JUDGMENT OF THE COURT (FIRST CHAMBER)
4 MARCH 1982 [1]

Effer SpA
v Hans-Joachim Kantner
(reference for a preliminary ruling from the Bundesgerichtshof)

(Brussels Convention)

Case 38/81

Convention on Jurisdiction and the Enforcement of Judgments — Jurisdiction in matters relating to a contract — Scope — Dispute between the parties as to the existence of the contract — Jurisdiction extends to that question

(Convention of 27 September 1968, Art. 5 (1))

In the cases provided for in Article 5 (1) of the Convention of 27 September 1968, the national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself, since that is indispensable in order to enable the national court in which proceedings are brought to examine whether it has jurisdiction under the Convention. Therefore the 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.

In Case 38/81

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] for a preliminary ruling in the action pending before that Court between

1 — Language of the Case: German.

EFFER SPA, Castel Maggiore (Bologna), Italy,

and

HANS-JOACHIM KANTNER, Langen, Federal Republic of Germany,

on the interpretation of Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1978, L 304, p. 36),

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: G. Reischl
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

Mr Kantner is the head of a patent agents' office in Darmstadt. He claims from Effer payment of a fee, the amount of which is not in dispute.

The Effer undertaking manufactured cranes and had them distributed in the Federal Republic of Germany through the Hykra undertaking. In order to establish whether the sale of a folding crane jib developed by Effer was contrary to existing patent rights, it was necessary for a patent agent to carry out certain investigations in the Federal Republic of Germany. Following a discussion between Effer and Hykra, the latter commissioned Mr Kantner in December 1971 for that purpose.

The parties to the main action are not agreed as to whether Hykra, which has since become bankrupt, commissioned Mr Kantner in the name of Effer or in

its own name. Owing to the alleged absence of any contract between it and Mr Kantner, Effer argues that the Germany courts have no jurisdiction to decide the dispute.

The German court of first instance before which Mr Kantner sued Effer found in favour of Mr Kantner, who also won on appeal. Effer then brought an appeal on a point of law before the Bundesgerichtshof, which, by an order of 29 January 1981, referred the following question to the Court of Justice for a preliminary ruling:

"May the plaintiff 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?"

The order making the reference was lodged at the Court Registry on 19 February 1981.

Written observations were submitted under Article 5 of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 by Mr Kantner, represented by O. Brändel, Rechtsanwalt, by Effer, represented by F. W. Beckensträter, Rechtsanwalt, of Frankfurt am Main, by the Government of the United Kingdom, represented by G. Dagtoglou, of the Treasury Solicitor's Department, acting as Agent, who submitted a report written by K. M. Newman of the Lord Chancellor's Department, and by the Commission of the European Communities, represented by its Legal Adviser, Erich Zimmermann, acting as Agent, assisted by W.-D. Krause-Ablass, Rechtsanwalt, of Düsseldorf.

Upon hearing the report of the Judge-Rapporteur and views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It also decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the First Chamber.

II — Written observations submitted under Article 5 of the Protocol of 3 June 1971

Mr *Kantner* takes the view that the question submitted by the Bundesgerichtshof for a preliminary ruling must be answered in the affirmative.

He emphasizes that in providing in Article 5 (1) that, in matters relating to a contract, the courts for the place of performance of the obligation in question have jurisdiction, the authors of the 1968 Convention were proceeding on the view that in such matters, the courts for the place of performance offer special guarantees that justice will be done. This is why, even from the foreign defendant's point of view, it does not seem inequitable to leave the choice of the courts to the plaintiff.

According to Mr Kantner, it would be only too easy to interfere with the intended aim of the legislature by arguing that the above-mentioned article is always inapplicable, whenever the defendant disputes the existence of a contract. Any action arising out of a contract and brought before the courts for the place of performance would be in danger of being dismissed, merely on the ground that the defendant disputed the existence of a contract, without further explaining his reasons. This would in practice strip of all meaning the rule conferring jurisdiction on the courts for the place of execution, which is of great economic importance. Therefore Article

5 (1) should be interpreted as meaning that the jurisdiction of the courts for the place of performance must be determined exclusively according to the statement of facts made by the plaintiff and not on the basis of the question whether the defendant admits or disputes the existence of a contract.

Mr Kantner does not deny that, if this interpretation were accepted, the plaintiff could secure the application of the rule for determining jurisdiction contained in Article 5 (1) of the Convention merely by alleging that he is asserting rights under a contract. Nevertheless, he believes, on the one hand, that this situation is the inevitable result of a rule which is intended to provide a special jurisdiction for the plaintiff and, on the other, that it carries no unacceptable risk for the foreign defendant, since if the plaintiff's case is not well founded, his action will have no more likelihood of succeeding before a national court than before a foreign court.

Finally, Mr Kantner notes that the material scope of the provision in question must be given a broad interpretation in view of the terms used in the different languages of the Convention for "matters relating to a contract" ("Vertrag oder Ansprüche aus einem Vertrag", "matière contractuelle", "materia contrattuale") and also because that is the prevailing opinion in case-law and academic writings.

For its part, *Effer* takes the view that the German version of Article 5 (1) cannot provide the basis for an argument to the effect that the action may be founded not only on the rights arising out of a contract but also on the contract itself. Indeed, it follows from the Italian and French versions of the provision, which are as authentic as the German, that in any event the actual existence of the contract can no longer be in issue in order to establish the jurisdiction, from an international point of view, of the court seised as the court for the place of performance.

According to Effer, it follows clearly from various passages from the Jenard Report on the Convention (Official Journal 1979, C 59, p. 1), that Article 5 (1) contains an exception to the general rule, accepted by the Convention, of the jurisdiction of the courts of the defendant's residence and that the condition justifying that exception is the existence of a contract. It refers, *inter alia*, to the German passage appearing on page 22 of the report, under the subheading "Gerichtsstand für Klagen aus Verträgen" ("*Forum contractus* (Article 5 (1)) including contracts of employment"; in the French version: "*Forum contractus*"), which states that the jurisdiction of the courts for the place of performance is limited, as in German law, to "Ansprüche aus Verträgen" (matters relating to contract; in the French version: "matière contractuelle").

In the absence of a contract, even when the existence of a contract is in issue *ab origine*, the general rule in Article 2 of the Convention is once again applicable.

The above-mentioned report notes that it would be unwise "to give jurisdiction to a number of courts". If the opinion of the plaintiff in the main proceedings were accepted, exactly the opposite position would be obtained. Furthermore, if the plaintiff's argument is correct, every conceivable case will come within the provisions of Article 5, and the question arises in which cases the general rule on the determination of jurisdiction contained in Article 2 of the Convention will still apply.

The *United Kingdom* notes that at first sight the question submitted by the Bundesgerichtshof seems to require a negative answer, owing to the well-known principle whereby all provisions containing exceptions to a general rule are to be interpreted strictly. In relation

to Article 5 (1) this principle leads to the conclusion that, in the absence of a contract, there can be no contractual obligation, the performance of which could found jurisdiction.

In spite of this, however, the United Kingdom believes that important practical considerations militate in favour of a different solution.

First it examines the result of a negative answer. In its opinion, in such a case the jurisdiction of a court founded on Article 5 (1) would be automatically ousted by any defendant who questions the existence of a contract in his defence. This would put it in the power of any defendant who chose to do so to avoid the application of Article 5 (1), simply by asserting that he had not consented to the alleged agreement or that for some other reason there had been no agreement or no valid contract. Furthermore, the principle that a dispute of the factual basis of a jurisdiction destroys that basis would appear to be equally applicable to other special jurisdictions, such as jurisdiction over torts under Article 5 (3) with equally unacceptable results.

In the opinion of the United Kingdom, these practical considerations point decisively to the need to preserve a special jurisdiction in cases of this kind, once is has been properly invoked. It refers, in this regard, to the judgment of the Court in Case 73/77 (*Sanders* v *Van der Putte* [1977] ECR 2383 at p. 2392), in which the Court stated that a dispute as to the existence of the agreement which forms the subject of the action does not affect the applicability of Article 16 (1) of the Convention, which itself makes provision for a special jurisdiction.

The United Kingdom admits that it would be possible to qualify a negative answer to the question to the effect that jurisdiction would not be ousted by a mere challenge of the existence of the contract, but the defendant would be entitled to contest the jurisdiction by establishing that there was no contract.

An interpretation of Article 5 (1) denying jurisdiction where the alleged contract itself is ultimately shown not to have existed would, however, mean that the substantive claim, having been fully litigated in one court, might have to be tried over again in another court. Although the questions which need to be resolved to establish jurisdiction will be the same as those required to determine the substantive claim, the decision on jurisdiction would not establish a *res judicata*, and it would be open to the plaintiff to seek to establish his claim afresh elsewhere, in the hope that different procedures and rules of evidence, perhaps even a different choice of law, would lead to a different result.

Questions relating to the existence of a contract are by no means always easy to determine. The existence may be disputed on a wide range of grounds, ranging from purely factual issues to a mixture of fact and law and purely legal issues. Since transactions for which Article 5 (1) is invoked will almost invariably have facets involving more than one country, these issues will more often than not raise preliminary choice of law problems.

It seems wasteful and undesirable to the United Kingdom that complex issues of this kind, which may involve prolonged litigation and which go ultimately to the substance of the claim, should nevertheless be fought out only on the preliminary issue of jurisdiction and possibly be litigated all over again when that issue has been determined.

The arguments in favour of giving Article 5 a strict interpretation to avoid multiple jurisdictions and to avoid depriving the defendant of the advantage of defending himself in the courts of his domicile do not carry much weight, in the United Kingdom's view. Whether or not there is a contract, the situation will presumably have links of some importance with the court whose jurisdiction is invoked, and what is more, the defendant will be compelled to litigate in that court on all material issues, even though his defence may be directed only to jurisdiction.

It is noteworthy that in a different, but related context, that of choice of the law applicable to contractual obligations, where the determination of the existence of a contract gives rise to problems, the solution proposed in the EEC Convention opened for signature in Rome on 19 June 1980 is that the existence and validity of a contract is to be determined by the law which would govern it under the Convention if the contract were valid.

For the reasons stated, although it would not subscribe to the view that a court would necessarily have jurisdiction under Article 5 (1) over every action concerning the existence of a contract, where the claim relates to an obligation derived from a relationship *prima facie* of a contractual nature, and is *bona fide* brought by the plaintiff, then the United Kingdom considers that a defence putting the existence of the contract in issue should not deprive the court of jurisdiction under Article 5 (1).

The *Commission of the European Communities* believes that the wording of Article 5 (1) does not imply that jurisdiction under that provision must be challenged whenever there is a dispute as to the existence of a contract between the parties or as to some other important fact on which jurisdiction may be founded. On the contrary, the very wording of this provision in the German version, to the effect that not only the rights arising from a contract but also the contract itself may be the subject-matter of an action, indicates instead that the courts for the place of performance have jurisdiction to investigate the question of the existence of the contractual relationship, to the extent necessary for the determination of questions of jurisdiction.

The rules appearing in Section 7 of the Convention show that it is for the court seised of a claim to examine of its own motion whether it has jurisdiction under the Convention. This examination commences with the determination of the facts which are relevant to jurisdiction and which must be assessed in law by the court seised, in order to decide whether they confer jurisdiction according to the provisions of the Convention. It follows, from the principle that the court seised must

establish of its own motion the facts needed to confer jurisdiction upon it, that the jurisdiction of that court cannot be contested under the Convention merely because the defendant disputes those facts. Otherwise, the provisions of the Convention on jurisdiction could be evaded by an defendant who, even without any valid reason, disputed such jurisdiction.

On the other hand, it might conceivably be possible to impose on the plaintiff certain minimum requirements in connection with proving the facts on which jurisdiction may be founded, subject to the penalty, in the event of default, that the court seised would declare itself to have no jurisdiction. The Commission notes that a requirement of this kind was attached to Article 17 but in principle the provisions of the Convention on jurisdiction do not lay down any formal condition or minimum requirement as to the way in which jurisdiction is to be proved. Article 20 of the Convention, however, takes account of the fact that it may cause the defendant great difficulty and inconvenience to be sued before a foreign court whose jurisdiction he disputes.

In order to avoid such results, the Commission notes, this provision provides in substance that the court seised must of its own motion examine whether it has jurisdiction and cannot consider the facts alleged by the plaintiff, which are thought to confer jurisdiction, as having been established — for example where the defendant does not enter an appearance — but must ask the plaintiff to prove them formally; the same article further requires that the defendant should have the opportunity to defend himself before the court seised, which may be particularly important when there is difficulty in determining the question of jurisdiction or when the solution of this question affects the evaluation of the substance of the case.

It may be argued that an examination of the question of jurisdiction under the Convention, by the court seised by the plaintiff, is unacceptable for a defendant resident in another Contracting State where, as in this case, the examination of that question overlaps with the examination of the substance of the action. In such a case, the substance of the application will be examined before the jurisdiction of the court seised by the plaintiff has been established in accordance with the rules of the Convention.

According to the Commission, however, this situation in no way justifies an evaluation which diverges from the above-mentioned principles. An examination by the court seised of the facts conferring jurisdiction is of legal importance for the assessment of the application, both in relation to the identity of such facts and in many other cases. Furthermore, it should not be forgotten that the court seised may arrive at a decision simultaneously on jurisdiction and on the substance of the application in the course of the same oral proceedings, even when each is determined by different facts.

Neither the wording nor the context of the provisions of the Convention concerning jurisdiction gives rise to the idea that there is no jurisdiction within the meaning of the Convention where consideration of the question of jurisdiction coincides wholly or partially

with consideration of the facts on which the action is grounded. On the contrary, there must be jurisdiction even in those cases. Moreover, to decide otherwise would be to introduce a distinction not materially justified, inasmuch as, in an action concerning the jurisdiction of the court for the place of performance, for example, the decision would depend on whether the place of performance was determined in the contract the existence of which was disputed or in a separate agreement.

For these reasons, the Commission propose that the Court should reply as follows to the question submitted by the Bundesgerichtshof:

"The plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5 (1) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters even when the existence of the contract on which the claim is based is in dispute between the parties. In order to determine where jurisdiction lies, the court seised must ascertain of its own motion whether a contract has been concluded between the parties."

III — Oral procedure

At the sitting on 29 October 1981 oral argument was presented by F. W. Beckensträter, Rechtsanwalt, Frankfurt am Main, for Effer SpA, and W.-D. Krause-Ablass, Rechtsanwalt, Düsseldorf, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 3 December 1981.

Decision

By an order dated 29 January 1981 which was received at the Court Registry on 19 February 1981, the Bundesgerichtshof [Federal Court of Justice] 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 a question on the interpretation of Article 5 (1) of that Convention, pursuant to which:

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

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

2 The question was raised in the context of a dispute between Effer SpA of Castel Maggiore (Bologna, Italy) and Mr Kantner, a patent agent practising in Darmstadt (Federal Republic of Germany).

3 Effer SpA, the appellant on a point of law in the main proceedings, is an undertaking which manufactures cranes. They were distributed in the Federal Republic of Germany through the Hydraulikkran undertaking (hereinafter referred to as "Hykra"). Effer developed a new machine and it was necessary to establish whether the sale of that machine was contrary to existing patent rights. After a discussion with Effer, Hykra commissioned Mr Kantner, patent agent, in December 1971 to carry out investigations in Germany for that purpose. The dispute between the parties to the main action concerns the question whether Hykra, which has since become insolvent, commissioned Mr Kantner in the name of Effer or in its own name. In order to obtain payment of his fees — the amount of which is not in dispute — Mr Kantner brought an action before a German court in December 1974. Effer denied the existence of a contractual relationship between it and the patent agent. Owing to the alleged absence of a contract, Effer argued that the German courts had no jurisdiction. The German courts found in favour of Mr Kantner, at first instance and on appeal. Effer then appealed on a point of law to the Bundesgerichtshof, which decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

"May the plaintiff 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?"

4 Mr Kantner, the respondent in the appeal on a point of law, and the Commission of the European Communities take the view that this question must be answered in the affirmative. The United Kingdom, although it does not wholly accept that argument, nevertheless considers that a dispute as to the existence of the contract does not prevent Article 5 (1) of the Convention from being applied, provided that the obligation is *prima facie* of a contractual nature and the action is *bona fide* brought by the plaintiff. Only Effer is of the opinion that the plaintiff may not invoke the jurisdiction of the courts for the place of performance of the contract when the existence of the contract on which the claim is based is in dispute.

5 It is established that the wording of Article 5 (1) of the Convention does not resolve this question unequivocally. Whilst the German version of that provision contains the words "Vertrag oder Ansprüche aus einem Vertrag", the French and Italian versions contain the expressions "en matière contractuelle" and "in materia contrattuale" respectively. Under these circumstances, in view of the lack of uniformity between the different language versions of the provision in question, it is advisable, in order to arrive at the interpretation requested by the national court, to have regard both to the context of Article 5 (1) and to the purpose of the Convention.

6 It is clear from the provisions of the Convention, and in particular from the preamble thereto, that its essential aim is to strengthen in the Community the legal protection of persons therein established. For that purpose, the Convention provides a collection of rules which are designed *inter alia* to avoid the occurrence, in civil and commercial matters, of concurrent litigation in two or more Member States and which, in the interests of legal certainty and for the benefit of the parties, confer jurisdiction upon the national court territorially best qualified to determine a dispute.

7 It follows from the provisions of the Convention, and in particular from those in Section 7 of Title II, that, in the cases provided for in Article 5 (1) of the Convention, the national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself, since that is indispensable in order to enable the national court in which proceedings are brought to examine whether it has jurisdiction under the Convention. If that were not the case, Article 5 (1) of the Convention would be in danger of being deprived of its legal effect, since it would be accepted that, in order to defeat the rule contained in that provision it is sufficient for one of the parties to claim that the contract does not exist. On the contrary, respect for the aims and spirit of the Convention demands that that provision should be construed as meaning that the court called upon to decide a dispute arising out of a contract may examine, of its own motion even, the essential preconditions for its jurisdiction, having regard to conclusive and relevant evidence adduced by the party concerned, establishing the existence or the inexistence of the contract. This interpretation is, moreover, in accordance with that given in the judgment of 14 December 1977 in Case 73/77 *(Sanders* v *Van*

der Putte [1977] ECR 2383) concerning the jurisdiction of the courts of the State where the immovable property is situated in matters relating to tenancies of immovable property (Article 16 (1) of the Convention). In that case the Court held that such jurisdiction applies even if there is a dispute as to the "existence" of a lease.

8 It is therefore necessary to reply to the question put by the Bundesgerichtshof that the plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters even when the existence of the contract on which the claim is based is in dispute between the parties.

Costs

The costs incurred by the United Kingdom and the Commission of the European Communities, which submitted observations to the Court, are not recoverable; as these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, costs are a matter for that court.

THE COURT (First Chamber),

in answer to the question submitted to it by the Bundesgerichtshof by an order dated 29 January 1981, hereby rules:

The plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in

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

Bosco O'Keeffe Koopmans

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 1981 [1]

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."

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

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 . . .".