

Civil and Commercial Matters even when the existence of the contract on which the claim is based is in dispute between the parties.

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Delivered in open court in Luxembourg on 4 March 1982.

P. Heim

Registrar

G. Bosco

President of the First Chamber

**OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 3 DECEMBER 1981¹**

*Mr President,
Members of the Court,*

The question on which I am giving my opinion today relates to Article 5 (1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [hereinafter referred to as "the Convention"], which provides:

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

1. in matters relating to a contract,² in the courts for the place of performance of the obligation in question."

¹ — Translated from the German.

² — *Translator's note:* The German version of Article 5 (1) states: "wenn ein Vertrag oder Ansprüche aus einem Vertrag den Gegenstand des Verfahrens bilden ...".

In this regard the Bundesgerichtshof [Federal Court of Justice] wishes to know whether a plaintiff may invoke this jurisdiction even when the existence of the contract on which the claim is based is in dispute between the parties.

The appellant in the main proceedings is an undertaking based in Italy which manufactures cranes. They were distributed in the Federal Republic of Germany through the undertaking Hydraulikkran of Böblingen, which has apparently since — in October 1974 — gone into liquidation. In order to ascertain whether the sale of equipment developed by the appellant was contrary to patent rights, a patent agent was to carry out investigations in Germany. As far as I can understand from the order

for reference, it seems that, following a conversation with the appellant, Hydraulikkran commissioned the respondent in the main proceedings, a patent agent practising in the Federal Republic of Germany, for that purpose.

The patent agent subsequently claimed from Effer payment of a fee and brought an action for that purpose before a German court in December 1974. Effer in fact denies that there were contractual relations between it and the patent agent. It admits that it commissioned Hydraulikkran but claims that the latter was not authorized to employ the respondent *on behalf of* the appellant; furthermore another patent agent was engaged by Hydraulikkran to carry out the desired investigation. In this dispute the respondent at first succeeded before the Landgericht [District Court] Frankfurt. However — proceeding on the basis that the German courts had jurisdiction under Article 5 (1) of the Convention — the Sixth Civil Senate of the Oberlandesgericht [Higher Regional Court] Frankfurt set aside the judgment of the Landgericht on the ground that it had no *local* jurisdiction and, because in reality it was not a patent dispute, referred the case to the Landgericht Darmstadt. However, that court also ordered Effer to pay the fee, and the appeal against that decision was unsuccessful, among other reasons because the Thirteenth Civil Senate of the Oberlandesgericht Frankfurt took the view that the German courts had jurisdiction under the above-mentioned provision of the Convention, in view of the fact that, for the application of that rule, it did not matter that there was a dispute over the *existence* of the contract on which the claim was based.

Thereafter the matter reached the Bundesgerichtshof in an appeal on a point of

law. The action having been brought in the court of the place of performance, the Bundesgerichtshof held that the place of performance was to be determined in accordance with German law because the main emphasis of the contract indicated German law. Accordingly, it was assumed that there is a single place of performance in relation to a contract with a patent agent, at the place where the services are to be provided, that is to say, where the patent agent has his office. According to the Bundesgerichtshof, however, it was not clear, in view of the appellant's submissions, whether a German court in fact had jurisdiction under Article 5 (1) of the Convention or whether — because the conditions laid down in Article 5 (1) were not met — the action should instead be brought at the place where Effer had its registered office. It therefore stayed the proceedings by an order dated 29 January 1981 and referred the above-mentioned question to the Court for a preliminary ruling.

Only the appellant has argued in favour of a negative answer to the question, whilst all the other parties to the proceedings, the respondent, the Commission and the United Kingdom Government, favour an answer in the affirmative.

I share the latter point of view. It is, incidentally, supported in academic writings (Bülow-Böckstiegel, "Internationaler Rechtsverkehr in Zivil- und Handelssachen, Kommentar zum Vollstreckungsübereinkommen", p. 57; Piltz, "Der Gerichtsstand des Erfüllungsortes nach dem Europäischen Gerichtsstands- und Vollstreckungsübereinkommen", Neue Juristische Wochenschrift 1981, p. 1876; Spellenberg, "Die Vereinbarung des Erfüllungsortes und Artikel 5 Nummer 1 des Europäischen Gerichts-

stands- und Vollstreckungsübereinkommens", Praxis des internationalen Privat- und Verfahrensrechts 1981, p. 75); there are also judgments of certain national courts to that effect (Oberlandesgericht Bamberg, Neue Juristische Wochenschrift 1977, p. 505; Oberlandesgericht Hamm, Recht der Internationalen Wirtschaft, 1980, p. 663).

I give the following grounds for my view:

1. First, with regard to the *wording* of Article 5 (1), the German version, which I quoted earlier, certainly supports the assumption that a dispute over the existence of a contract does not *a priori* exclude the jurisdiction of the courts of the place of performance. Versions in other languages are not as clear, especially the French and Italian, on which the appellant focused particular attention and which may not of course be disregarded. However, I do not see how the phrases used there ("en matière contractuelle", "in materia contrattuale") should necessarily give rise to the conclusion that the formation of a contract must not be in dispute and that jurisdiction under Article 5 (1) is ruled out where there is a dispute as to the existence of a contract.

2. Persuasive authority in favour of an affirmative answer is undoubtedly to be found in the judgment of 14 December 1977 in Case 73/77 *Sanders v Van der Putte* ([1977] ECR 2383 at p. 2388 et seq.). That case concerned the interpretation of Article 16 (1) of the Convention, which provides:

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

1. in proceedings which have as their object rights *in rem* in, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated."

It seems that in that case there was a similar dispute over the question whether a tenancy agreement had ever existed. Nevertheless the application of the above-mentioned provision was not ruled out. That is clear from paragraphs 12 to 15 of the decision, in which the following sentence appears:

"The foregoing considerations explain the assignment of exclusive jurisdiction to the courts of the State in which the immovable property is situated in the case of disputes relating to tenancies of immovable property so-called, that is to say, in particular, *disputes* between lessors and tenants *as to the existence or interpretation of leases* or to compensation for damage caused by the tenant and to giving up possession of the premises."

3. If it were to be accepted that the presence of a dispute over the existence of a contractual relationship *ipso facto* excludes an action under Article 5 (1) of the Convention, then it would be possible by a simple denial on the part of the defendant to render that provision largely ineffective, as well as that contained in Article 5 (3) — jurisdiction in matters relating to tort — where indeed the defendant's defence as a rule consists of denying the existence of a tort. That cannot be practical or what was intended. Although it must be conceded that Article 5 (1) constitutes an exception to the general rule contained in Article 2 — jurisdiction of the courts of the defendant's domicile — and consequently it cannot be presumed that the former provision is to be interpreted broadly, yet such considerations may

certainly not lead to an interpretation which would make it possible to render an exceptional provision practically ineffective.

4. On the other hand, a plaintiff who invokes jurisdiction under Article 5 (1) of the Convention can hardly be required to give more than a coherent statement of his claim. That was indeed the opinion of the representative of the United Kingdom in stating that the plaintiff must *bona fide* claim that there is a contractual relationship and, indeed, on the basis of facts which *prima facie* indicate the existence of a contract.

In this regard the Commission correctly pointed out that recourse to the Convention's jurisdiction rules is not in principle tied to formal conditions or compliance with minimum standards of evidence and that the requirement of writing laid down in Article 17 of the Convention for jurisdiction agreements must rather be regarded as a definite exception. Thus it was held in the judgment of 17 January 1980 in Case 56/79 *Zelger v Salintri* ([1980] ECR 89 at p. 97), that an *informal* agreement as to the place of performance is sufficient for Article 5 (1).

5. Further support for the proposition that a dispute over the existence of a contract does not deprive the courts of the place of performance of jurisdiction may be derived from the fact that a court whose jurisdiction is invoked in reliance on the Convention must — as a result of Article 20 of the Convention — *examine*, of its own motion, the question of its jurisdiction under the provisions of the Convention (see the Jenard Report on Article 19 of the Convention and Bülow-Böckstiegel, *op.cit.*, Point III on Article

20 of the Convention). That can only mean that all the conditions necessary for the alleged jurisdiction are to be established and also a legal appraisal is to be undertaken. It follows that the same must also be true with regard to the question whether a contract, and with it a contractual place of performance, is to be taken to exist.

In this connection the better view must be that no relevance is to be attached to the fact that the examination of the question of jurisdiction wholly or partly overlaps with the examination of the substance of the claim. The possibility that the examination of the facts founding jurisdiction may also affect the determination of the substantive claim is not to be ruled out in other cases either. One needs only to look at the example given by the Commission, of a jurisdiction agreement in a firm's general trading conditions, where the examination of the question whether the agreement was validly concluded may also prejudice questions relating to the claim, since in many cases other matters are determined in the trading conditions. Otherwise a distinction would be drawn according to whether there was a separate agreement on the place of performance or not, which scarcely seems justified. The view that jurisdiction under the Convention could not be recognized if the examination of the question of jurisdiction wholly or partly overlapped with the examination of the facts founding the claim would not be compatible with the principle, clearly expressed in the Jenard Report, that the Convention should be given a wide application.

It is clear, however, that the judicial practice described by the Commission of requiring no evidence of the facts founding jurisdiction if they are at the same time ingredients of the substantive

claim would also be incompatible with the rules of the Convention, precisely because those rules require an examination as to jurisdiction by the court *of its own motion* and with it, if necessary, the hearing of evidence limited to the determination of jurisdiction.

6. Finally, it should not be forgotten that the interpretation which I have set out does not lay an unreasonable burden on defendants who may find themselves obliged to defend themselves before foreign courts. Thus the second paragraph of Article 20 of the Convention, which provides that the court shall stay the proceedings so long as it is not shown that the defendant has been able

to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, ensures that the defendant has an opportunity to submit his point of view. Moreover, if he is sued before the courts of a Contracting State in which he is not domiciled, he is not obliged to attend and enter an appearance. In such a case the first paragraph of Article 20 of the Convention requires the court to examine the question of jurisdiction of its own motion. In this respect an alleged fact cannot be regarded as admitted on account of the defendant's failure to enter an appearance; on the contrary full proof of the facts founding jurisdiction is to be required of the plaintiff (see *Bülow-Böckstiegel, op. cit.*).

7. Without going into the problem raised by the United Kingdom, as to whether in fact jurisdiction which has been correctly invoked under Article 5 (1) of the Convention still exists even if the claim that there is no contract is later shown to be justified, I propose that the question submitted by the Bundesgerichtshof should be answered as follows:

A plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5 (1) of the Convention even when the existence of the contract on which the claim is based is in dispute between the parties.