

JUDGMENT OF THE COURT

27 April 1999 \*

In Case C-99/96,

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 Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

**Hans-Hermann Mietz**

and

**Intership Yachting Sneek BV**

on the interpretation of Article 13, first paragraph, points 1 and 3, Article 24, Article 28, second paragraph, and Article 34, second paragraph, of the above Convention of 27 September 1968 (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

\* Language of the case: German.

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 and P. Jann (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, C. Gulmann, J. L. Murray, D. A. O. Edward (Rapporteur), H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: P. Léger,  
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- the German Government, by Jörg Pirrung, Ministerialrat in the Federal Ministry of Justice, acting as Agent,
  
- the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, and David Lloyd Jones, Barrister,
  
- the Commission of the European Communities, by Ulrich Wölker, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of the United Kingdom Government, represented by David Lloyd Jones, and the Commission, represented by Marco Nuñez-Müller, of the Brussels Bar, at the hearing on 9 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 8 October 1997,

gives the following

### **Judgment**

1 By order of 29 February 1996, received at the Court on 26 March 1996, the Bundesgerichtshof (Federal Court of Justice) 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 four questions on the interpretation of Article 13, first paragraph, points 1 and 3, Article 24, Article 28, second paragraph, and Article 34, second paragraph, of the above Convention of 27 September 1968 (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 Convention').

2 Those questions have arisen in proceedings brought before a German court with a view to securing an order in Germany for the enforcement of a judgment delivered

on 12 May 1993 ('the Netherlands judgment') by the President of the Arrondissementsrechtbank te Leeuwarden (Regional Court, Leeuwarden) (Netherlands) ('the court of origin') following adversarial interim proceedings ('*kort geding*') between Intership Yachting Sneek BV ('Intership Yachting'), a limited-liability company established in Sneek (Netherlands), and Mr Mietz, who is domiciled in Lüchow (Germany).

- 3 Under the system of the Convention, the general rule in regard to the jurisdiction of courts, set out in the first paragraph of Article 2, is that persons domiciled in a Contracting State must, whatever their nationality, be sued in the courts of that State.
  
- 4 The first paragraph of Article 3 of the Convention provides that 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, the rules set out in Articles 5 to 18 of the Convention.
  
- 5 Articles 13 and 14 form part of Section 4, entitled 'Jurisdiction over consumer contracts', of Title II of the Convention. The first paragraph of Article 13 provides as follows:

'In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of [Articles 4 and 5(5)], if it is:

1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
  
3. any other contract for the supply of goods or a contract for the supply of services, and
  - (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and
  
  - (b) the consumer took in that State the steps necessary for the conclusion of the contract.'

6 The second paragraph of Article 14 of the Convention provides as follows:

'Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.'

7 In addition, Article 24, which constitutes Section 9 of Title II of the Convention and specifically governs provisional and protective measures, provides as follows:

'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 The rules governing recognition and enforcement of judgments are found in Title III of the Convention. Article 28, which appears in Section 1 of Title III, entitled 'Recognition', provides as follows:

'Moreover, a judgment shall not be recognised if it conflicts with the provisions of Sections 3, 4 or 5 of Title II, or in a case provided for in Article 59.

In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction.

Subject to the provisions of the first paragraph, the jurisdiction of the court of the State of origin may not be reviewed; the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction.'

- 9 Article 29, which also appears in Section 1 of Title III of the Convention, provides that:

'Under no circumstances may a foreign judgment be reviewed as to its substance.'

10 The second and third paragraphs of Article 34, which forms part of Section 2, entitled 'Enforcement', of Title III of the Convention, are worded as follows:

"The application may be refused only for one of the reasons specified in Articles 27 and 28.

Under no circumstances may the foreign judgment be reviewed as to its substance.'

11 Mr Mietz and Intership Yachting concluded in writing in Sneek a 'contract of sale' for the purchase of an Intership Type 1.150 G vessel, to which a number of alterations were to be made. As consideration, Mr Mietz was to pay DEM 250 000 in five instalments.

12 Mr Mietz having failed to meet in full his obligation to pay the price, Intership Yachting obtained the Netherlands judgment, by which Mr Mietz was ordered, *inter alia*, to pay to Intership Yachting the sum of DEM 143 750, plus interest. That judgment was declared to be provisionally enforceable.

13 On 29 October 1993 the Landgericht (Regional Court) Lüneburg (Germany), on the application of Intership Yachting, declared the Netherlands judgment to be enforceable and issued an order for its enforcement.

14 Mr Mietz appealed against that decision authorising enforcement to the competent Oberlandesgericht (Higher Regional Court). He argued that Intership Yachting and himself had agreed on all of the details of the order for the vessel in question, which was intended for his own personal use, at the Boat Show in Düsseldorf (Germany) and that, when they met again in Sneek one week later, they had merely signed the contract and he had made the agreed advance payment of DEM 40 000. From this

he concluded that, under the second paragraph of Article 14 of the Convention, the courts of the Contracting State in which the debtor was domiciled, that is to say Germany, had exclusive jurisdiction in the matter.

- 15 The Oberlandesgericht dismissed that appeal and Mr Mietz appealed on a point of law ('Revision') against that decision to the Bundesgerichtshof.
  
- 16 The Bundesgerichtshof takes the view that recognition and enforcement of the Netherlands judgment could be refused, pursuant to the first paragraph of Article 28 of the Convention, only if Mr Mietz were able to rely on the rules governing jurisdiction over consumer contracts set out in Articles 13 and 14 of the Convention.
  
- 17 The Bundesgerichtshof notes in this regard the different definitions which the Member States have given to the concept of the sale of goods on instalment credit terms (Kauf beweglicher Sachen auf Teilzahlung) and to the concept of the supply of goods (Lieferung beweglicher Sachen), terms which are set out in points 1 and 3 respectively of the first paragraph of Article 13 of the Convention.
  
- 18 The Bundesgerichtshof also notes that the Netherlands judgment contains no information as to where the acts preparatory to the conclusion of the contract were performed, so that it finds it impossible on that basis to determine whether the court of origin did or did not infringe Article 13, first paragraph, point 3, of the Convention, which reserves to the courts of the Member State in which the consumer resides jurisdiction over disputes concerning contracts for the supply of services or goods in the case where certain preparatory acts have been performed in that State. During the appeal proceedings, Mr Mietz had argued that the creditor had advertised with a view to this sale during a specialist show organised in Germany and that the contract had been concluded orally during that show. The Bundesgerichtshof, however, is unsure whether it can take into account this new

argument by Mr Mietz inasmuch as the second paragraph of Article 28 of the Convention prohibits review as to substance.

19 If the Court should take the view that Mr Mietz could indeed rely on the rules governing jurisdiction over consumer contracts, the Bundesgerichtshof questions whether the court of origin would not have been entitled to derogate from those rules by virtue of Article 24 of the Convention. Articles 13 and 14 would not then constitute an obstacle to recognition of the Netherlands judgment.

20 The Bundesgerichtshof accordingly decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1. Is there a sale of goods on instalment credit terms within the meaning of point 1 of the first paragraph of Article 13 of the Brussels Convention in the case where, in a document described by the parties as a "contract of sale", one of the parties undertakes to manufacture a specific type of motor yacht with nine specified alterations and to transfer it to the other party, and the latter is required to pay DEM 250 000 for it in five instalments?

If the first question is answered in the negative:

2. Is the contract described in the first question a contract for the supply of goods within the meaning of point 3 of the first paragraph of Article 13 of the Brussels Convention?

3. Under the second paragraph of Article 34 of the Brussels Convention, in conjunction with the second paragraph of Article 28 thereof, must account also be taken of new facts which, according to the debtor, establish that the court of the State of origin breached the provisions of Section 4 of Title II of that Convention?

If either the first or the second and third questions are answered in the affirmative:

4. Does the possibility provided for in Articles 289 to 297 of the Netherlands *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedure) for obtaining a judgment ordering payment of contractual consideration through application for an immediate interim order by way of an abbreviated procedure (“*kort geding*”) constitute a provisional measure within the meaning of Article 24 of the Brussels Convention?
- 21 It is appropriate first of all to reply to the first and second questions, which should be examined together, then to the fourth question, and finally to the third question.

### **The first and second questions**

- 22 In order to determine the scope of the first and second questions, it should be borne in mind that the dispute in the main proceedings concerns a contract concluded between two parties, which those parties described as a ‘contract of sale’, involving the construction of a yacht conforming to a standard model type but featuring a number of alterations. The first contracting party undertook to manufacture the yacht and to transfer the property in it to the second contracting party, who, by way of consideration, undertook to pay the price for it in five instalments. It appears from the order for reference that the final instalment was to be paid at the time of the trial voyage, that is to say, before possession of the yacht passed definitively to the second contracting party.

23 In view of certain observations concerning the possible treatment of a registered vessel as immovable property, it follows from the order for reference that, without prejudice to the question whether the contract in issue is to be treated as a contract for the supply of services or for the supply of goods, the yacht in question must, in any event, be classified as goods within the meaning of the Convention.

24 In that context, the crux of the Bundesgerichtshof's first question is whether the concept of the sale of goods on instalment credit terms within the meaning of Article 13, first paragraph, point 1, of the Convention must be understood as extending to a contract:

- relating to the manufacture by the first contracting party of goods corresponding to a standard model, to which certain alterations have been made;
  
- by which the first contracting party has undertaken to transfer the property in those goods to the second contracting party, who has undertaken, by way of consideration, to pay the price in several instalments; and
  
- in which provision is made for the final instalment to be paid before possession of the goods is transferred definitively to the second contracting party.

If the answer is in the negative, the Bundesgerichtshof asks, by its second question, whether such a contract must be treated as a contract for the supply of goods within the meaning of Article 13, first paragraph, point 3, of the Convention.

- 25 It must be stressed that the Court has not been asked to address the question whether a person in the position of Mr Mietz satisfies the other conditions set out in Article 13 of the Convention in order to be treated as a consumer within the meaning of that provision.
- 26 According to settled case-law, the concepts used in Articles 13 and 14 of the Convention must be interpreted independently, by reference principally to the system and objectives of the Convention (see, in particular, Case 150/77 *Bertrand v Ott* [1978] ECR 1431, paragraphs 14, 15, 16 and 19, Case C-89/91 *Shearson Lehman Hutton v TVB* [1993] ECR I-139, paragraph 13, and Case C-269/95 *Benincasa v Dentalkit* [1997] ECR I-3767, paragraph 12).
- 27 Furthermore, the rules of jurisdiction which derogate from the general principle on jurisdiction, such as the rules featuring in Articles 13 and 14, cannot give rise to an interpretation going beyond the cases envisaged by the Convention (see *Bertrand*, paragraph 17, *Shearson Lehman Hutton*, paragraphs 14, 15 and 16, and *Benincasa*, paragraphs 13 and 14, all cited above).
- 28 The Court held, in paragraph 20 of its judgment in *Bertrand*, that the sale of goods on instalment credit terms is to be understood as a transaction in which the price is discharged by way of several payments or which is linked to a financing contract.
- 29 A contract such as that described in paragraph 22 of the present judgment is indeed a transaction in which the agreed price is discharged by way of several payments, so that such a contract could be described as a contract of sale, since transfer of possession and property takes place only after the agreed price has been paid in full.

30 Such a contract cannot, however, be described as a 'sale ... on instalment credit terms' within the meaning of Article 13, first paragraph, point 1, of the Convention.

31 It follows from the wording of the Convention, and in particular from the expression 'instalment credit terms' in the English version, that Article 13, first paragraph, point 1, of the Convention is intended to protect the purchaser only where the vendor has granted him credit, that is to say, where the vendor has transferred to the purchaser possession of the goods in question before the purchaser has paid the full price. In such a case, on the one hand, the purchaser may, when the contract is concluded, be misled as to the real amount which he owes, and, on the other, he will bear the risk of loss of those goods while remaining obliged to pay any outstanding instalments. Such considerations do not, however, apply where the price must be paid in full before transfer of possession takes place. Where the full price must be paid before transfer of possession, the special protection referred to in the first paragraph of Article 13 of the Convention cannot be extended to the purchaser solely on the ground that he has been allowed to pay the price in several instalments.

32 As regards the second question, it must be stressed that the Bundesgerichtshof is asking the Court only whether a contract such as that in the main proceedings is to be treated as a contract for the supply of goods within the meaning of Article 13, first paragraph, point 3, of the Convention. There can be no doubt that such a contract should be classified as a contract for the supply either of services or of goods. It is unnecessary, for the purposes of the present judgment, to decide whether, in this particular case, there was a supply of services or of goods.

33 The answer to the first and second questions must therefore be that Article 13, first paragraph, point 1, of the Convention must be construed as not applying to a contract between two parties having the following characteristics, that is to say, a contract:

- relating to the manufacture by the first contracting party of goods corresponding to a standard model, to which certain alterations have been made;
- by which the first contracting party has undertaken to transfer the property in those goods to the second contracting party, who has undertaken, by way of consideration, to pay the price in several instalments; and
- in which provision is made for the final instalment to be paid before possession of the goods is transferred definitively to the second contracting party.

It is in this regard irrelevant that the contracting parties have described their contract as a 'contract of sale'. A contract having the characteristics mentioned above is however to be classified as a contract for the supply of services or of goods within the meaning of Article 13, first paragraph, point 3, of the Convention. It is for the national court, should the need arise, to determine whether the particular case before it involves a supply of services or a supply of goods.

#### The fourth question

34 It should be noted at the outset that Articles 289 to 297 of the Netherlands Code of Civil Procedure ('the Netherlands Code') deal with a form of procedure known

as '*kort geding*', which allows the President of the Arrondissementsrechtbank to grant enforceable measures 'in all cases which, having regard to the interests of the parties, require an immediate measure on grounds of urgency' (Article 289(1)).

- 35 Under Article 292 of the Netherlands Code, 'interim decisions are without prejudice to the main proceedings'. *Kort geding* may be instituted without the need to bring substantive proceedings before the court having jurisdiction. The President of the Arrondissementsrechtbank may, however, refer the parties back to the ordinary proceedings (Article 291).
- 36 In order to exercise his jurisdiction in respect of *kort geding*, the President of the Arrondissementsrechtbank is required to comply with the jurisdiction rules provided for under Netherlands law.
- 37 Under Article 289 of the Netherlands Code, *kort geding* may be instituted at very short notice and, in accordance with Article 295, an appeal must be lodged within two weeks, on pain of being declared inadmissible.
- 38 Under those circumstances, it must be held that *kort geding* is a procedure of the type envisaged in Article 24 of the Convention, under which a court is authorised, by the law of its State, to order provisional or protective measures even if, under the Convention, it does not have jurisdiction as to the substance of the matter.
- 39 The Bundesgerichtshof's fourth question must therefore be construed as seeking to ascertain whether a judgment ordering payment of contractual consideration, delivered at the end of a procedure such as *kort geding*, is a provisional measure which

may be granted by virtue of the jurisdiction provided for under Article 24 of the Convention.

40 It is important to stress that it is not necessary for the court hearing an application for provisional or protective measures to have recourse to Article 24 of the Convention where it has, in any event, jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention (see, to that effect, Case C-391/95 *Van Uden v Deco-Line* [1998] ECR I-7091, paragraph 19).

41 In this connection, the Court held at paragraph 22 of its judgment in *Van Uden* that 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.

42 In contrast, in the case of a judgment delivered solely by virtue of the jurisdiction provided for under Article 24 of the Convention and ordering interim payment of a contractual consideration, the Court ruled in *Van Uden* that such a judgment 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 ordered 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.

43 The answer to the fourth question must therefore be that a judgment ordering interim payment of contractual consideration, delivered at the end of a procedure such as that provided for under Articles 289 to 297 of the Netherlands Code by a court not having jurisdiction under the Convention as to the substance of the matter is not a provisional measure capable of being granted under 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 ordered 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.

### The third question

- 44 By this question, the Bundesgerichtshof is asking in substance whether the court to which application for enforcement is made may, in the context of the procedure for ordering enforcement set out in Title III of the Convention, take account of new facts relied on by one party for the purpose of establishing that a contract such as that described in paragraph 22 of the present judgment satisfies the conditions listed in Article 13, first paragraph, point 3, heads (a) and (b), of the Convention.
- 45 It should, however, be noted that, even if Mr Mietz were allowed to prove that he ought to have been treated as a consumer within the meaning of Article 13 of the Convention, the court of origin could still have had jurisdiction to order provisional measures.
- 46 Article 24 of the Convention expressly provides that a court has jurisdiction under its national law to grant an application for such measures, even if does not have jurisdiction as to the substance of the matter. That jurisdiction must be exercised within the limits set out in Article 24 of the Convention with regard, in particular, to the granting of measures ordering interim payment, limits which do not apply where the court has jurisdiction as to the substance of the matter (see, to that effect, *Van Uden*, paragraph 19).

- 47 However, it is important to ensure that enforcement, in the State where it is sought, of provisional or protective measures allegedly founded on the jurisdiction laid down in Article 24 of the Convention, but which go beyond the limits of that jurisdiction, does not result in circumvention of the rules on jurisdiction as to the substance set out in Articles 2 and 5 to 18 of the Convention (see, to that effect, *Van Uden*, paragraph 46).
- 48 Next, it should be noted that although, in the main proceedings, the court of origin ordered only one measure — namely interim payment — it may happen, in other situations, that the court of origin orders several measures, some of which are to be classified as provisional or protective measures within the meaning of Article 24 of the Convention, while others go beyond the limits provided for in that provision.
- 49 The question which arises for the court to which application for enforcement is made therefore relates not to the jurisdiction, as such, of the court of origin, but rather to the extent to which it is possible to seek enforcement of a judgment delivered in the exercise of the jurisdiction recognised by Article 24. That jurisdiction constitutes, within the context of the Convention, a special regime (see, in that regard, Case 125/79 *Denilauler v Couchet Frères* [1980] ECR 1553, paragraph 15, and *Van Uden*, paragraph 42).
- 50 Finally, it must be stressed that this is not a case where the court of origin has expressly based its jurisdiction to order interim payment by reference to its jurisdiction under the Convention to deal with the substance of the matter, nor a case where such jurisdiction is evident from the actual terms of its judgment, as would in particular be the case if the judgment showed that the defendant was domiciled in the Contracting State of the court of origin and none of the types of exclusive jurisdiction set out in Article 16 of the Convention was applicable.

51 In such circumstances, only the provisions of Article 27 and, if appropriate, the first paragraph of Article 28 of the Convention would be capable of preventing recognition and enforcement of the judgment of the court of origin.

52 Contrary, however, to the submissions of the United Kingdom Government and the Commission, the fact that the defendant appears before the court dealing with interim measures in the context of fast procedures intended to grant provisional or protective measures in case of urgency and which do not prejudice the examination of the substance cannot, by itself, suffice to confer on that court, by virtue of Article 18 of the Convention, unlimited jurisdiction to order any provisional or protective measure which the court might consider appropriate if it had jurisdiction under the Convention as to the substance of the matter.

53 Unlike the circumstances outlined above, the Netherlands judgment, for the enforcement of which an order is sought in the main proceedings, has the following characteristics:

- it was delivered at the end of proceedings which were not, by their very nature, proceedings as to substance, but summary proceedings for the granting of interim measures;
- the defendant was not domiciled in the Contracting State of the court of origin and it does not appear from the Netherlands judgment that, for other reasons, that court had jurisdiction under the Convention as to the substance of the matter;
- it does not contain any statement of reasons designed to establish the jurisdiction of the court of origin as to the substance of the matter

and

— it is limited to ordering the payment of a contractual consideration, without, on the one hand, repayment to the defendant of the sum awarded being guaranteed if the plaintiff is unsuccessful as regards the substance of his claim or, on the other, the measure sought relating 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.

54 It follows from the reply to the fourth question that, if the court of origin had expressly indicated in its judgment that it had based its jurisdiction on its national law in conjunction with Article 24 of the Convention, the court to which application for enforcement was made would have had to conclude that the measure ordered — namely unconditional interim payment — was not a provisional or protective measure within the meaning of that article and was therefore not capable of being the subject of an enforcement order under Title III of the Convention.

55 So, where the court of origin is silent as to the basis of its jurisdiction, the need to ensure that the Convention rules are not circumvented (see, in this respect, paragraph 47 of this judgment) requires that its judgment be construed as meaning that that court founded its jurisdiction to order provisional measures on its national law governing interim measures and not on any jurisdiction as to substance derived from the Convention.

56 It follows that, in a case having the characteristics set out in paragraph 53 of the present judgment, the court to which application for enforcement was made should conclude that the measure ordered is not a provisional measure within the meaning of Article 24 and for that reason cannot be the subject of an enforcement order under Title III of the Convention.

- 57 It is consequently unnecessary for that court to examine whether, and under what circumstances, it might take account of new facts for the purpose of possible application of the second paragraph of Article 28 of the Convention.
- 58 It follows that the Court need not reply to the third question.

### **Costs**

- 59 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 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 Bundesgerichtshof by order of 29 February 1996, hereby rules:

- 1. Article 13, first paragraph, 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, must be construed as not applying to a contract between two parties having the following characteristics, that is to say, a contract:

- relating to the manufacture by the first contracting party of goods corresponding to a standard model, to which certain alterations have been made;
  
- by which the first contracting party has undertaken to transfer the property in those goods to the second contracting party, who has undertaken, by way of consideration, to pay the price in several instalments; and
  
- in which provision is made for the final instalment to be paid before possession of the goods is transferred definitively to the second contracting party.

It is in this regard irrelevant that the contracting parties have described their contract as a 'contract of sale'. A contract having the characteristics mentioned above is however to be classified as a contract for the supply of services or of goods within the meaning of Article 13, first paragraph, point 3, of the Convention of 27 September 1968. It is for the national court, should the need arise, to determine whether the particular case before it involves a supply of services or a supply of goods.

2. A judgment ordering interim payment of contractual consideration, delivered at the end of a procedure such as that provided for under Articles 289 to 297 of the Netherlands Code of Civil Procedure by a court not having jurisdiction under the Convention of 27 September 1968 as to the substance of the matter is not a provisional measure capable of being granted under Article 24 of that 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 ordered 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.

Rodríguez Iglesias

Kapteyn

Puissochet

Hirsch

Jann

Mancini

Moitinho de Almeida

Gulmann

Murray

Edward

Ragnemalm

Sevón

Wathelet

Delivered in open court in Luxembourg on 27 April 1999.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President