JUDGMENT OF THE COURT
29 June 1994 *

In Case C-288/92,

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 (Federal Court of Justice) (Germany) for a preliminary ruling in the proceedings pending before that court between

Custom Made Commercial Ltd

and

Stawa Metallbau GmbH

on the interpretation of Article 5(1) and the first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (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 version — p. 77),

* Language of the case: German.

THE COURT,

composed of: O. Due, President, J. C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C. N. Kakouris (Rapporteur), F. A. Schockweiler, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: C. O. Lenz,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the German Government, by Professor Christof Böhmer, Ministerialrat at the Federal Ministry of Justice, acting as Agent,

— the Italian Government, by Professor L. Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by O. Fiumara, Avvocato dello Stato,

— the Commission of the European Communities, by P. van Nuffel, of the Legal Service, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt, Düsseldorf,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government and the Commission of the European Communities at the hearing on 19 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 8 March 1994,

gives the following

Judgment

1 By order of 26 March 1992, received at the Court on 30 June 1992, the Bundesgerichtshof 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 (OJ 1978 L 304, p. 36) ('the Convention'), 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 version — p. 77), a number of questions on the interpretation of Article 5(1) and the first paragraph of Article 17 of the Convention.

2 Those questions arose in proceedings between Stawa Metallbau GmbH ('Stawa'), which has its seat in Bielefeld (Germany), and Custom Made Commercial Ltd ('Custom Made'), which has its seat in London, concerning the payment by the latter of merely part of the price agreed under a contract for the supply of windows and doors to be manufactured by Stawa.

3 According to the order for reference, Stawa gave a verbal undertaking in London on 6 May 1988, following negotiations conducted in English, to supply the goods to Custom Made. The goods were to be used for a building complex in London. The contract, the first to be concluded between the parties, stipulated that payment was to be in sterling.

4 Stawa confirmed the conclusion of the contract by a letter of 9 May 1988 written in English, to which it attached for the first time its general business conditions written in German. Paragraph 8 of those general conditions stated that in the event of a dispute between the parties the place of performance and jurisdiction was to be Bielefeld. Custom Made did not raise any objection to those general conditions.

5 When Custom Made paid only part of the stipulated price, Stawa brought proceedings for recovery of the balance before the Landgericht (Regional Court) Bielefeld. On 13 December 1989 that court delivered a default judgment in which it ordered Custom Made to pay to Stawa the sum of £144 742.08 plus interest.

6 In its application to have that judgment set aside, Custom Made submitted, *inter alia*, that the German courts lacked international jurisdiction. On 9 May 1990 the Landgericht Bielefeld delivered an interlocutory judgment declaring Stawa's claim to be admissible.

7 Custom Made appealed against that decision to the Oberlandesgericht (Higher Regional Court) Hamm, once again claiming that the German courts lacked international jurisdiction.

8 The Oberlandesgericht dismissed that appeal by judgment of 8 March 1991, in which it based the international jurisdiction of the German courts on Article 5(1) of the Convention, in conjunction with the first part of Article 59(1) of the Uniform Law on the International Sale of Goods annexed to the Hague Convention of 1 July 1964 (*United Nations Treaty Series*, 1972, Vol. 834, p. 107 et seq.), which provides that the buyer must pay the price to the seller at the seller's place of business or, if he does not have a place of business, at his habitual residence.

9 Custom Made brought an appeal on a point of law before the Bundesgerichtshof against the judgment of the Oberlandesgericht.

10 The Bundesgerichtshof took the view that the dispute gave rise to problems of interpretation of the Convention and for that reason decided to stay the proceedings until the Court had delivered a preliminary ruling on the following questions:

'1. (a) Is the place of performance under Article 5(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to be determined pursuant to the substantive law applicable to the obligation in issue under the conflicts rules of the court hearing the case where the case concerns a claim for payment of the price brought by the supplier against the customer under a contract for manufacture and supply, according to the conflicts rules of the court hearing the case that contract is governed by uniform sales law and under that law the place of performance of the obligation to pay the price is the place of establishment of the plaintiff supplier?

(b) In the event that the Court of Justice replies in the negative to Question 1(a):

How is the place of performance under Article 5(1) of the Convention to be determined in such a case?

2. In the event that according to the answers to Questions 1(a) and (b) the German courts cannot derive jurisdiction from Article 5(1) of the Convention:

(a) Can a jurisdiction agreement validly be made under the third hypothesis in the second sentence of Article 17, first paragraph, of the Convention (in

the 1978 version) where after the oral conclusion of a contract the supplier confirms the conclusion of the contract in writing and that written confirmation is accompanied for the first time by general business conditions containing a jurisdiction clause, the customer does not dispute the jurisdiction clause, there is no trade practice at the place where the customer is established to the effect that the absence of response to such a document is to be regarded as assent to the jurisdiction clause, the customer is not aware of any such trade practice and it is the first time that the parties have done business with each other?

(b) In the event that the Court of Justice replies in the affirmative to Question 2(a):

Is that also true where the general business conditions containing the jurisdiction clause are in a language which the customer does not understand and is not that in which the contract was negotiated and concluded and where the written confirmation of the contract, written in the language in which the contract was negotiated and concluded, refers generally to the attached general business conditions but not specifically to the jurisdiction clause?

3. In the event that the Court of Justice replies in the affirmative to Questions 2(a) and (b):

In relation to a jurisdiction clause contained in general business conditions which meets the requirements laid down in Article 17 of the Convention for a valid jurisdiction agreement, does Article 17 preclude further examination, under the national substantive law which is applicable in accordance with the conflicts rules of the court hearing the case, of the question whether the jurisdiction clause is validly incorporated in the contract?'

Question 1(a)

11 In this question, as elucidated by the grounds of the order for reference, the national court asks whether Article 5(1) of the Convention is to be understood as meaning that, in the case of a claim for payment by a supplier against his customer under a contract for manufacture and supply, the place of performance of the obligation to pay must be determined pursuant to the substantive law applicable to the obligation in issue under the conflicts rules of the court seised, even if those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

12 Article 2 of the Convention sets out the general rule that the jurisdiction of a court is based on the place of the defendant's domicile, although Article 5 also confers jurisdiction on other courts, the choice of which is a matter for the applicant. This freedom of choice was introduced in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may most conveniently be called upon to take cognizance of the matter (see Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473, paragraph 13). However, Article 5 does not establish that connecting factor itself as the criterion for the choice of the competent forum. It is not possible for an applicant to sue a defendant before any court having a connection with the dispute since Article 5 lists exhaustively the criteria for linking a dispute to a specific court.

13 Article 5(1) provides in particular that a defendant may, in matters relating to a contract, be sued in the courts 'for the place of performance of the obligation in question'. That place usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it and explains why that court has jurisdiction in contractual matters (see Case 266/85 *Shenavai* v *Kreischer* [1987] ECR 239, paragraph 18).

14 Although the connecting factor is the reason which led to the adoption of Article 5(1) of the Convention, the criterion employed in that provision is not the connection with the court seised but, rather, only the place of performance of the obligation which forms the basis of the legal proceedings.

15 The place of performance of the obligation was chosen as the criterion of jurisdiction because, being precise and clear, it fits into the general aim of the Convention, which is to establish rules guaranteeing certainty as to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought.

16 It has been submitted, certainly, that the criterion of the place of performance of the obligation which specifically forms the basis of the applicant's action, a criterion expressly laid down in Article 5(1) of the Convention, may in certain cases have the effect of conferring jurisdiction on a court which has no connection with the dispute, and that, in such a case, the criterion explicitly laid down should be departed from on the ground that the result it yields would be contrary to the aim of Article 5(1) of the Convention.

17 That last argument cannot be accepted, however.

18 The use of criteria other than that of the place of performance, where that confers jurisdiction on a court which has no connection with the case, might jeopardize the possibility of foreseeing which court will have jurisdiction and for that reason be incompatible with the aim of the Convention.

19 The effect of accepting as the sole criterion of jurisdiction the existence of a connecting factor between the facts at issue in a dispute and a particular court would

be to oblige the court before which the dispute is brought to consider other factors, in particular the pleas relied on by the defendant, in order to determine whether such a connection exists and would thus render Article 5(1) nugatory.

20 Such an examination would also be contrary to the purposes and spirit of the Convention, which requires an interpretation of Article 5 enabling the national court to rule on its own jurisdiction without being compelled to consider the substance of the case (see Case 34/82 *Peters* v *ZNAV* [1983] ECR 987, paragraph 17).

21 It follows that under Article 5(1), in matters relating to a contract, a defendant may be sued in the courts for the place of performance of the obligation in question, even where the court thus designated is not that which has the closest connection with the dispute.

22 It is accordingly necessary to identify the 'obligation' referred to in Article 5(1) of the Convention and to determine its 'place of performance'.

23 The Court has ruled that the obligation cannot be interpreted as referring to any obligation whatsoever arising under the contract in question, but is rather that which corresponds to the contractual right on which the plaintiff's action is based (see Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497, paragraphs 10 and 13).

24 Having allowed an exception in the case of contracts of employment presenting certain special features (see, in particular, Case 133/81 *Ivenel* v *Schwab* [1982] ECR 1891), in paragraph 20 of its judgment in *Shenavai*, cited above, the Court confirmed that the obligation referred to in Article 5(1) is the contractual obligation which forms the actual basis of the legal proceedings.

25 That interpretation was endorsed on the conclusion of the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1989 L 285, p. 1). On that occasion the rule in Article 5(1) of the Convention was maintained in the same terms and was supplemented by a single exception relating to contracts of employment which had already been recognized by way of interpretation in the Court's case-law cited above.

26 With regard to the 'place of performance', the Court has ruled that it is for the court before which the matter is brought to establish under the Convention whether the place of performance is situate within its territorial jurisdiction and that it must for that purpose determine in accordance with its own rules of conflict of laws what is the law applicable to the legal relationship in question and define, in accordance with that law, the place of performance of the contractual obligation in question (see *Tessili*, cited above, paragraph 13, as referred to in paragraph 7 of *Shenavai*, cited above).

27 That interpretation must also be accepted in the case where the conflicts rules of the court seised refer to the application to contractual relations of a 'uniform law' such as that in issue in the main proceedings.

28 That interpretation is not called in question by a provision such as Article 59(1) of the Uniform Law, under which the place of performance of the obligation on the buyer to pay the price to the seller is the seller's place of business or, if he does not have a place of business, his habitual residence, subject only to the proviso that the parties to the contract have not stipulated a different place for the performance of that obligation under Article 3 of that Law.

29 It follows that Article 5(1) of the Convention must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the

obligation in dispute under the conflicts rules of the court seised, even where those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

30 In view of the reply to Question 1(a), it is not necessary to reply to the other questions asked by the national court.

Costs

31 The costs incurred by the German and Italian Governments and the Commission of the European Communities, 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 a question referred to it by the Bundesgerichtshof, by order of 26 March 1992, hereby rules:

Article 5(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, must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised, even where those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

Due Moitinho de Almeida Diez de Velasco

Kakouris Schockweiler Grévisse

Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 29 June 1994.

R. Grass O. Due

Registrar President