OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 9 September 2004 [1]

I — Introduction

This case raises the issue of whether the examination of witnesses prior to commencement of substantive proceedings, in the form existing in Netherlands law, falls within the scope of the Brussels Convention. [2] Specifically, it seeks to ascertain whether such proceedings constitute a 'provisional or protective measure' for the purposes of Article 24 of the Convention.

1 — Original language: Spanish.

2 — Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1), hereinafter 'the Brussels Convention' or 'the Convention'. The consolidated version was published in OJ 1998 C 27, p. 1.

II — The main proceedings

1. The relevant stages in the proceedings in which this preliminary question has arisen are to be found in the order for reference.

2. By a decision of 23 April 2002 the Haarlem Rechtbank (court of first instance) ordered the 'preliminary hearing' (*voorlopig getuigenverhoor*) of a witness resident in the Netherlands. That measure was granted on the application of Unibel Exser BVBA ('Unibel'), a company with address in Stekene (Belgium), in the context of proceedings against St. Paul Dairy Industries NV ('St. Paul'), based in Lokeren (Belgium).

3. St. Paul appealed against that decision to the Gerechtshof (Regional Court of Appeal), Amsterdam, seeking an order setting aside the decision on the ground that the Netherlands court of first instance lacked jurisdiction or refusing the taking of witness evidence sought. Unibel in turn applied to

the Gerechtshof to declare the appeal inadmissible or to dismiss it, and to declare the decision to be provisionally enforceable.

4. However, the order for reference contains not the slightest indication of the nature of the dispute giving rise to it. At the hearing, St. Paul's representative stated that there was disagreement as to the quantum of damages payable by reason of the malfunctioning of machinery installed by Unibel at an industrial plant belonging to St. Paul.

III — The questions referred for a preliminary ruling

5. In that action, in accordance with the Protocol of 3 June 1971 on the interpretation of the Brussels Convention by the Court of Justice, the Gerechtshof stayed the proceedings and referred the following two questions to the Court of Justice for a preliminary ruling:

'(1) Does the provision of Article 186 et seq. of the Wetboek van Burgerlijke Rechtsvordering (Netherlands Code of Civil Procedure) concerning the "preliminary hearing of witnesses prior to the bringing of proceedings" come within the scope of the Brussels Convention in light of the fact also that, as provided for in that legislation, it seeks not only to enable material evidence to be taken from witnesses shortly after the facts in dispute and to prevent evidence from being lost but also, and in particular, to provide an opportunity for persons involved in an action subsequently brought before the civil courts — those considering bringing such an action, those who anticipate that the action will be brought against them, or third parties otherwise concerned by such an action — to obtain advance clarification of the facts (with which they are perhaps not entirely familiar), so as to enable them better to assess their position, particularly also with regard to the issue of identification of the party against whom proceedings must be instituted?

(2) If so, can the provision in that case constitute a measure within the meaning of Article 24 of the Brussels Convention?'

IV — Considerations advanced by the referring court

6. The Gerechtshof made a number of observations in the order for reference:

It is common ground that both parties are established in Belgium, that the legal rela-

tionship at issue is governed by Belgian law, that the Dendermonde court, St Niklaas section (Belgium), is the competent court in that connection, that no case is pending in that regard before the courts in the Netherlands (nor moreover in Belgium or elsewhere) and that the witness sought by Unibel, A.C. Schipper, is resident at Zaandam, the Netherlands.

Under Article 66(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[3] which entered into force on 1 March 2002, that regulation is applicable only to legal proceedings instituted after that date. Since — according to the decision — Unibel's originating application was only received at the registry of the Rechtbank on 5 February 2002, the regulation is not applicable in the present case, if the request for the preliminary hearing of witness evidence must be deemed to constitute legal proceedings within the meaning of the abovementioned article.

The parties are at variance on several points: whether the preliminary hearing of witness evidence where the case is not yet pending (i) comes within the scope of the Brussels Convention and (ii) can, if so, be deemed to constitute a measure within the meaning of Article 24 of the Convention itself. Unibel answers those questions in the affirmative and St. Paul in the negative.

V — Applicable national law

7. Article 186(1) of the Netherlands Code of Civil Procedure (hereinafter 'the WBR') provides that, in cases where the law allows witness evidence, a court may order the taking of that evidence, on the application of the party wanting that evidence, before substantive proceedings are instituted.

8. According to Article 187 of that code, the Netherlands court in whose jurisdiction the person who is to give the evidence is domiciled or resident has territorial jurisdiction to order the preliminary examination of that witness. The opponent is, in principle, invited to attend the taking of the evidence.

9. By order of 24 March 1995[4] the Hoge Raad der Nederlanden (Netherlands Supreme Court) set out the potential functions of the procedural mechanism in question: it is useful not only in securing witness statements shortly after the facts in dispute, thereby preventing evidence from being lost, but also, above all, in enabling any person involved in a subsequent civil action, as a

3 — OJ 2001 L 12, p. 1.

4 — HR of 24 March 1995, NJ 1998, No 414.

potential applicant or defendant, to obtain advance clarification of the facts, so as to allow them better to assess their procedural position in order, for example, to identify the person against whom proceedings should be instituted.

VI — Proceedings before the Court of Justice

10. The request for a preliminary ruling was lodged at the Registry of the Court of Justice on 6 March 2003. In addition to Unibel, the German and United Kingdom Governments and the Commission submitted written observations.

11. The case was assigned to the First Chamber of the Court of Justice.

St. Paul and the Commission were represented at the public hearing, held on 14 July 2004.

VII — Submissions of the interested parties

12. In the view of Unibel, the preliminary examination of witnesses, governed by Article 186 of the WBR, does come within the scope of Article 24 of the Convention, since it is intended to preserve a factual or legal situation. The procedure is provisional because the witness statements so obtained do not necessarily constitute definitive evidence in the substantive proceedings. Furthermore, Article 186 of the WBR is the only course available to a Belgian citizen to obtain a witness statement in the Netherlands prior to the commencement of substantive proceedings.

13. The German Government concludes, from an interpretation of the literal meaning and legislative intention of the Convention, that it does not cover the preliminary examination at issue, because the decision to be adopted on conclusion of that procedure is not capable of recognition and enforcement, within the meaning of Article 25 of the Convention. The mechanism is not designed to govern the legal relations between the parties, but to afford assistance in arranging the conduct of the case by means of a protective measure.

14. The United Kingdom Government is of the view that Article 24 of the Convention should be interpreted as not precluding provisional measures granted prior to commencement of an action. On the second question, as to the admissibility of which it entertains doubts, that government takes the view that a party cannot use Article 24 to expose its opponent to demands for evidence which lack the appropriate procedural safeguards.

15. The Commission, for its part, points out that Article 24 only applies when the Convention itself applies. It asserts, further, that the preliminary examination of witnesses does not satisfy the requirement of reversibility which, according to the case-law of the Court of Justice, characterises provisional measures under Article 24.

16. At the hearing, St. Paul likewise declined to accept that the procedure under Article 186 of the WBR falls within the scope of the Brussels Convention.

VIII — Analysis of the questions referred for a preliminary ruling

17. The first question referred for a preliminary ruling seeks to ascertain whether the specific procedure of the preliminary hearing [5] of witnesses in the Netherlands law on civil procedure falls within the scope of the Brussels Convention, whilst the second asks whether it constitutes one of the protective measures under Article 24 of that convention.

18. Since it is unlikely that a procedure such as that under analysis, which is not intended to determine the substance of a dispute, could fall within the scope of any provision of the Convention other than Article 24, both elements should be reformulated as seeking to determine whether the preliminary hearing of witnesses under Article 186 of the WBR can be treated as one of the acts referred to in Article 24. A different approach, clearly, would be to regard the first question as clarifying whether the Convention applies, in the abstract, to the preliminary hearing of witnesses, whilst the second would ascertain the specific provision covering that procedure. I take the view, however, that the latter alternative, in addition to being contrived, adds nothing helpful to the former.

19. In any event, other requirements must be satisfied for the Convention to come into play. Although these relate formally to admissibility, they are so closely bound up with examination of the substance of the matter that I shall analyse them together.

Admissibility and substance

20. The case presents various factors which affect its admissibility. On the one hand, if the dispute is to fall within the scope of the Brussels Convention, it must concern a civil

5 — For practical purposes, I am using a literal translation of the expression employed by the Netherlands legislature.

or commercial matter and must be relevant to an action with an international dimension. Since provisional or protective measures safeguard very varied rights, their inclusion in the Convention depends not on their own nature, but on the nature of the rights they protect. One cannot invoke the Convention in respect of provisional or protective measures relating to matters unconnected with the Convention.[6]

21. Furthermore, in the absence of any other qualifying factor, the hearing of witnesses at issue can be treated as one of the 'provisional or protective measures' within the meaning of Article 24 of the Convention.

22. According to Article 1, the Convention applies in civil and commercial matters, whatever the nature of the court or tribunal, and does not cover the status or legal capacity of natural persons, matrimonial property arrangements, wills and succession, bankruptcy, creditors' agreements and other similar proceedings, social security or arbitration.

23. Despite the fact that the order for reference makes not the slightest mention of the terms of the substantive dispute, the explanations which St. Paul gave at the hearing and the documents sent with the request for a preliminary ruling show that the origin of the dispute lies in a dispute regarding the calculation of the damages payable for loss caused by the defective operation of technical equipment. The principal claim apparently arises from an agreement between the two businessmen or from a head of tortious liability created by law.[7] This is, then, a dispute, or at least a potential dispute, relating to a civil or commercial matter. It is in any event for the national court to ascertain whether that is so.

24. Of greater substance is the objection relating to whether or not the dispute has an international dimension.

25. The Convention does not expressly define that requirement. However, the preamble reflects the importance of determining the 'international jurisdiction'[8] of the courts of the Contracting Parties. Furthermore, it can be inferred from the purpose of the Convention, in light of the provision in which it has its legal basis, namely the former Article 220 of the EC Treaty (now Article 293 EC), that it reflects the same

6 — Case 143/78 *de Cavel* [1979] ECR 1055, paragraph 8, and Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 32.

7 — Case 189/87 *Kalfelis* [1988] ECR 5565, paragraph 18.

8 — Single recital.

purpose as the very Community it serves, [9] whose legislative activity covers relationships liable to represent an obstacle to cross-border commerce. In other words, it is not the intention of the Convention to become the sole law designating the competent forum in situations of no significance for the establishment of the internal market, that is, in circumstances where all the constituent elements are located within one Member State.

26. In the present case, as is plain from the order for reference, the parties to the dispute are Belgian and the legal relations between them are governed by Belgian law. Conversely, the proceedings which have given rise to the interlocutory application under analysis are being heard in the Netherlands, before a Dutch court. It is undeniable, therefore, that in the eyes of the referring court there are cross-border elements to the dispute.

27. The fact that two Belgian companies bring proceedings in the Netherlands does not necessarily make these proceedings international, since there must also be a sufficient connection with some form of transnational element. That would be the position, undoubtedly, if one took the view that the application heard in the Netherlands was an interlocutory application in main proceedings brought in, say, Belgium. Such an element would not be present, however, were one to regard the Netherlands proceedings, on the other hand, as having their own autonomy, being independent of any subsequent Belgian action which might arise.

28. The Court of Justice has no information on which to base a finding that there is a sufficient connection between the preliminary hearing of the witness applied for and any proceedings in a different Member State.

29. As various interested parties in the proceedings have pointed out, the 'preliminary hearing of witnesses' does not necessarily have that kind of connection. Undoubtedly the statements so obtained normally have their greatest effect in other proceedings. The law does not, however, require that proceedings be brought within a particular time-limit in order for the measure to be valid or enforceable. Moreover, since, as the Hoge Raad has held, the characteristic function of such a preliminary hearing of witnesses is as a means to obtain relevant information in order to gauge the prospects of success of a subsequent action or to identify the person against whom proceedings should be instituted it is perfectly possible that it may not be used as a preliminary to another action.

30. If, in the present case, such is indeed the purpose of the application for a preliminary

9 — Case C-398/92 *Mund & Fester* [1994] ECR I-467, paragraphs 11 and 12.

hearing of witnesses, it might be difficult to find a sufficiently significant connection between that measure and any subsequent proceedings, and consequently there would be no international dispute.

31. That suggests that the preliminary hearing of witnesses is, for the purposes of the Convention, an independent measure for the taking of evidence rather than a protective mechanism. As such, it cannot confer an international dimension on other, main, proceedings, from which it is sufficiently dissociated.

32. In European comparative law also there are mechanisms which allow evidence to be heard before legal proceedings are brought. These typically tend to pursue the specific aim of preserving an element in the proceedings, [10] and to that end the court hearing the application may consider whether the alleged risk of loss actually exists, [11] whether the facts it is sought to prove are relevant to determination of a dispute [12] or whether there is prima facie evidence that the procedure is necessary. [13] The court which would be called upon to hear the substantive action and, in exceptional cases only, that in whose jurisdiction the witness in question resides are competent to order such measures. [14]

33. Danish and Spanish law, furthermore, allow the use of the preliminary hearing of evidence in order to clarify facts relevant for determination of the dispute.

34. In the present case, given the lack of information on the specific purpose of the contested application for the hearing of a witness, it is impossible to give a conclusive view as to whether the dispute is international in nature.

35. It is therefore for the national court to adopt a decision on the matter. Extrapolating to the matter of intra-Community jurisdic-

10 — See Paragraph 485 et seq. of the German Code of Civil Procedure (Zivilprozessordnung, 'ZPO'); Paragraph 384 et seq. of the Austrian Code of Civil Procedure (Zivilprozessordnung, 'ÖZPO'); Article 584 of the Belgian Legal Code (Code judiciaire); Article 343 of the Danish Procedural Code; Article 256 et seq. of the Spanish Law of Civil Procedure; Article 10 of Chapter 17 of the Finnish Procedural Code; Article 145 of the French New Code of Civil Procedure; Article 692 et seq. of the Italian Code of Civil Procedure (Codice di procedura civile, 'CPC'); Article 350 of the Luxembourg New Code of Civil Procedure; Articles 520 to 522a of the Portuguese Code of Civil Procedure; Chapter 41 of the Swedish Procedural Code.

11 — See Paragraph 485(1) of the ZPO.

12 — See the judgment of the Oberlandesgericht (Higher Regional Court) Hamm (Germany) in NJW-RR 1998, p. 933. Also, Paragraph 387 of the ÖZPO.

13 — Paragraph 487 of the ZPO.

14 — Paragraph 486(3) of the ZPO; Paragraph 343(3) of the ÖZPO; Article 693 of the CPC.

tion the principle established by the Court of Justice that there must be a cross-border element suggests that the provisions of the Convention do not apply to activities pursued within a single Member State, and determination of that circumstance depends on findings of fact which must be reached by the national court. [15]

36. That approach is consistent with the principle laid down by the Court of Justice that it is for the courts of the place where the subject-matter of the measures sought is located to assess the circumstances which may lead to the grant or refusal of the measures sought. [16]

37. It remains, finally, to determine whether, if the foregoing two requirements are satisfied, the procedure governed by Article 186 of the WBR falls within any of the situations referred to in the Convention. Since the stated aim of the measure is not the resolution of a substantive dispute, it cannot be covered by any provision other than Article 24. This is indicated by the terms used by the Gerechtshof itself, which refers to that article in the second question it has referred for a preliminary ruling. The same conclusion is to be drawn, furthermore, explicitly or by implication, from the observations of the interested parties.

38. So, in order to determine whether the preliminary hearing of witnesses amounts to a protective measure it is necessary, first of all, to clarify what is meant by such a measure.

39. According to Article 24 of the Convention:

'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.'

40. The Court of Justice has ruled on this point on several occasions, and has confirmed that such a measure may be granted before substantive proceedings are commenced. [17]

41. As regards the characteristic features of those measures, the Court of Justice has noted that they must be intended to preserve

15 — See, in all respects, Case C-41/90 *Hoefner and Elser* [1991] ECR I-1979, paragraph 37.

16 — Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 16.

17 — Case C-391/95 *Van Uden* [1998] ECR I-7091, paragraph 29. See also Bischoff, J.-M. and Huet, A., 'Chronique de jurisprudence de la Cour de justice des Communautés européennes', *Journal du droit international*, No 1, 1982, pp. 942 to 947, in particular p. 947.

a factual or legal situation so as to safeguard rights the recognition of which is sought (or may be sought, as is apparent from the foregoing) from the court hearing the substance of the matter.[18]

42. The granting of such measures requires on the part of the court which has jurisdiction particular care and detailed knowledge of the actual circumstances in which the measures are to take effect. Depending on the peculiarities of each case and, in particular, commercial practices, 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 sought, require bank guarantees or nominate a sequestrator and generally make grant of the measure subject to all conditions guaranteeing the provisional or protective character of the measure ordered.[19]

43. Thus, the grant of provisional or protective measures under Article 24 depends, amongst other factors, on there being a real connecting link between the subject-matter of the measures applied for and the territorial jurisdiction of the Contracting State of the court hearing the case.

44. It is also implicit in the preceding considerations that there is a duty on the court which orders the protective measures, in reliance on Article 24, to have regard for the need to impose conditions intended to reinforce the temporary nature of the measures.

45. As the Hoge Raad has stated,[20] the preliminary hearing of witnesses may be finished as a means of obtaining witness statements shortly after the facts in dispute, preventing evidence from being lost and clarifying information relevant for bringing proceedings. As part of the latter function, that court referred to the fact that any person involved in a subsequent civil action, as a potential applicant or defendant, must be able to obtain advance clarification of the facts, so as to enable them better to assess their procedural position in order, for example, to identify the person against whom proceedings should be instituted.

46. That approach by the Hoge Raad indicates that the description '*preliminary* hearing' is inaccurate, since neither the assessment of the evidence nor the relevance of the information submitted depends on the

18 — *Reichert and Kockler*, paragraph 34.

19 — *Denilauler*, paragraph 15.

20 — Paragraph 9 above.

bringing of an action or on expiry of a given time-limit, since they are deemed to have intrinsic value, independently of any other proceedings.

47. The case-law of the Court of Justice referred to above, however, suggests that, if use of a procedure among those laid down in Article 186 of the WBR is intended to conserve evidence for use in subsequent substantive proceedings, that procedure is covered by the expression 'provisional or protective measures' in Article 24 of the Convention. That is not the position in relation to mechanisms intended to clarify procedural aspects, where the link with any substantive action may prove to be tenuous or circumstantial.

48. The Schlosser Report on the association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention and to the Protocol on its interpretation by the Court of Justice,[21] although with reference to the enforcement of judgments, confirms that conclusion:

'If it were desired that interlocutory decisions by courts on the further conduct of the proceedings, and particularly on the taking of evidence, should be covered by Article 25 of the 1968 Convention, this would also affect decisions with which the parties would be totally unable to comply without the court's cooperation, and the enforcement of which would concern third parties, particularly witnesses. It would therefore be impossible to "enforce" such decisions under the 1968 Convention. It can only be concluded from the foregoing that interlocutory decisions which are not intended to govern the legal relationships of the parties, but to arrange the further conduct of the proceedings, should be excluded from the scope of Title III of the 1968 Convention.'

49. The Hoge Raad's definition reveals, also, that in the majority of cases the court to which the application is made does not need to make any assessment of the risk that the evidence may perish in order to grant the measure, since in reality the purpose is to gather information of use in formulating a strategy as to the advisability of bringing proceedings.

50. Such procedures, however, have no basis in the Convention because, being of a different nature — in particular because they are markedly autonomous and are not temporary — they cannot be equated to provisional and protective measures under Article 24.

21 — OJ 1979 C 59, p. 71 et seq., in particular paragraph 187 (hereinafter 'the Schlosser Report').

51. It is therefore in my view not possible to give the referring court a straight answer, owing to the fact that whether or not the Convention applies depends on the actual purpose of the preliminary hearing of witnesses.

52. That being so, there would be grounds to declare the questions referred inadmissible since, according to settled case-law, the need to achieve an effective interpretation of Community law means that the national court must define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based.[22]

53. In that regard, one should bear in mind that the information contained and the questions raised in orders for reference should not only enable the Court of Justice to give helpful answers but must also enable the governments of the Member States and other interested parties to submit observations in accordance with Article 20 of the EC Statute of the Court of Justice. It is the duty of the Court of Justice to ensure that the opportunity to submit observations is safeguarded, in view of the fact that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties.[23]

54. Nevertheless, in view of all the foregoing arguments, it seems more conducive to the sound administration of justice to furnish the referring court with a number of interpretive criteria, precisely the criteria which highlight the shortcomings of the exposition of the facts in the request for a preliminary ruling.

55. I propose, then, that the response to the questions which the Gerechtshof, Amsterdam, has referred for a preliminary ruling be that a provision such as that in Article 186 of the WBR does come within the scope of the Brussels Convention, since it constitutes a 'provisional or protective measure' for the purposes of Article 24, provided that it is a means of conserving an item of evidence for the purpose of adducing that evidence in subsequent proceedings.

22 — See, inter alia, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6, and Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 39.

23 — Joined Cases 141/81 to 143/81 *Holdijk* [1982] ECR 1299, paragraph 6, and the orders in Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 13, and in Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 10.

56. The Commission contests that conclusion on the ground that it conflicts with the principle of legal certainty.

57. One has to acknowledge the difficulties which can arise, in any given situation, in determining whether the purpose of conserving evidence is predominant over the intention to obtain clarification. In my view, however, wherever it is shown that there is a risk of loss of evidence, the court is entitled to apply the Convention rules.

58. Moreover, to understand otherwise would be to disregard the fact that the concept of 'provisional or protective measures' to which Article 24 of the Convention refers must be autonomous of national legal systems.

59. In any event, as the United Kingdom Government correctly observes, the question raised is of merely historical interest since, in the meantime, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,[24] which facilitates such measures, came into force on 1 January 2004.

60. That instrument permits a court in a Member State to request a court in a different Member State to take evidence, or even to take evidence directly, whenever such measures are intended for use in judicial proceedings, commenced *or contemplated.*[25] The court receiving the request must execute the request in accordance with its own law or, unless such a procedure is incompatible with that law, in accordance with any special procedure in force in the Member State of the requesting court.[26]

61. In other respects, Regulation No 1206/2001 prevails over the provisions of bilateral or multilateral agreements or arrangements concluded by the Member States in relation to matters to which it applies.[27] As regards any residual applicability of Regulation No 44/2001, the primacy of the new instrument is founded on the principle *lex posterior derogat priori.*

24 — OJ 2001 L 174, p. 1.

25 — Article 1(1) and (2).

26 — Article 10(2) and (3).

27 — Article 21(1).

IX — Conclusion

62. In light of the foregoing, I propose that the Court of Justice should answer the questions referred by the Gerechtshof, Amsterdam, to the effect that a provision such as that in Article 186 of the Netherlands Code of Civil Procedure should be regarded as a measure for the purposes of Article 24 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, provided that it is a means of conserving an item of evidence for the purpose of adducing that evidence in subsequent proceedings.