

OPINION OF ADVOCATE GENERAL ELMER

delivered on 21 February 1995 *

Introduction

observation in the Court's judgment in Case 33/78 *Somafer v Saar-Ferngas* ¹ may however be understood as meaning that such a limitation applies in the sphere of application of that provision.

1. According to Article 5(5) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, a person domiciled in a Contracting State may, in another Contracting State, be sued 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 establishment is situated.

Facts

2. The French limited company Campenon Bernard was in 1985 awarded a contract by the Ministry of Public Works in Kuwait to construct a motorway from the port of Kuwait to the Iraqi border. The steel to be used for reinforcement of the concrete was, according to the contractor's specifications, to comply with a United States technical standard known as ASTM A 615.

In this case the question referred to the Court for a preliminary ruling from the Cour de Cassation (Court of Cassation), Paris, is whether the plaintiff may avail himself of that special rule of jurisdiction only in cases in which the dispute concerns an obligation to be performed in the State in which the branch, agency or other establishment is situated.

Such a geographical limitation is not apparent from the wording of the provision. An

Campenon Bernard ordered the steel from the French company Fercometal, which subcontracted the order to a Spanish company.

* Original language: Danish.

1 — [1978] ECR 2183.

In order to ensure that the steel complied with the contractor's specifications, Campenon Bernard applied to the Paris office of the British company, Lloyd's Register of Shipping, which, by a contract dated 3 December 1985, forwarded to Campenon Bernard by letter dated 9 December 1985, undertook to check that the steel complied with the prescribed standard. According to the contract the check was to be carried out by the Spanish sub-contractor of the Spanish branch of Lloyd's Register of Shipping and payment was to be made in pesetas.

On 17 and 24 January 1986 the Spanish office of Lloyd's Register of Shipping issued certificates that the steel complied with the technical standards, whereupon Campenon Bernard paid Fercometal the purchase price and had the steel shipped to Kuwait.

In May 1986, however, the contractor in Kuwait refused the steel as not complying with the required standard.

Campenon Bernard thereupon brought an action before the Tribunal de Commerce (Commercial Court), Paris, against Lloyd's Register of Shipping, represented by its Paris office, claiming damages.

3. Lloyd's Register of Shipping claimed before the Tribunal de Commerce and later before the Cour d'Appel (Court of Appeal), Paris, that the action was inadmissible, contending that Article 5(5) of the Brussels Convention did not confer on the French courts jurisdiction to deal with the matter. In the course of considering the appeal by Lloyd's Register of Shipping against the judgment of the Cour d'Appel dated 5 June 1991, the Cour de Cassation subsequently referred the following question to the Court of Justice for a preliminary ruling:

'In the light of the first paragraph of Article 5 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, does the expression "dispute arising out of the operations of a branch (...)" in Article 5(5) of the Convention necessarily presuppose that the undertakings in question entered into by the branch in the name of *its parent body* are to be performed in the Contracting State in which the branch is established?'

Brussels Convention

4. The principal rule with regard to jurisdiction is to be found in the first paragraph of Article 2 of the Brussels Convention, which provides:

'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.'

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

4. ...

5. Article 5, which is to be found in Section 2 of Title II of the Convention, entitled 'Special jurisdiction' lists a number of cases of special jurisdiction of which the applicant may choose to avail himself instead:

5. 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;

'Article 5:

6. ...

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

7. ...'

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

6. In the judgment of reference the Cour de Cassation refers to the judgment in Case 33/78 *Somafer v Saar-Ferngas*, previously cited, where the Court declared:

2. ...

'Although Article 5 makes provision in a number of cases for a special jurisdiction, which the plaintiff may choose, this is because of the existence, in certain clearly-

defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to efficacious conduct of the proceedings. Multiplication of the bases of jurisdiction in one and the same case is not likely to encourage legal certainty and the effectiveness of legal protection throughout the territory of the Community and therefore it is in accord with the objective of the Convention to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2 ...' (paragraph 7);

The Court further declared:

'... Such special link comprises in the first place the material signs enabling the existence of the branch, agency or other establishment to be easily recognized and in the second place the connection that there is between the local entity and the claim directed against the parent body established in another Contracting State' (paragraph 11).

and

In the case now pending it is the Court's definition of the expression '*operations*' of a branch, agency or other establishment which calls for consideration. In the *Somafer* judgment the Court stated:

'The scope and limits of the right given to the plaintiff by Article 5(5) must be determined by the particular facts which either in the relations between the parent body and its branches, agencies or other establishments or in the relations between one of the latter entities and third parties show the special link justifying, in derogation from Article 2, the option granted to the plaintiff ...' (paragraph 8).

'...This concept of *operations* comprises on the one hand actions relating to rights and contractual or non-contractual obligations concerning the management properly so called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there. Further it also comprises those relating to undertakings which have been entered into at the abovementioned

place of business in the name of the parent body and *which must be performed in the Contracting State where the place of business is established* and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment, within the above-defined meaning, has engaged at the place in which it is established on behalf of *the parent body*' (paragraph 13, my emphasis).

Kingdom, the Greek Government and the Commission have all supported that criticism.

The observations emphasize that the wording of Article 5(5) contains no geographical limitation of the expression 'operations', which is a purely economic concept.

7. The Court's statement that the expression 'operations' also comprises the obligations which the branch, agency or other establishment has entered into on behalf of the parent body, in so far as it concerns the addition '*and which must be performed in the Contracting State where the place of business is established*', has been criticized both in academic writings² and in Advocate General Sir Gordon Slynn's Opinion in Case 218/86 *SAR Schotte v Parfums Rothschild*.³

If Article 5(5) were to apply only to disputes concerning obligations which were to be performed in the State in which the branch, agency or other establishment were situated, the independent practical significance of the provision would in addition be extremely slight. According to Article 5(1) the courts for the place of performance of the obligation already have jurisdiction in matters relating to a contract and under Article 5(3) the courts for the place where the harmful event occurred have jurisdiction in matters relating to tort, delict or quasi-delict. With such a limitation Article 5(5) would in reality be reduced to covering cases of choice between jurisdictions within the individual Contracting State, for which the provision cannot have been intended.

Procedure before the Court

8. In the written observations submitted to the Court, Campenon Bernard, the United

What is more, Article 5(5) is intended to apply to third persons contracting with a parent company's branch or agency and the same conditions apply to such third persons irrespective of where the contract is to be performed.

² — See Gothot et Holleaux: *La Convention de Bruxelles*, 1985, p. 56. Dicey and Morris: *On the Conflict of Laws*, London 1987, p. 348. See also: H. Tebbens: *Compétence judiciaire et exécution des jugements en Europe*, Butterworths, 1993, p. 99.

³ — [1987] ECR 4905.

Finally the United Kingdom mentions that in the second paragraph of Article 8 of the Convention (insurance matters) and the second paragraph of Article 13 thereof (certain consumer contracts) exactly the same wording is used as in the contested Article 5(5). The provisions must therefore, in the United Kingdom's view, be uniformly interpreted.⁴ The practical effect of the second paragraph of Article 8 and the second paragraph of Article 13 would however be very considerably reduced if those provisions were to be interpreted with the limitation ascribed to Article 5(5) in the *Somafer* judgment.

9. The French Government, in its observations, dissociates itself from a strictly literal interpretation of the requirements of the *Somafer* judgment. With particular reference to the Court's more recent decision in Case 218/86 *Schotte*⁵ it advocates a solution according to which there must be a real link between the dispute and the State in which it is to be heard, for instance that at least one part of the contract is to be performed in that State.

10. Lloyd's Register of Shipping in its observations has invited the Court to confirm in its entirety the geographical limitation of Article 5(5) referred to in the *Somafer* judgment and in doing so has mentioned *inter alia* that the reason for the provision is the practical procedural consideration of allowing disputes to be decided on the spot, as it were. Advocate General Reischl in his Opin-

ion in Case 139/80 *Blanckaert & Willems v Trost*⁶ interprets the *Somafer* judgment as follows:

'... The abovementioned decision shows, furthermore, that in order to satisfy the requirements of Article 5(5) of the Convention the existence of *some* restrictions on the representative's independence and *some* opportunity for the principal undertaking to exercise its influence is not sufficient. The agency or other establishment must actually be a kind of decentralized office with essentially the same ability to conduct business as the principal undertaking, but *restricted of course to the territory of the Member State in which it is situated*. I think that is what is required by the words quoted above, in particular by the use of the words "place of business".' (my emphasis).

In the view of Lloyd's Register of Shipping that requirement as to the place of performance does not create a textually unacceptable restriction of the provision.

⁴ — See also Advocate General Darmon's Opinion in Case C-89/91 *Shearson Lehman Hutton v TVB* [1993] ECR I-139.

⁵ — Cf. footnote 3.

⁶ — [1981] ECR 819.

Discussion

11. The Court has consistently held that the rules of the Convention on special jurisdiction — which are certainly derogations from the general rule of the first paragraph of Article 2 on the domicile of the defendant — are to be restrictively interpreted.⁷

12. It may at first seem doubtful how much weight can be attached in cases such as this to the statements in the *Somafer* judgment on the concept of 'operations'.

In the first place the statement in paragraph 13 contains an indication of what *is* covered by the concept of 'operations', but there is no indication of what *is not* covered by the concept — see for example the expressions 'this concept of operations comprises on the one hand...' and 'Further it also comprises ...'. The Court had no occasion to decide the question of whether to attribute a geographical limitation to Article 5(5). The dispute before the court of reference concerned a case which would also be covered by the provision even if such a limitation had

applied and according to the report of the parties' observations the question of a geographical limitation was not even discussed.

Next it must be stressed that the Court's statement that the concept of operations also comprises actions 'relating to undertakings which have been entered into at the above-mentioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established' is in the nature of an *obiter dictum*. The case before the court of reference concerned not this type of dispute but on the contrary a dispute 'concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above-defined meaning, has engaged at the place in which it is established on behalf of the parent body'.

I would refer to paragraph 2 of the grounds of judgment, according to which the action concerned the question whether the German court had jurisdiction:

'... to try an action brought by a German undertaking against a French undertaking, the registered office of which is in French territory but which has an office or place of contact in the Federal Republic of Germany described on its note-paper as "Vertretung

7 — See for example the judgments in Case 189/87 *Kalfelis v Schröder* [1988] ECR 5565 at paragraph 19 and in Case C-26/91 *Handte v TMCS* [1992] ECR I-3967 at paragraph 14.

für Deutschland”, for the recovery of the expenses incurred by the German undertaking to protect gas mains belonging to it from any damage which might be caused by demolition work which the French undertaking was carrying out in the vicinity on behalf of the Saarland”.

The idea therefore suggests itself that in making its observation the Court was not deciding the question of the application of Article 5(5) to a case such as this.

13. The same may be said of Case 139/80 *Blanckaert & Willems*,⁸ which concerned the jurisdiction of German courts to try a dispute regarding the plaintiff's agency in the Rhine and Ruhr, Eifel and South Westphalia area. Advocate General Reischl's observation⁹ to the effect that the undertaking must of course be restricted to the territory of the Member State in which it is situated was made therefore in a context in which it was not necessary to consider the consequences of the opposite point of view.

14. In its judgment in Case 218/86 *Schotte*,¹⁰ the Court did not discuss the question of whether a geographical limit applied to subparagraph 5 of Article 5, which, as I mentioned previously,¹¹ was raised by Advocate General Sir Gordon Slynn. The question referred to the Court for a preliminary ruling did not concern that matter, but it was clear from the case that the perfume atomizer pumps to which the action related were *not* to be supplied in the Contracting State in which the branch, agency or other establishment was situated (Germany), but on the contrary in the Contracting State in which the defendant (parent) undertaking was situated (France).

In that judgment the Court declared that Article 5(5) could be applied in a situation ‘in which two companies bear the same name and are under common management, and in which one of those undertakings, although not a dependent branch or agency of the other, nevertheless enters into transactions on behalf of the other and thus acts as its extension in business relations’ (paragraph 13).

It was also emphasized in the judgment that the German firm, not only ‘took part in the negotiations and in the conclusion of the contract but was also responsible, during the performance of the contract, for ensuring that the deliveries contracted for were made and that invoices were paid’ (paragraph 14).

⁸ — Cf. footnote 6.

⁹ — See section 10 of my Opinion, above.

¹⁰ — [1987] ECR 4905; see footnote 3.

¹¹ — See section 11 above.

The dispute concerned 'orders placed for the delivery ... to the French undertaking of atomizer pumps'.

The Court therefore mentioned expressly that the question concerned deliveries to a firm in France without raising the question of a geographical limitation in the application of Article 5(5) in a case in which such a limitation might possibly have led to the opposite result.¹²

definition the weaker parties in the relevant contractual relationship. In addition there is the important difference that Article 5(5) applies where the defendant is domiciled in a Contracting State, whereas the second paragraphs of Article 8 and 13 deal expressly with situations in which the insurer or the party with whom the consumer has entered into a contract is not domiciled in the Contracting State. I naturally agree that it would be difficult for the provisions in question to be applied with a geographical limitation such as that at issue in this case. But that does not mean that it may be immediately deduced that the limitation is untenable as far as Article 5(5) is concerned.

15. I certainly cannot concur with the United Kingdom's view¹³ that the same interpretation must be given to the identical provisions of Article 5(5) on the one hand and the second paragraphs of Article 8 and of Article 13 on the other.¹⁴ In my view that argument is significantly weakened by the very purpose of the two latter provisions: to protect the insured (second paragraph of Article 8) and the consumer (second paragraph of Article 13) respectively, who are by

16. On the other hand decisive importance must be attached to the fact that Article 5(5) would to all intents and purposes be devoid of independent content if it were applicable only to disputes regarding obligations which must be performed in the Contracting State in which the branch, agency or other establishment is situated. The courts for the place of performance of the obligation already have jurisdiction under Article 5(1) in matters relating to a contract and the courts for the place where the harmful event occurred already have jurisdiction under Article 5(3) in matters relating to tort, delict or quasi-delict. As emphasized by Campenon Bernard, the United Kingdom, the Greek Government and the Commission, with such a limitation of Article 5(5) would actually be

12 — In Case 14/76 *de Bloos v Bouyer* [1976] ECR 1497, subparagraph 5 of Article 5 was not applicable for other reasons and the question was therefore not involved.

13 — See section 8 above.

14 — Those provisions are as follows:

Second paragraph of Article 8: 'An insurer who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.'

Second paragraph of Article 13: 'Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.'

reduced to cases of choice between several jurisdictions within the individual Contracting State.

17. If a geographical limitation were to be generally construed as being covered by the economic concept 'operations' in Article 5(5), that might also entail significant difficulties of interpretation, with the resultant legal uncertainty. Is it, for example, impossible to apply the provision if only a single part of the contract is to be performed outside the Contracting State? The French Government's suggestion that performance of at least one part of the contract must take place within the Contracting State raises the same difficulty, though in reverse. Can it be required, for example, that that part of the contract must be an essential one? Is the person with whom the contract is concluded to be able to avoid legal proceedings, for example by having certain parts of the obligation he has assumed performed outside the Contracting State by engaging a sub-contractor for instance, and will it be significant whether there has been agreement as to whether a (given) sub-contractor may be employed in the performance of the obligation? And what differences may the criterion possibly lead to as regards the delivery of goods or the performance of services?

Rather than creating clarity, a geographical limitation such as that at issue raises a series of problems and thus gives rise to legal uncertainty.

18. Furthermore, Article 5(5) serves two purposes:

— Partly to make it easier for the plaintiff to take proceedings in cases in which there is 'a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension' (*Somafer* judgment, paragraph 12); and

— Partly, as mentioned in the United Kingdom's observations, to approximate the situation just described to the point of departure of the first paragraph of Article 2 of the Convention regarding general jurisdiction arising from the domicile of the defendant. For agencies such as those listed in Article 5(5) — non-legal persons — there is by definition no such jurisdiction arising from domicile.

Article 5(5) should therefore in my view be interpreted according to its clear wording, which entails no geographical limitation.

Opinion

19. On the foregoing grounds I shall suggest that the Court should answer the question referred to it as follows:

The expression 'as regards a dispute arising out of the operations of a branch, agency or other establishment ...' in Article 5(5) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not entail any requirement that the obligations undertaken by a branch (...) in the name of *the parent company* are to be performed in the Contracting State in which the branch ... is situated.