OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 15 SEPTEMBER 1976 [1]

Mr President,
Members of the Court,

In order to understand the reference for a preliminary ruling made to the Court by the Cour d'Appel, Mons, by order of 9 December 1975 the following preliminary remarks must be made:

On 24 October 1959 the French company Bouyer, the registered office of which is in Tomblaine, Meurthe et Moselle, concluded a contract with the Belgian company De Bloos, the registered office of which is in Leuze, whereby the exclusive distribution rights of the products produced by Bouyer for Belgium, Luxembourg and the former Belgian Congo were granted to the abovementioned Belgian company. The contract was initially for three years but subsequently, as neither party had given notice to terminate it, it was impliedly extended. In accordance with Regulation No 17 it was notified to the Commission; however no individual exemption was necessary as, by virtue of communication from the Commission in 1969, it fell within the scope of the regulation providing for exemption of categories of agreements (Regulation No 67/67, OJ English Special Edition 1967, p. 10).

In the autumn of 1972 difficulties evidently arose between the parties to the contract. They were caused by the fact that Bouyer had entered into negotiations in Belgium with another undertaking concerning the distribution of its products. De Bloos regards this as a breach of contract having certain legal consequences. In this respect it relies on a Belgian Law of 27 July 1961 as amended by the Law of 13 April 1971. Thereby contracts such as the one at issue are deemed to have been concluded for an indefinite period if they are extended on two occasions. In addition the law provides that the injured party in the case of unilateral revocation without compliance with a reasonable period of notice has a right to fair compensation, and that if notice is given by the grantor on grounds other than the wrongful act of the grantee then reasonable additional compensation is payable.

In reliance on these provisions De Bloos appealed to the commercial court in Tournai. It sought a ruling that the exclusive dealing agreement had been dissolved on 1 October 1972 through breach of contract by Bouyer and an order that the French company should pay damages.

The defendant company challenges the jurisdiction of the court in which the action was brought. The abovementioned Belgian law provides that actions by the grantee under a contract conferring an exclusive concession against his supplier for breach of contract can be brought in the court which has jurisdiction at the place of residence of the trader if the exclusive dealing contract produces effects in Belgium. However the commercial court did not take account of this provision as, clearly correctly, it regarded it as being superseded by the Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters which entered into force on 1 March 1973. It relied rather on the Convention in particular Article 5 thereof which provides that:

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

1 — Translated from the German.

(1) in matters relating to a contract, in the courts for the place of performance of the obligation in question ...'

The commercial court implied from clauses in business letters and invoices from the defendant which specified that the courts of Nancy were to have jurisdiction, that the bills were payable in Nancy and that the goods were to be delivered to the business premises of the defendant, that the defendant company had to perform its obligations not in Belgium but in France. Therefore it decided that the jurisdiction of Belgian courts to deal with the case was excluded.

De Bloos appealed against this judgment to the Cour d'Appel in Mons. In its assessment of the facts the Cour d'Appel at first reached another conclusion in that it found no agreement that the place of performance be in France and thus no agreement conferring jurisdiction within the meaning of Article 17 of the abovementioned Convention in respect of the disputed obligation. It decided that the abovementioned clauses only applied to individual business transactions but not for the outline contract which was the sole object of the court proceedings. In addition the court thought it conceivable that the Belgian courts might have jurisdiction either on the basis of abovementioned Article 5 (1) of the Convention on jurisdiction or under Article 5 (5) thereof which runs as follows:

'as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.'

The Cour d'Appel is not without its doubts in this respect for the following reasons:

In applying Belgian law — it is Belgian law that is to be applied to the particular situation by the court on the basis of a provision for conflict of laws contained in the Belgian law of 1961 as the exclusive dealing agreement produces effects in Belgium — the court reached the conclusion, with regard to Article 5 (1) of the Convention, that is with regard to the courts for the place of performance, that the claim made could be classified in various ways. One view was that it may be decisive that the duty to pay compensation replaces the obligation to comply with a reasonable period of notice; in the principal obligation of the grantee, may be found the basis for the claim to compensation which may therefore be regarded as a contractual right. Another view was that the grantor has a choice between complying with a reasonable period of notice or paying damages, the duty to pay damages being a legal consequence of the dissolution of the contract, that is to say, a new, independent obligation. Accordingly the place of performance is regarded as being either in Belgium, that is the area where the principal obligations of the grantee are to be performed or, as the obligations to make payment are to be performed where the debtor resides, then the place of performance is that at which the defendant French debtor resides.

The Cour d'Appel finds difficulties in the application of Article 5 (5) of the Convention on jurisdiction in that according to the facts as stated in the proceedings the exclusive dealer was not entitled to deal *in the name* of the supplier and that he was not subject to the control and direction of the supplier. Therefore it has doubts whether the Belgian exclusive dealer can be regarded as a branch etc. within the meaning of Article 5 (5) of the Convention.

For these reasons the court stayed proceedings in order to obtain a preliminary ruling on the interpretation of the Convention on jurisdiction and the enforcement of Judgments. The following questions were formulated in its order for reference of 9 December 1975:

I — In an action brought by the grantee of an exclusive sales concession against the grantor in which he claims that the latter has infringed the exclusive concession, may the term *'obligation'* in Article 5 (1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters be applied without distinction to each of the obligations set out below or must its application to any of them be excluded:

1. Any obligation arising out of the outline contract granting an exclusive sales concession or even arising out of the successive sales concluded in performance of this outline contract;
2. the obligation in dispute or forming the basis of the legal proceedings and, if so,
   (a) the original obligation (such as the obligation not to sell to others in the territories agreed upon or the obligation to give reasonable notice in the event of unilateral breach);
   (b) or the obligation to provide the equivalent of the original obligation (to pay compensation or damages);
   (c) or the obligation to pay damages where the effect of novation arising from the dissolution or termination of the contract is to render void the original obligation;
   (d) or, finally, the obligation to pay 'fair compensation' or even 'additional compensation' provided for in Articles 2 and 3 of the Belgian Law of 27 July 1961 concerning the unilateral termination of exclusive sales concessions of indefinite duration, as amended by the Law of 13 April 1971;

II — Where, on the one hand, the grantee of an exclusive sales concession is not empowered either to negotiate in the name of the grantor or to bind him and, on the other hand, he is not subject either to the control or direction of the grantor, is such a person at the head of a branch, agency or other establishment of the grantor within the meaning of Article 5 (5) of the Brussels Convention?

I — Before I can examine these questions I must first state my opinion concerning a problem of procedural law. This results from the fact that the Government of the United Kingdom also submitted observations concerning the reference for a preliminary ruling which, in accordance with the usual practice, was communicated to all Member States of the Community although the Convention on jurisdiction and the enforcement of Judgments and the Protocol on its interpretation for the time being only apply in relation to the original Member States of the Community.

As became evident in the course of the procedure there is no unanimity on the question whether such observations are admissible from the three new Member States. In support of their admissibility, reference is particularly made to Article 5 of the Protocol on interpretation which refers to the EEC Protocol on the Statute of the Court of Justice in respect of references for a preliminary ruling. The view is taken that since Article 20 of the abovementioned Protocol certainly refers to all Member States the same must also apply in relation to proceedings under Article 3 of the Protocol on interpretation. In addition reference is made to Article 37 of the EEC Protocol on the Statute of the Court of Justice whereby all Member States have the right to 'intervene in cases before the Court'. Against this the French Government, which was the only party to raise objections, stated that exclusion of the

new Member States from the proceedings is supported by the fact that only courts of the original Member States and their 'competent authorities' within the meaning of Article 4 of the Protocol on interpretation are able to refer questions to the Court of Justice. Moreover only the Contracting States, that is those States which concluded the Convention, are in a position to define its contents.

In our examination of this problem doubts may certainly be felt whether reference to Article 5 of the Protocol on interpretation is sufficient to justify the participation of the new Member States in the reference for a preliminary ruling concerning the Convention on jurisdiction. It must not be overlooked that Article 5 begins with the words 'except where this Protocol otherwise provides'. This may be understood in the sense that the point at issue is the purpose and system of the Protocol and that the determining factor is for which Member States is the Protocol already binding. In addition reference may be made to Article 4 of the Protocol in which — apart from the Commission and the Council — reference is only made to notice being given to the *Contracting States.* This may be regarded as a general clarification of the right of participation but it is difficult to see why, in relation to proceedings under Article 4 of the Protocol on interpretation which also concerns only questions of interpretation, there should be a different sphere of application in respect of Member States from that relating to proceedings under Article 3.

On the other hand it must be acknowledged that the references made in the course of the proceedings to Article 3 (2) of the Act concerning the Conditions of Accession and the Adjustments to the Treaties and Article 63 of the Convention on jurisdiction have considerable force. Article 3 (2) of the Act concerning the Conditions of Accession provides that the new Member States undertake,

'to accede to the conventions provided for in Article 220 of the EEC Treaty, and to the protocols on the interpretation of those conventions by the Court of Justice, signed by the original Member States and to this end they undertake to enter into negotiations with the original Member States in order to make the necessary adjustments thereto.'

As we know these negotiations have already reached the first stage. Article 63 of the Convention on jurisdiction provides that:

'The Contracting States recognize that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last paragraph of Article 220 of the Treaty establishing the European Economic Community.

The necessary adjustments may be the subject of a special convention between the Contracting States of the one part and the new Member State of the other part'.

According to the Report on the Convention on jurisdiction and the enforcement of Judicial Decisions in Civil and Commercial Matters — which for the sake of brevity I shall call 'the Report' — this means that the basic principles of the Convention may not be departed from and therefore that the essence and the fundamental principles of the Convention will also apply in respect of the new Member States. Consequently future Contracting States have a genuine interest which should be protected in taking part in proceedings concerning its interpretation; the corresponding legal decisions will — at least in respect of the basic principles of the Convention — form part of the body of law which must be adopted by the new Member States. However since it is certainly not easy to define what is

fundamental to the Convention and what allows of adjustment, I believe there should be no hesitation in allowing new Member States in general to submit observations in respect of requests for a preliminary ruling concerning the Convention on jurisdiction and the enforcement of Judgments. This conclusion is further supported by the fact that we are here concerned with objective proceedings intended to ascertain the purport of the Convention in which in principle nothing is left open to the parties thereto. In addition, if occasion arises, the intentions which the Contracting States had at the time of concluding the Convention may be taken into account as regards statements by the original Member States.

I do not think it is necessary to examine in detail Article 37 of the EEC Protocol on the Statute of the Court of Justice as its application to proceedings of the present nature appears to me to be extremely doubtful and I therefore suggest that it be ruled that there is no objection to collaboration by the new Member States in proceedings concerning the interpretation of the Convention on jurisdiction and the enforcement of Judgments.

II — 1. The *first question* to which I must turn relates to the interpretation of Article 5 (1) of the Convention, that is the provision which provides for the jurisdiction of the place of performance for the enforcement of contractual rights.

A problem arises here in so far as, where a national court, examining its jurisdiction on the basis of this provision and in view of the fact that substantive law including international private law in the Community has — still — not been harmonized, has to determine, according to its own private international law, the law which is applicable to the legal situation concerned and then has to ascertain, on the basis of this law, where the obligations in question are to be performed. If this produces several places of performance then under the Convention the question arises whether they are all equally important or whether the abovementioned provision is to be so interpreted as to leave some places of performance out of account.

After all the observations submitted in this respect in the course of the proceedings I have no doubt that the Commission is correct in stating that the 'performance of the obligation' arising out of a contract, mentioned in Article 5, has to a certain extent an independent meaning, a Community law meaning as it were, and that national law alone is not decisive in this respect.

In principle it may be assumed that terms used in such agreements which are of significance for the life of the Community — the Convention on jurisdiction and enforcement of Judgments concerns the facilitation of legal proceedings — have a meaning for the purposes of Community law at least in so far as there exists no clear and unambiguous reference to national law as, for example, in Article 52 in respect of the concept of domicile.

It is particularly important for the Convention on jurisdiction and the enforcement of Judgments that a *uniform* system of jurisdiction is created. Its provisions must be observed by national courts and, with a few exceptions, once jurisdiction has been accepted there is in principle no occasion for reopening the matter. This is evident from the abovementioned Report. However it may be said that fundamental autonomous concepts are a necessary precondition for the definition of common rules of jurisdiction.

It is further relevant that the Convention is based on the attempt not to have duplication of jurisdiction except where this is necessary. In this respect it is *inter alia* characteristic that the place where the contract was concluded is not taken into consideration. However as the court

seised of the matter rules as to the law applicable and as, apart from a few exceptions, the matter is subsequently no longer open to dispute, the danger of duplication of jurisdiction cannot be entirely ruled out where the national law alone is decisive, as is illustrated by the present case.

Even if it is going too far to say the place of performance results from the Convention itself there is no support for such an extensive incursion into national law and moreover in the absence of further details this would entail the danger of considerable legal uncertainty — nevertheless in view of the abovementioned factors there remains the consideration that places of performance which may be determined in relation to a particular legal situation on the basis of national law are not necessarily decisive for the application of the Convention.

If, on the basis of the principles that we have deduced, we examine the different aspects of the question before us as formulated with regard to the factual situation in the main action, then a further consideration may be deduced without any particular difficulties.

Article 5 (1) of the Convention is certainly not to be understood as meaning that *one* place of performance applies in respect of *a whole* contractual relationship, in particular for such a complex relationship as that of an exclusive dealing agreement in the context of which are included numerous individual contracts of sale. In view of the customary method of determining jurisdiction of the place of performance in legal systems which already used the concept, the contrary assumption must appear quite unacceptable. It is also clear that Article 5 (1) refers to the obligation which is the object of the dispute. This is expressed in the abovementioned Report, which was submitted together with the draft Convention to the Governments, in which reliance is placed on the obligation *on which the claim is based (klagebegründende Verpflichtung)*. This view is supported by numerous authors such as Martha Waser in 'Convention Communautaire sur la compétence judiciaire et l'exécution des décisions' (page 248). She draws clear support from the German and Italian texts of the Convention. Furthermore an appropriate amendment of the French and Dutch texts is provided for in the context of the work in respect of the accession of the new Member States of the Convention. This is evident, having regard to the intentions of the authors of the Convention, from a report of the working party of the Council of 20 November 1975 which was submitted by the Commission. In the case of synallagmatic contracts Article 5 (1) of the Convention provides, according to the obligation at issue, a different jurisdiction as the place of performance differs. Therefore in exclusive dealing agreements it is natural that the obligations of the grantor and those of the grantee must be kept apart and that for the enforcement of claims for breach of contract by the grantor, the individual contracts of sale which were undertaken within the context of the agreement must be left out of consideration because of their legal independence.

It is not quite so simple to resolve what may be regarded as the central problem of the main action, that is the question whether rights against the grantor for breach of an exclusive dealing agreement must also be regarded separately in so far as they are not regarded as contractual obligations under national law or whether, irrespective of the fact that they are provided for by law, the place of performance of the principal obligation is decisive as this is the basis of the claim and as the action fundamentally concerns the improper performance of them.

In this respect it is possible to opt for a strict interpretation of the text of Article 5 (1) and to take the view that since reference is made to rights arising out of

a *contract,* it does not apply to legal obligations which have arisen in the case of failure to perform contractual obligations. Finally however it must be admitted that there are stronger arguments in support of the view of the Commission which advocates a broader interpretation.

Therefore the principle of concentration of jurisdiction applies in relation to the Convention the intention being to avoid as far as possible conflicting decisions in the various Contracting States. This interpretation is clearly evidenced by the abovementioned Report. In this respect reference may also be made to Article 21 by virtue of which, in cases where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of the first court. This is also supported by Article 22 which provides, in cases where related actions are brought in the courts of different Contracting States, that a court other than the court first seised may, while the actions are pending at first instance, stay its proceedings. For the purposes of that article actions are deemed to be related where they are so closely connected 'that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

Any other interpretation which might lead to division of jurisdiction would fail to take account of the principle of good administration of justice and would therefore appear rather strange in the context of an agreement the purpose of which is to ensure effective pursuit of legal actions. The main action in the present case shows that such an interpretation would give rise to considerable problems; the jurisdiction of the Belgian courts would have to be recognized for the application for judicial dissolution of the contractual relations as this is clearly dependent on the principal obligation of the grantor and thus leads to a place of performance in Belgium. However if, in respect of the claim for damages, which depends on the decision as to the dissolution of the contractual relations, any other qualification were made, the place of performance would have to be taken to be in France and the French courts would therefore have jurisdiction.

Finally it is also relevant — we need not here decide whether it is decisive — that if the solution advocated by the Commission is adopted the result is that the competent court of the place of performance is in the territory of the State the law of which is applicable to the disputed situation — a result which was expressly declared to be desirable in the abovementioned Report. This is not only evident from Belgian private international law but it is also apparent from the appropriate rules as to conflict of laws of most of the Member States whereby matters depend on the sphere of operations of the grantee. In addition this is also contained in the proposed Convention on the law applicable to contractual and non-contractual obligations; Article 4 of a draft text already prepared provides that — except where the parties have agreed otherwise — the contract is to be governed by the law of the country with which it is most closely connected.

Thus in answer to the first question referred for a preliminary ruling it should be stated that the application of Article 5 (1) of the Convention on jurisdiction is dependent on the contractual obligation which is the basis of the dispute and that in the case of disputes concerning the consequences of the breach of an exclusive dealing agreement by the grantee, the main obligation of the grantee forms the subject of the proceedings even if the consequences of the breach of this obligation are prescribed by law.

2. As we have seen interpretation of Article 5 (5) of the Convention on jurisdiction and the enforcement of

Judgments is also required by the court making the reference. The *second question* of the order for reference makes it necessary to determine what is to be understood by 'branch', 'agency' and 'other establishment' and how the phrase 'a dispute arising out of the operations of a branch' etc. is to be interpreted.

A lengthy explanation is not necessary. I feel that the statements submitted by the Commission which were also supported by the representative of the British Government are convincing.

Thus it may be said that characteristics of a branch are, on the one hand, a certain autonomy and, on the other, being subordinate to the parent company and subject to the control of that company. Particular characteristics are the absence of its own legal personality and the authority to act on behalf of the parent company. An agency is similar but its autonomy is certainly less marked.

This was supported by reference to the legal systems of the Member States, to earlier bilateral or multilateral conventions and to provisions of the EEC Treaty which certainly have some value as a means of interpretation for a convention which was concluded within the context of the EEC Treaty. It may be deduced from Articel 52 of the EEC Treaty contrasting agencies and branches on the one hand and subsidiaries on the other, that the former possess no legal personality. Accordingly and after what has become evident in the course of the main action it is certain that in the present case the jurisdiction of the Belgian courts cannot be deduced from Article 5 (5) of the Convention at least in so far as it concerns the terms branch and agency.

With regard to the term 'other establishment' the Commission showed that this does not entail any greater independence and therefore that the subordination to another undertaking is characteristic. As legal personality is not the decisive legal factor in economic matters it is conceivable that these terms might also include bodies with legal personality such as a wholly controlled subsidiary company which operates as though it were a department of the undertaking. It appears feasible for those having an exclusive dealing right to be regarded as such establishments as in one part of the modern doctrine on the subject, economic dependence, the grantor's ability to determine the conditions of disposal stands to the fore. Even if it is presumed that the Belgian undertaking — although this does not appear to be the case according to the facts as they appear — is included in the term 'other establishments' understood in this way, then no jurisdiction for the claims against the grantor could be assumed by virtue of Article 5 (5) of the Convention. As the Commission rightly emphasized it is important in this respect that as Article 5 (5) provides for an exception it must in principle be strictly construed. In addition it is important that, in drawing up the Convention, jurisdictions linked to the nationality or residence of the plaintiff were not taken into account. On this basis it cannot be presumed that Article 5 (5) permits a legally independent establishment to bring an application before the court competent for the area in which that establishment is situate in so far as such application concerns a controlling undertaking, the parent company. Clearly Article 5 (5) rather has the sole purpose of facilitating legal proceedings for *third parties* who are involved with a subsidiary establishment in that they are not obliged to lodge their application where the parent company is situate. Thus it was solely for their benefit that jurisdiction was established in a place nearer to that in which the case of action arose.

Thus in answer to the second question it should be ruled that Article 5 (5) of the Convention can in no way allow of an interpretation giving jurisdiction to the Belgian courts for the main action in this case.

3. In conclusion I therefore suggest that the questions referred for a preliminary ruling by the Cour d'Appel, Mons, should be answered as follows:

(a) For the application of Article 5 (1) of the Convention on jurisdiction and the enforcement of Judgments, in disputes concerning an exclusive dealing agreement regard must not be had to *any* obligation arising from the contractual relationship but exclusively to *that* obligation which is the basis of the dispute. In particular in disputes concerning compliance with exclusive dealing agreements, those agreements which result from contracts of sale concluded in the context of the exclusive dealing agreement must not be taken into consideration. In disputes concerning the consequences of breach of an exclusive dealing agreement by the grantor the subject of the proceedings is the basic obligation of the grantor irrespective of the question whether the consequences of a breach are laid down by law and irrespective of how the obligation to pay compensation is regarded in national law.

(b) Article 5 (5) of the Convention only applies in respect of establishments which are subordinate to another undertaking and in respect of which the parent establishment possesses powers of control and direction. In so far as legally independent undertakings may be regarded as establishments because of their economic dependence, Article 5 (5) does not apply to disputes with the controlling undertaking.