OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 17 January 1985

My Lords,

This is a reference to the Court by the Oberlandesgericht Koblenz dated 3 February 1984 pursuant to Articles 2 (2) and 3 (2) of the Protocol of 3 June 1971 on the Interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Convention'). It concerns Article 18 of the Convention, on the prorogation of jurisdiction by the act of entering an appearance, in relation not to the main action but to a set-off raised by the defendant as a defence to the plaintiff's claim.

The plaintiff in the proceedings before the national court is a company, Sommer Exploitation Société Anonyme, having its registered office in Neuilly-sur-Seine, France. Its business is the manufacture of felt cloth. The defendant is Mrs Hannelore Spitzley who owns the undertaking Filzvertrieb Hannelore Spitzley in Trimbs in the Federal Republic of Germany. That undertaking manufactures and sells felt products. Mrs Spitzley obtained supplies from Sommer Exploitation.

The defendant's husband, Wolfgang Spitzley, used to act as the plaintiff's commercial agent in Germany, first under a contract dated 21 October 1974, then under a contract dated 31 March 1976. Clause VII of the latter contract, which was drawn up in French, provided *inter alia* as follows: 'French law shall apply to this contract. The courts of the place where Sommer Exploitation SA has its registered office shall have exclusive jurisdiction in disputes arising out of this contract.' ('Le contrat est régi par le droit français. Il est fait attribution de juridiction pour tous litiges éventuels, émanant de ce contrat, aux tribunaux compétents du siège de la société Sommer Exploitation.')

At a meeting on 20 June 1978 between the plaintiff's export manager and Mr Spitzley, the contract was terminated orally. The plaintiff confirmed this termination by a letter dated 28 June 1978. By letter of 4 July 1978, Mr Spitzley accepted the notice of termination but said that he would come back to the matter of his outstanding commission. On 25 September 1978 the plaintiff, the defendant's husband and the defendant, represented by her husband, made a written agreement covering both the price of goods owed by the defendant to the plaintiff and amounts of commission owed by the plaintiff to the husband. By that agreement the defendant acknowledged that she owed DM 148 934.28 in respect of goods supplied, from which was to be deducted DM 63 760.89 in respect of commission due to her husband for the period from the third quarter of 1977 to the second quarter of 1978 inclusive, and the defendant undertook to pay the balance (DM 85 173.39) in five equal monthly

instalments starting on 30 September 1978. As regards other amounts of commission due to the husband, the agreement provided that 'any further commission due to Mr Spitzley will be paid by cheque within 20 days of the end of the quarter after presentation of the usual commission claim'. This is a reference to commission arising outside the period covered by the agreement, a subject still in dispute between the parties.

The defendant paid DM 38 902.90 of the DM 85 173.39 in execution of the agreement, leaving DM 46 270.49 still outstanding thereunder. The plaintiff brought an action against the defendant for this amount before the Landgericht Koblenz. The defendant paid a further DM 3 145.35 in March 1980, and the plaintiff reduced its claim by that amount so that the plaintiff's claim was then for DM 43 125.14.

The defendant did not (and does not now) deny that she owed that amount to the plaintiff in respect of goods supplied, but she sought to set off against it the sum of DM 46 594.01 which she claimed was still outstanding in commission due to her husband under the commercial agency contract of 31 March 1976 and which, she maintained, had been assigned to her.

In the proceedings before the Landgericht the plaintiff did not rely on the jurisdiction clause in Clause VII of the 1976 commercial agency contract, but joined issue on the substance of the set-off. It contested the validity of the alleged assignment to the defendant of the husband's remaining claims to commission, and it challenged the claims themselves both as to their legal foundation and as to their amount.

In its judgment of 18 October 1982, the Landgericht Koblenz upheld the plaintiff's claim in full (i.e. DM 43 125.14). As regards the set-off, the court held that the defendant's husband had validly assigned his existing and future claims for commission to her by an oral declaration made in 1977, but it found on the evidence that only DM 6 258.59 were due to him by way of commission. Allowing the set-off to that extent, it gave judgment for the plaintiff in the amount of DM 36 866.55 with interest.

The defendant appealed against that decision to the Oberlandesgericht Koblenz, arguing that the plaintiff's claim should be dismissed in its entirety because commission was still due from the plaintiff to her husband, which she could set off against the plaintiff's claim. The plaintiff cross-appealed for DM 2 256.20 with interest.

The Oberlandesgericht Koblenz noted that by Clause VII of the commercial agency contract of 31 March 1976, the plaintiff and the defendant's husband had agreed that the courts of the place where the plaintiff had its registered office, namely Neuilly in France, were to have exclusive jurisdiction in relation to disputes arising in respect of that contract. It expressed the view that this was an agreement in writing whereby, under Article 17 of the Convention, the courts of Neuilly would have exclusive jurisdiction for 'claims' arising in respect of the commercial agency contract, the agreement actually using the word 'disputes' which is broader. It then considered the question whether the same rule applied to set-offs arising out of that contract. On the one hand it interpreted the letter and spirit of the agreement conferring jurisdiction concluded in this case by the plaintiff and the defendant's husband to mean that no court other than the court of the place where the plaintiff has its registered office had jurisdiction to hear a claim for a set-off. On the other hand, it noted that the

plaintiff had entered an appearance to the set-off to contest it on its substance and had not pleaded the existence of the agreement conferring exclusive jurisdiction. In these circumstances the Oberlandesgericht was concerned as to whether Article 18 of the Convention gave it jurisdiction on the basis that the plaintiff had submitted to its jurisdiction.

Article 18 provides: 'Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16.' None of the provisions of Article 16 is in point here.

The difficulty felt by the Oberlandesgericht was that Article 18 does not apply in terms to a plaintiff but only a defendant, and it was not sure whether the plaintiff's conduct (in the light of Article 18) allowed it to override the jurisdiction clause in the interpretation which it had given it. To resolve these difficulties it asks the Court:

'(1) If a plaintiff, without raising any objection, enters an appearance in proceedings relating to a claim for a set-off which is not based on the same contract or subject matter as his application and in respect of which there is an agreement conferring exclusive jurisdiction within the meaning of Article 17 of the Convention, does such an appearance set aside any procedural prohibition against setting off arising from that agreement conferring jurisdiction or its interpretation (judgment of the Court of Justice of 9 November 1978 in Case 23/78 *Meeth* v *Glacetal*)?

(2) Or is the court prevented in such a case from giving judgment in respect of the claim for a set-off by the agreement conferring jurisdiction and the prohibition against setting-off contained therein notwithstanding the fact that the plaintiff has entered an appearance to the set-off claim without raising any objection?'

The second question posed (an alternative to the first) is based on the assumption that the jurisdiction clause in question contains a 'prohibition against setting-off'; but it should be pointed out that Clause VII does not expressly prohibit set-offs and this springs from the interpretation placed upon it by the Oberlandesgericht reading it in conjunction with Article 17 of the Convention.

Neither of the parties to the main action, nor the defendant's husband, have submitted written observations. The Commission, the Federal Republic of Germany and the United Kingdom have done so, and they have all come to the same conclusion, namely that the first limb of the question should be answered in the affirmative. In other words, they submit that where the plaintiff has appeared before a court to contest a set-off raised by the defendant without challenging the court's jurisdiction, then that court is competent by virtue of Article 18 to deal with the set-off, notwithstanding that the set-off is not based on the same contract or subject matter as the plaintiff's claim and is covered by a clause conferring exclusive jurisdiction under Article 17 of the Convention.

The Commission refers to the Court's judgment in Case 150/80 *Elefanten Schuh* v *Jacqmain* [1981] ECR 1671 (holding that Article 18 of the Convention applies even where the parties have by agreement designated a court which is to have jurisdiction within the meaning of Article 17) and argues that Article 18 should be

read as applying to the case of a plaintiff who defends a claim for a set-off. It adduces four reasons for this. First, the conduct of the plaintiff in contesting the substance of the set-off without challenging the court's jurisdiction amounts to an implied prorogation of jurisdiction. Secondly, it is more convenient, particularly for the taking of evidence, if the set-off in the instant case is dealt with by the German court. Thirdly, applying Article 18 also to set-offs achieves one of the aims of that article, which is to extend the field of application of the Convention's rules on jurisdiction. Finally, such an extension would not substantially reduce the plaintiff's procedural safeguards.

The United Kingdom argues from the scheme of the Convention as a whole and from the purpose of Article 18. The scheme of the Convention (particularly Article 6 (3) regarding counterclaims) is designed to avoid superfluous procedure, in particular by concentrating proceedings in a single court; and the purpose of Article 18 is, subject to the listed exceptions, to give maximum freedom of choice to the parties. On both points the United Kingdom relies on the judgment of the Court in Case 23/78 *Meeth* v *Glacetal* [1978] ECR 2133, in which the Court held that Article 17 did not prohibit a national court from entertaining a set-off in spite of reciprocal exclusive jurisdiction clauses entered into by the parties, and submits that Article 18 should apply as much to the party who is nominally the plaintiff but who is the defendant to a counterclaim as it does to the party who is the defendant to a principal claim. Hence it submits that in the instant case the plaintiff's submission to the jurisdiction under Article 18 overrides any contrary provision of a jurisdiction agreement, thus giving the German court jurisdiction over the set-off.

The Federal Republic of Germany advances similar arguments. It submits that the parties' joining issue on the substance of a set-off without contesting jurisdiction constitutes a tacit conferment of jurisdiction, capable of modifying any earlier agreement to the contrary. This submission is based on two arguments: first, the freedom of the parties to choose the forum is paramount in the scheme of the Convention. The *Elefanten Schuh* judgment establishes that Article 17 does not prevent the parties from waiving a jurisdiction clause by submitting to the jurisdiction of another court. Secondly, the extension of Article 18 to set-offs and counterclaims is required for reasons of economy of procedure. The Federal Republic expressly submits (and the United Kingdom clearly implies) that this reasoning applies as much to counterclaims as to set-offs.

The first paragraph of Article 17 of the Convention provides:

'If the parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in

connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.' Although it might be argued that Article 17 gives binding force to jurisdiction agreements concluded by the parties, so that thereafter the parties and any other courts seised are bound by their choice of forum, the Court has made it clear that this is not the case and that the parties remain free to change their choice of forum. At paragraph 10 of its decision in Case 150/80, *Elefanten Schuh* v *Jacqmain* at page 1684, the Court said: 'Neither the general scheme nor the objectives of the Convention provide grounds for the view that the parties to an agreement conferring jurisdiction within the meaning of Article 17 are prevented from voluntarily submitting their dispute to a court other than that stipulated in the agreement.' It is clear from this passage, as well as from paragraphs 5 and 8 of the decision in Case 23/78 *Meeth* v *Glacetal* at pages 2141 and 2142, emphasizing the free will of the parties, that the parties can waive their jurisdiction agreement.

There is no doubt that if a plaintiff sues in a court other than one stipulated in an agreement as to jurisdiction, within the meaning of Article 17, the other party to the agreement may as defendant submit to the jurisdiction by entering an unconditional appearance. That court then has jurisdiction (*Elefanten Schuh* ruling, paragraph 1). Such a situation falls expressly within the wording of Article 18 since jurisdiction is conferred where 'a defendant enters an appearance'. There is no express provision that if, in an action not covered by an agreement as to jurisdiction, a defendant raises a counterclaim or set-off which is covered by an agreement as to jurisdiction, and the plaintiff resists the counterclaim or set-off without challenging the jurisdiction, the court has jurisdiction over the latter dispute.

In my opinion, however, the scheme and intendment of the Convention require that the same rules should apply to claims as to counterclaims and set-offs in this respect. Except where specific mandatory rules are laid down, the Convention recognizes a margin of choice of jurisdiction in the parties to a dispute. Even if they agree a jurisdiction in advance they can subsequently, by respectively making and defending claims in some other court, confer jurisdiction on that court. That freedom of choice must apply equally whether the claim is raised in the initial proceedings or by way of counterclaim and set-off. Moreover it is clear from Articles 6, 21, 22 and 23 of the Convention that multiplicity of proceedings is to be avoided and in its decision in *Meeth* v *Glacetal* (paragraph 8) the Court stressed the need to avoid superfluous procedures. If parties to disputes, both content to test them before some other court than that agreed in respect of one of the disputes, are obliged automatically to have the dispute covered by an agreement as to jurisdiction transferred to some other court, then clearly two sets of

proceedings must follow. This is contrary to the objectives of the Convention.

This conclusion does not produce an unacceptable erosion of the effect of Article 17, since the plaintiff who is defendant to a counterclaim or set-off, like the defendant to a claim, can always challenge jurisdiction by relying on the agreement no later than the time of making submissions which under national procedural law are considered to be the first defence addressed to the court seised (*Elefanten Schuh* ruling, paragraph 2). This protection in particular is available where the dispute raised by the counterclaim or set-off relates to facts other than those in issue in the claim. There may, of course, in addition be national rules of procedure which limit the extent to which unrelated matters can be raised by way of set-off or counterclaim.

I can see no justification for distinguishing between the position of a plaintiff and a defendant in regard to submission to the jurisdiction, nor in distinguishing between a counterclaim and a set-off raised by a defendant.

It should be added that in the instant case no problem arises from the fact that the parties to the action (Sommer Exploitation and Mrs Spitzley) are not the same as the parties to the agreement of 31 March 1976 (Sommer Exploitation and Mr Spitzley) since, as the Landgericht Koblenz found at first instance, Mr Spitzley had validly assigned his rights under that agreement to Mrs Spitzley.

Accordingly I am of the opinion that the questions put by the Oberlandesgericht Koblenz should be answered as follows:

If a plaintiff enters an appearance before a court to contest a set-off or a counterclaim raised by the defendant without contesting the court's jurisdiction, that court has jurisdiction over the set-off or counterclaim by virtue of Article 18 of the Convention, notwithstanding that the set-off or counterclaim does not arise from the same contract or facts as the plaintiff's claim and is covered by a clause conferring exclusive jurisdiction on another court under Article 17 of the Convention.

No order should be made as to the costs of the Commission and the two Member States which have intervened in these proceedings.