour d'Appel d'Aix-en-Provence 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') a question on the interpretation of Articles 5(3), 16(5) and 24 of the Convention.
- 2 The question was raised in proceedings between Mr and Mrs Reichert and their son Mario Reichert, on the one hand, and Dresdner Bank AG on the other.
- 3 Mr and Mrs Reichert, who reside in Germany, are the owners of immovable property in the Commune of Antibes, Alpes-Maritimes, France, the legal

ownership of which they donated to their son, Mario Reichert, by a notarial instrument executed at Creutzwald, Moselle, France. That donation was challenged by Dresdner Bank AG, a creditor of Mr and Mrs Reichert, in the Tribunal de Grande Instance (Regional Court), Grasse, in whose judicial district the property at issue lies, on the basis of Article 1167 of the French Civil Code, under which creditors may 'challenge in their own name transactions entered into by their debtors in fraud of their rights' by a procedure known as the '*action paulienne*'.

4 By a judgment of 20 February 1987, the Tribunal de Grande Instance de Grasse held that it had jurisdiction (which the Reicherts denied) on the basis of Article 16(1) of the Convention, under which, 'in proceedings which have as their object rights *in rem* in immovable property, ... the courts of the Contracting State in which the property is situated' have exclusive jurisdiction, regardless of domicile.

5 The Reicherts appealed against the ruling on jurisdiction to the Cour d'Appel d'Aix-en-Provence which, by a judgment of 18 November 1987, decided to stay the proceedings and referred to the Court for a preliminary ruling a first question asking substantially whether a case in which a creditor challenges, by an action under national law, in this case the *action paulienne* under French law, a donation of immovable property which he regards as having been made by his debtor in fraud of his rights, comes within the scope of Article 16(1) of the Convention.

6 By judgment of 10 January 1990, in Case C-115/88 *Reichert and Others v Dresdner Bank* [1990] ECR I-27, the Court ruled as follows:

'An action whereby a creditor seeks to have a disposition of a right *in rem* in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor does not come within the scope of Article 16(1) of the Convention.'

- 7 However, at the request of Dresdner Bank AG, which intended to rely, in its defence to the appeal on jurisdiction, on other articles of the Convention in addition to Article 16(1) mentioned in the first question, the Cour d'Appel d'Aix-en-Provence, by the aforesaid judgment of 7 May 1990, referred to the Court for a preliminary ruling the following further question:

'If Article 16(1) of the Brussels Convention of 27 September 1968 does not apply, is an action under Article 1167 of the French Civil Code, by which a creditor seeks to obtain the revocation in regard to him of a transfer of rights *in rem* in immovable property by his debtor in a way which he regards as in fraud of his rights, covered by the rules on jurisdiction in Article 5(3), Article 24 or Article 16(5) of the said convention if regard is had to the tortious, delictual or quasi-delictual nature of the alleged fraud or to the existence of protective measures which the decision on the substance of the case is intended to make it possible to enforce against the property which is the subject of the rights *in rem* transferred by the debtor?'

- 8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 9 As the Court has replied in its judgment in Case C-115/88 *Reichert*, cited above, that an action such as the *action paulienne* under French law does not come within the scope of Article 16(1) of the Convention, it is appropriate to reply to the further question raised by the national court.
- 10 Under Article 2 of the Convention, subject to special provisions, persons domiciled in a Contracting State, whatever their nationality, are to be sued in the courts of that State. The Convention envisages exceptions to that general rule by making provision for the applicant, in certain cases, to sue the defendant in the courts of the State of the latter's domicile or in the courts of another State (as in Articles 5 and 24 of the Convention). The Convention also provides for certain cases of exclusive jurisdiction regardless of domicile (as in Article 16).

- 11 To reply to the question referred to the Court, it is thus appropriate to consider in turn whether an action such as the *action paulienne* in French law comes within the scope of one of the exceptions for which the Convention provides and which are referred to in the order for reference.

Interpretation of Article 5(3) of the Convention

- 12 Article 5 of the Convention provides that:

‘A person domiciled in a Contracting State may, in another Contracting State, be sued:

...

- (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred’.

- 13 The Dresdner Bank, the respondent in the main proceedings, maintains that the *action paulienne* comes within the scope of Article 5(3) of the Convention inasmuch as it is a revocatory action which, as such, aims at rendering ineffective a culpable or deliberate act or omission which is contrary to the law or to unwritten rules of care and causes damage to a third party, that is, an act of a quasi-delictual nature.

- 14 The Commission, on the contrary, thinks that the *action paulienne*, which may affect a third party acting in good faith, who has therefore not committed any wrongful act or omission, and which not only leads, in certain circumstances, to imposing on such a third party acquiring the property an obligation to make reparation but may also result in an indirect depletion of his assets, cannot be regarded as an action for liability in tort, delict or quasi-delict. It does not, therefore, come within the scope of Article 5(3) of the Convention.

- 15 As the Court held in the judgment in Case 189/87 *Kalfelis v Schröder* [1988] ECR 5565, paragraphs 15 and 16, the concept of 'matters relating to tort, delict or quasi-delict' serves as a criterion for defining the scope of one of the rules concerning the special jurisdictions available to the plaintiff. Regard being had to the objectives and general scheme of the Convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, that concept should not be interpreted as a simple reference to the national law of one or other of the States concerned. Accordingly, the concept of 'matters relating to tort, delict or quasi-delict' must be regarded as an independent concept which is to be interpreted, for the application of the Convention, principally by reference to the scheme and objectives of the Convention in order to ensure that the latter is given full effect.
- 16 The Court also held in its abovementioned judgment in Case 189/87 *Kalfelis*, at paragraph 17, that in order to ensure uniformity in all the Member States, it must be recognized that the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1).
- 17 In the abovementioned judgment in Case C-115/88 *Reichert*, at paragraph 12, the Court pointed out that the *action paulienne* in French law was based on the creditor's personal claim against the debtor and sought to protect whatever security he might have over the debtor's estate. If successful, its effect was to render the transaction whereby the debtor had effected a disposition in fraud of the creditor's rights ineffective as against the creditor alone.
- 18 It may be seen, moreover, from the Commission's observations, which are not challenged on this point, that in French law the *action paulienne* may be instituted both against dispositions made for consideration by the debtor when the beneficiary acts in bad faith and against transactions entered into without consideration by the debtor even if the beneficiary acts in good faith.

19 The purpose of such an action is not to have the debtor ordered to make good the damage he has caused his creditor by his fraudulent conduct, but to render ineffective, as against his creditor, the disposition which the debtor has made. It is directed not only against the debtor but also against the person who benefits from the act, who is not a party to the obligation binding the creditor to his debtor, even, in cases where there is no consideration for the transaction, where that third party has not committed any wrongful act.

20 In these circumstances an action such as the *action paulienne* in French law cannot be regarded as a claim seeking to establish the liability of a defendant in the sense in which it is understood in Article 5(3) of the Convention and therefore does not come within the scope of that provision.

Article 16(5) of the Convention

21 Article 16 of the Convention provides that:

‘The following courts shall have exclusive jurisdiction, regardless of domicile:

...

(5) in proceedings concerned with the enforcement of judgments, the courts of the Contracting State in which the judgment has been or is to be enforced.’

22 The Dresdner Bank claims that the *action paulienne*, in so far as it is preparatory to the enforcement of a decision, does come within the exceptions set out in Article 16(5) of the Convention.

- 23 The Commission's view, on the contrary, is that the *action paulienne*, as its purpose is not to obtain a decision of the court with regard to a difficulty in enforcing a judgment, but to obtain from the court a judgment varying the legal situation of the debtor's assets, does not come within the scope of that article.
- 24 It should be pointed out, in the first place, that, as the Court held in its judgment in Case 220/84 *AS-Autoteile Service v Malhé* [1985] ECR 2267, at paragraph 16, Article 16 of the Convention makes a number of exceptions to the general rule set out in Article 2 of the Convention by granting exclusive jurisdiction to the courts of a Contracting State other than that specified under Article 2 in proceedings which have a particular connection with that other State, on the basis of the location of immovable property, the seat of a company, an entry in a public register or, in the case of paragraph (5), the place where a judgment is to be enforced.
- 25 In the second place it should be pointed out that Article 16 must not be given a wider interpretation than is required by its objective, since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, in their being brought before a court which is not that of the domicile of any of them (judgments in Cases 73/77 *Sanders v van der Putte* [1977] ECR 2383, at paragraphs 17 and 18, and C-115/88 *Reichert*, cited above, at paragraph 9).
- 26 From that point of view it is necessary to take account of the fact that the essential purpose of the exclusive jurisdiction of the courts of the place in which the judgment has been or is to be enforced is that it is only for the courts of the Member State on whose territory enforcement is sought to apply the rules concerning the action on that territory of the authorities responsible for enforcement.
- 27 Thirdly, it should be pointed out that the report drawn up by the committee of experts which prepared the text of the Convention (Official Journal 1979 C 59, p. 1) states that the expression 'proceedings concerned with the enforcement of judgments' is to be understood as meaning proceedings which may arise from 'recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic

instruments’ and that ‘problems arising out of such proceedings come within the exclusive jurisdiction of the courts for the place of enforcement.’

- 28 As has been stated in paragraph 17 above, an action such as the *action paulienne* under French law seeks to protect whatever security the creditor may have by requesting the court having jurisdiction to render the transaction whereby the debtor has effected a disposition in fraud of the creditor’s rights ineffective as against the creditor. Although it thus preserves the interests of the creditor with a view in particular to a subsequent enforcement of the obligation, it is not intended to obtain a decision in proceedings relating to ‘recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments’ and does not therefore come within the scope of Article 16(5) of the Convention.

Article 24 of the Convention

- 29 Article 24 of the Convention provides that:

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

- 30 Dresdner Bank claims that the *action paulienne* seeks to give the creditor a provisional security and so constitutes a ‘protective measure’ within the meaning of Article 24 of the Convention.

- 31 The Commission’s view, on the contrary, is that the *action paulienne* does not seek to preserve a factual or legal situation so as to safeguard rights the recognition of which is, moreover, sought from the court having jurisdiction as to the substance of the matter, but that it seeks to vary the legal situation of an asset. It therefore constitutes neither a provisional nor a protective measure within the meaning of Article 24 of the Convention.

- 32 The Court has already declared in the judgment in Case 143/78 *De Cavel v De Cavel* [1979] ECR 1055, at paragraph 8, that as provisional or protective measures may serve to safeguard a variety of rights, their inclusion in the scope of the Convention is determined not by their own nature but by the nature of the rights which they serve to protect. It added, in paragraph 9 of that judgment, that the provisions of Article 24 of the Convention cannot be relied upon to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded therefrom.
- 33 The Court also pointed out in the judgment in Case 125/79 *Denilauler v Couchet Frères* [1980] ECR 1553, at paragraphs 15 and 16, that an analysis of the function attributed under the general scheme of the Convention to Article 24 leads to the conclusion that, where such types of measures are concerned, special rules were contemplated so as to take account of the particular care and detailed knowledge of the actual circumstances required by the granting of this type of measure as well as the determination of procedures and conditions intended to guarantee the provisional and protective character of such measures.
- 34 The expression ‘provisional, including protective, measures’ within the meaning of Article 24 must therefore 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 sought elsewhere from the court having jurisdiction as to the substance of the matter.
- 35 Whilst an action such as the *action paulienne* under French law enables the creditor’s security to be protected by preventing the dissipation of his debtor’s assets, it does not seek to preserve a factual or legal situation pending a decision of the court having jurisdiction as to the substance of the matter. Its purpose is that the court may vary the legal situation of the assets of the debtor and that of the beneficiary by ordering the revocation as against the creditor of the disposition effected by the debtor in fraud of the creditor’s rights. It cannot, therefore, be described as a provisional or protective measure within the meaning of Article 24 of the Convention.

- 36 It follows from the foregoing that the answer to the national court should be that an action provided for by national law, such as the *action paulienne* in French law, whereby a creditor seeks to obtain the revocation in regard to him of a transfer of rights *in rem* in immovable property by his debtor in a way which the creditor regards as being in fraud of his rights does not come within the scope of Articles 5(3), 16(5) or 24 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Costs

- 37 The costs incurred by the Commission of the European Communities, which has 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 (Fifth Chamber),

in answer to the question referred to it by the Cour d'Appel d'Aix-en-Provence, by judgment of 7 May 1990, hereby rules:

An action provided for by national law, such as the *action paulienne* in French law, whereby a creditor seeks to obtain the revocation in regard to him of a transfer of rights *in rem* in immovable property by his debtor in a way which the creditor regards as being in fraud of his rights does not come within the scope of Articles

5(3), 16(5) or 24 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Joliet

Grévisse

Moitinho de Almeida

Rodríguez Iglesias

Zuleeg

Delivered in open court in Luxembourg on 26 March 1992.

J.-G. Giraud

R. Joliet

Registrar

President of the Fifth Chamber