OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 22 November 1989 *

Mr President,
Members of the Court,

1. Mr and Mrs Reichert, who are German nationals residing in Germany and the owners of immovable property at Antibes, in France, made a donation of the legal ownership of that property to their son Mario Reichert, also resident in Germany. The instrument was executed before a notary in the French *département* of Moselle.

2. The main proceedings concern a dispute between Dresdner Bank AG, a company governed by German law, whose registered office is at Frankfurt am Main, on the one hand, and Mr and Mrs Reichert and their son, on the other. On the basis of Article 1167 of the French civil code, Dresdner Bank brought proceedings before the tribunal de grande instance (Regional Court), Grasse, in the form of an *action paulienne*, seeking a declaration that the donation was ineffective as against the applicant, who was a creditor of Mr and Mrs Reichert. The tribunal de grande instance, Grasse, within whose judicial district the property is situated, held that it had jurisdiction to hear the proceedings pursuant to Article 16(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, which provides:

'in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated [shall have exclusive jurisdiction, regardless of domicile]'

3. The Reicherts appealed to the cour d'appel (Court of Appeal), Aix-en-Provence, against the ruling on jurisdiction.

4. By a judgment of 16 November 1987, pursuant to Article 1 of the Protocol of 3 June 1971 on the interpretation by the Court of the Convention of 27 September 1968, the cour d'appel sought a preliminary ruling from the Court on whether

'by providing that the courts of the Contracting State in which the property is situated are to have exclusive jurisdiction in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, it was the intention of the Brussels Convention to lay down a rule of jurisdiction without any reference whatever to the classification of actions as personal, real or mixed actions, taking account only of the substantive legal issue, namely the nature of the rights concerned, and whether the rule of jurisdiction thus laid down entitles a creditor who contests transactions entered into by his debtor in fraud of his rights — in this case a donation of rights *in rem* in immovable property — to bring his action before the courts of the Contracting State in which the property is situated'.

5. Let it be said at the outset that I agree with the French Government's view that the question should be restated in two parts, the first part being whether the concept of matters relating to rights *in rem* in immovable property should be interpreted in accordance with the laws of the Contracting

* Original language: French.

States or in the light of the objectives and system of the Brussels Convention.

6. A — Without formulating a general principle in that regard, the Court has hitherto generally ruled in favour of an independent interpretation, although it accepts that neither of the two options rules out the other and that the choice must be made on a case-by-case basis, depending on the provision concerned. [1] It has taken that approach, in particular, in two cases concerning the interpretation of the concept of 'tenancies of immovable property', which also appears in Article 16(1) of the Convention. [2]

7. The cour d'appel considers that the wording of Article 16(1) should not be interpreted as merely a reference to French internal law and its traditional classification of actions into personal, real and mixed actions.

8. The same view is held by most of the governments which have submitted observations in this case, which have pointed out that the concept of 'rights *in rem*' is not interpreted uniformly in all the Contracting States. It follows that only by giving that concept an independent interpretation can a uniform implementation of the Convention throughout the Community be achieved, and I propose that the Court should take that approach.

1 — See the judgment of 15 November 1983 in Case 288/82 *Duijnstee* v *Goderbauer* [1983] ECR 3663, paragraph 17, for cases where the Court has taken this approach. For a more qualified approach, see the judgment of 6 October 1976 in Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473.

2 — See the judgments of 14 December 1977 in Case 73/77 *Sanders* v *Van der Putte* [1977] ECR 2383 and of 15 January 1985 in Case 241/83 *Rösler* v *Rottwinkel* [1985] ECR 99.

9. B — The second part of the question is, in effect, whether the concept of 'proceedings which have as their object rights *in rem* in immovable property', as interpreted within the framework of the Brussels Convention, covers proceedings such as the *action paulienne* in French law in cases where such an action — which may also concern movable property — is brought by a creditor to challenge the donation of the legal ownership of immovable property made by a debtor.

10. The national court observes that Article 16(1) refers not to the nature of the proceedings brought but to that of the rights in issue — in this case the right of legal ownership of immovable property, which is unquestionably a right *in rem* — and seeks confirmation from the Court that proceedings affecting such a right must be brought before the courts of the State in which the property is situated.

11. There is much to be said for such an approach. If the action is successful, will Mr and Mrs Reichert's son not cease to be able to rely, as against the Dresdner Bank, on his right *in rem* — hitherto available *erga omnes* — in the property? Is this not, therefore, a case of 'proceedings which have as their object rights *in rem* in immovable property'?

12. Such an approach would also have the merit of answering the Court's concern, expressed in paragraph 23 of its judgment in Case 241/83 *Rösler* v *Rottwinkel* [1985] ECR 99, cited above, — in the context, it is true, of tenancies of immovable property — that account must be taken

'of the uncertainty which would be created if the courts allowed exceptions to be made to the general rule laid down in Article 16(1), which has the advantage of providing

for a clear and certain attribution of jurisdiction covering all circumstances, thus fulfilling the purpose of the Convention, which is to assign jurisdiction in a certain and predictable way'.

13. In addition, an *action paulienne* lies only if the debt is liquid and due for payment. [3] It will therefore normally be followed by attachment, which can only be effected at the place where the property is situated. Moreover, Article 54 of the French code of civil procedure provides that any creditor may be authorized to enter a provisional registration of a judicial hypothec over immovable property if he can show that he has 'a prima-facie valid claim', that there are circumstances of urgency and that recovery of the debt is endangered. [4] That step appears to have been taken in the present case. All those arguments, therefore, plead in favour of an interpretation allowing the courts of the place where the property is situated jurisdiction to hear an *action paulienne*, as 'the best placed' [5] to deal with the dispute.

14. It is none the less certain, on the other hand, that the plaintiff in an *action paulienne* does not rely on any right *in rem* [6] and, as the French Government has stated, if the action is successful,

'it does not give rise to a reverse transfer of a right *in rem* in immovable property. The avoidance of the donation of the property is purely relative. It means that the donation cannot be relied upon as against the creditor. It is an essential characteristic of rights *in rem*, however, that they have absolute effect *erga omnes*'.

15. It is striking to note that this conception of what constitutes the essence of a right *in rem* is shared by the United Kingdom — representing the common law tradition — which also proposes that the scope of Article 16(1) should be limited to proceedings brought directly to determine as against the whole world the lawful ownership or possession of the property. But, as the United Kingdom rightly points out, the principal object of the action in question is to establish that the defendant acted with the intention of defrauding his creditors rather than to determine the issue of lawful ownership or possession of immovable property.

16. Like the United Kingdom, the German and Italian Governments and the Commission consider that it is not enough that a right *in rem* in immovable property should be *concerned by* an action, or that the action should *relate to* or have a *connection with* immovable property for Article 16(1) to be applicable. On the contrary, the right *in rem* must be the actual *cause* of the action, which must have as it object to determine, *erga omnes*, the ownership of the property in question.

17. Even if the present instance is a borderline case, I too endorse the solution put forward with pleasing unanimity by the German, United Kingdom, French and Italian Governments and by the Commission. I agree with them that Article 16(1) should be interpreted restrictively, since it forms an exception to the basic principle governing jurisdiction laid down in the first paragraph of Article 2 of the Convention:

3 — See Alex Weill and François Terré *Droit civil: les obligations*, Paris, Précis Dalloz, 1980, p. 960

4 — See Roland Tendler: *Les sûretés*, Paris, Dalloz, 1983, p. 246

5 — Judgment of 14 December 1977 in *Sanders* v *Van der Putte*, cited above, paragraph 11

6 — See note 1 at the bottom of p. 966 in Weill and Terré, cited above.

'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State'.

18. The Court's case-law cited above in footnote 2, which concerns the tenancies of immovable property to which Article 16(1) also refers, also takes a relatively restrictive approach. The Court held that Article 16 covers neither disputes concerning contracts whose principal object is not the tenancy (such as an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented from a third person by the lessor — *Sanders*) nor those which are only indirectly related to the use of the property let (such as those concerning the loss of holiday enjoyment and travel expenses — *Rösler*).

19. That interpretation of the Convention is also borne out by teleological considerations.

20. It is clear, first of all, that the aim of Article 2, which is to protect the defendant, would not be achieved if other provisions of the Convention were interpreted too broadly.

21. It is important, moreover, to bear in mind that the jurisdiction provided for in Article 16(1) is exclusive, a factor which would exacerbate yet further the consequences of too broad an interpretation.

22. Nor can Article 16(1) be applied without reference to its own *raison d'être*. In its judgment in *Sanders*, the Court considered that:

'the assignment, in the interests of the proper administration of justice, of exclusive jurisdiction to the courts of one Contracting State in accordance with Article 16 of the Convention results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them;

having regard to that consideration, the provisions of Article 16 must not be given a wider interpretation than is required by their objective'.

23. Finally, there are very specific reasons for Article 16(1) providing that the courts of the State in which the property is situated are to have exclusive jurisdiction.[7] Proceedings 'which have as their object rights *in rem* in immovable property' often entail a whole series of procedural steps which must be taken on the spot. There may be, for instance, checks, enquiries and expert examinations which, by definition, can only be carried out at the *locus rei sitae* and to which it is therefore logical to apply the *lex rei sitae*. Moreover, local practices which are not generally known except in the courts of the place are often important. Finally, account was also taken of the need to make entries in land registers located where the property is situated.

7 — See, in this connection, the report of P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ C 59, 5.3.1979, p. 35).

24. It may be assumed, by contrary inference, that the article should not be applied where the dispute is not such as to entail such procedural steps or when a knowledge of local practices is not relevant.

25. As regards the actual answer to be given to the cour d'appel, two options are available: either an answer couched in negative terms, ruling that proceedings such as the *action paulienne* under Article 1167 of the French civil code do not come within the scope of the paragraph in question (which would undoubtedly be sufficient to enable the national court to settle the dispute before it) or one formulated in positive terms, stating which types of action are to be regarded as coming within the scope of Article 16(1). If the latter course were taken, it would be useful to take the first part of the answer proposed by the United Kingdom, thus ensuring that the ruling can also be properly understood in the countries whose legal systems are based on common law.

26. In the final analysis, I think it preferable to choose the first option, as the French and Italian Governments and the Commission have done. My consideration of the national court's question has necessarily been based on the aim and effects of the *action paulienne* in French law (disregarding, obviously, the classification of that action in the French legal system). It would, therefore, be prudent not to give an answer going beyond that framework.

27. I therefore propose that the Court should rule as follows:

'(1) The concept of "proceedings which have as their object rights *in rem* in immovable property" in Article 16(1) of the Brussels Convention of 27 September 1968 must be interpreted in the light of the objectives and system of that convention;

(2) An action such as the *action paulienne* under Article 1167 of the French civil code does not come within that concept.'