JUDGMENT OF THE COURT
26 MAY 1982 [1]

Roger Ivenel
v Helmut Schwab
(reference for a preliminary ruling from the French Cour de Cassation)

(Brussels Convention — Place of performance of the obligation)

Case 133/81

Convention on Jurisdiction and the Enforcement of Judgments — Special jurisdiction — Court for the place of performance of a contractual obligation — Claims based on different obligations resulting from a contract of employment — Obligation to be taken into account for the purpose of jurisdiction — Obligation characterizing the contract in question

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

The obligation to be taken into account for the purposes of the application of Article 5 (1) of the Convention of 27 September 1968 in the case of claims based on different obligations arising under a contract of employment as a representative binding a worker to an undertaking is the obligation which characterizes the contract.

In Case 133/81

REFERENCE to the Court by the French Cour de Cassation 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 for a preliminary ruling in the proceedings pending before that court between

ROGER IVENEL, Strasbourg (France),

and

1 — Language of the Case: French

HELMUT SCHWAB, Oettingen (Federal Republic of Germany),

on the interpretation of Article 5 (1) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, A. Chloros and F. Grévisse, Judges,

Advocate General; G. Reischl
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. On 1 September 1977 Roger Ivenel, who was living in Strasbourg (France), entered the employment of Schwab Maschinenbau, established at Oettingen (Federal Republic of Germany), as a traveller and commercial representative in France.

On 18 January 1978 Roger Ivenel brought an action against his employer before the Conseil de Prud'hommes, Strasbourg, for payment of various sums and in particular commission which allegedly had not been paid to him since 1975 and various allowances by reason of the termination of the contract of employment. As against this claim Helmut Schwab raised the objection of lack of jurisdiction both *ratione materiae* and *ratione loci*, alleging on the one hand

that the plaintiff was an independent contractor and on the other that according to the Convention of Brussels of 27 September 1968 the Court having jurisdiction was that for the place of performance of the obligation in question, in this instance the place of payment of the commission, namely Oettingen.

When the action was before the Conseil de Prud'hommes Article 5 (1) of the Brussels Convention was worded as follows:

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

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

2. By judgment of 17 April 1978 the Conseil de Prud'hommes dismissed the two objections.

With regard to the objection *ratione materiae* it found that the plaintiff was bound to the defendant by a contract of employment as a representative.

As regards the objection *ratione loci* the Conseil de Prud'hommes considered that the concept "place of performance of the obligation in question" contained in Article 5 (1) of the Brussels Convention must be understood as referring to the place of performance of the main or characteristic obligation of the contract. In the case of a contract of employment as a representative the place of performance of the work was that where the representative had his office, collated orders and attended to their execution. The court having jurisdiction under Article 5 was therefore in this case the court for the place where Roger Ivenel was ordinarily resident, namely Strasbourg.

Upon appeal by Helmut Schwab the Cour d'Appel, Colmar, by judgment of 10 October 1978 confirmed the jurisdiction *ratione materiae* of the Conseil de Prud'hommes but considered that the Conseil had no jurisdiction *ratione loci*. In that respect the Cour d'Appel considered that having regard to the judgment of the Court of Justice of 6 October 1976 in Case 14/76 *de Bloos* [1976] ECR 1497 the obligation to be taken into account was that which corresponded to the contractual right on which the plaintiff's action was based. In the case in point that was the obligation to pay the commission and allowances claimed by Ivenel from Schwab who was ordinarily resident in the Federal Republic of Germany. Since both in French and German law such a payment was due at the address of the debtor and not of the creditor the Conseil de Prud'hommes, Strasbourg, had no jurisdiction *ratione loci*.

3. Roger Ivenel thereupon appealed in cassation against the judgment of the Cour d'Appel.

In its judgment of 2 April 1981 the Cour de Cassation considered that since the proceedings related to the performance of a contract for representation involving mutual obligations, some of which at least were performed in France, the question of the place of performance of the obligation within the meaning of Article 5 (1) of the Brussels Convention raised a serious difficulty of interpretation. The Cour de Cassation therefore decided to stay the proceedings until the Court of Justice had given a ruling on this matter.

4. The judgment of 2 April 1981 referring the matter to the Court was received at the Court Registry on 3 June 1981.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by Roger Ivenel, the plaintiff in the main action, represented by Jean-Paul Desache, Advocate at the Cour de Cassation, Paris, by Helmut Schwab, defendant in the main action, represented by Roger L. Catrice, Advocate at the Cour de Paris, and the Commission of the European Communities, represented by Jacques Delmoly, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations lodged with the Court

Roger Ivenel, the plaintiff in the main action, first of all refers to the judgment of the Court of 6 October 1976 in Case 14/76 *de Bloos* [1976] ECR 1497. In that judgment the Court decided that the term "obligation" in Article 5 (1) of the Brussels Convention referred to the contractual obligation on which the plaintiff's claim was based and that in a case where the plaintiff asserted the right to be paid damages or sought the discharge of the contract by reason of the wrongful conduct of the other party, the obligation referred to in Article 5 (1) was still that which arose under the contract and the non-performance of which was relied upon to support such claims.

The relevant obligation for the application of Article 5 (1) is therefore an independent contractual obligation. That provision does not cover compensation which has no independence and merely reflects another contractual obligation the breach of which it penalizes.

In this case the contractual obligation serving as basis for the legal action necessarily has its origin in the legal status as an employed representative as determined by Article L 751 (1) *et seq.* of the French Code of Employment. Any work carried out in a country is subject to the rules of employment law in that country, irrespective of the nationality of the contracting parties.

Mr Ivenel considers that the obligation to pay sums due to an employee in return for his work, which is simply the result of the proper performance of the work, does not satisfy the condition of independence any more than debts arising from breach of the contract. Its legal basis is constituted by mandatory legal rules appertaining to public policy and relating to the performance of the contract of employment by the parties. In the same way Mr Ivenel had to comply with his period of notice in France and the sum claimed under that head is intended to compensate for the employer's disregard of that obligation. Consequently the obligation to compensate, arising from that breach of contract, falls within the jurisdiction of the court having jurisdiction in regard to the performance of the original obligation.

Mr Ivenel goes on to observe that even if the relevant obligation for determining the court having jurisdiction were the "independent" obligation to pay the representative the sums claimed, the performance of that obligation must take place in France.

According to the judgment of the Court of 6 October 1976 in Case 12/76 *Tessili* [1976] ECR 1473 the place of performance of the obligation in question within the meaning of Article 5 (1) of the Brussels Convention is to be determined in accordance with the law which governs the obligation in question according to the rules of conflict of laws of the court before which the matter is brought.

According to French private international law claims by an employee in relation to his employment are governed by the provisions of the Code of Employment of the place where the contract of employment was performed.

Further, under French law the payment of wages must be made at the place of employment or, in the case of travellers and representatives who have no fixed place of employment, at their home.

Mr Schwab, the defendant in the main action, criticizes the decision of the Conseil de Prud'hommes, Strasbourg, according to which in the case of a contract for representation the main or characteristic obligation of the contract referred to in Article 5 (1) of the Brussels Convention is the obligation of the representative so that the place where he carries out his work determines jurisdiction. In that respect he points out that the plaintiff had been engaged orally in Germany and that he was directly subject to the management of the undertaking established in Oettingen as regards his work as a representative. Further, Mr Ivenel received his salary in Germany and had asked that the salary conditions of the German representatives should be applied to him.

Mr Schwab agrees with the judgment of the Cour d'Appel, Colmar, according to which the obligation determining jurisdiction *ratione loci* is that of the defendant as debtor in regard to Mr Ivenel, so far as the remuneration for the latter's work is concerned. That point of view is moreover in conformity with the judgment of the Court in Case 14/76 *de Bloos,* cited above.

Mr Schwab states in addition that according to the terms of the last paragraph of Article 1247 of the French Code Civil and Article 269 of the German Bürgerliches Gesetzbuch the payments claimed by Mr Ivenel relating to his salary were payable at the address of the debtor.

He contends that the Court should confirm its case-law.

The *Commission of the European Communities* observes that in academic legal writing the inference generally drawn from the judgment in Case 14/76 *de Bloos* is that the Court rejected the theory of the main or characteristic obligation, advocated forcefully by certain authors.

For its part, it considers however that the judgment in *de Bloos* must be interpreted as meaning that in contracts giving rise to mutual obligations the obligation which serves as basis for an action is the main obligation of the defendant. As regards the application of Article 5 (1) of the Convention the consequences of breach of a contractual obligation must be treated in such a case as the consequences of the main obligation.

That interpretation is in conformity with one of the objectives of the Convention referred to by the Court in paragraph 9

of the same judgment, namely the aim to concentrate jurisdiction in a single court. That objective is behind the theory of the main obligation expounded in the course of the argument in that case both by the Commission and by Mr Advocate General Reischl (Opinion of 15 September 1976 [1976] ECR, pp. 1517 and 1518). That theory reduces the risks of splitting up a contract and consequently the dangers of "multiplying" the heads of jurisdiction, which might entail contradictory decisions.

The Commission points out that certain difficulties which, as in this case, national courts encounter in applying Article 5 (1) of the Convention have their origin in paragraph 17 of the judgment in *de Bloos* which calls upon the national court in actions for the payment of compensation by way of damages to ascertain whether, under the law applicable to the contract, an independent contractual obligation or an obligation replacing the unperformed contractual obligation is involved. It considers that the Court could not have intended in that paragraph to mean damages by way of compensation for the breach of the contract.

The clear and simple solution set out in paragraph 16 of the judgment should be adopted, namely that of the main obligation which the contract places on the defendant and the non-performance of which is relied upon in support of the claim for damages or for the dissolution of the contract.

The Commission goes on to observe that according to Article 6 of the Convention on the Law applicable to Contractual Obligations of 19 June 1980 (Official Journal L 266, p. 1) a choice of law made by the parties cannot have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law of the country in which the employee habitually carries out his work in performance of the contract. That specific rule of conflict applicable to an individual contract of employment has its origin in the notion, accepted in the various national legal systems, that since the employee is considered to be the weaker party in contractual relations his interests deserve special protection.

The Commission recommends that that rule be taken into account in deciding the present case.

In that connection it refers to a judgment of the Cour d'Appel, Angers, of 29 January 1980 concerning a contract of employment of the same kind as that at issue in this case and made between a Belgian employer and a French representative (*Van Pelt* v *Jedre*, Revue Critique de Droit International Privé, 1981, p. 118). It appears from that judgment that claims on the one hand for the payment of commission and sums due in respect of paid holidays and on the other for the payment of compensation in lieu of notice, in respect of goodwill and by way of damages constitutes an entity which it is difficult to divide into separate parts. From the point of view of theory, such a solution, which is the result of a synthetic view of the various contractual obligations, constitutes a more reliable basis for determining the place of performance of the obligation in question than an analytical approach to which the theory of the independence of obligations belongs. Moreover, it has the merit of being in conformity with the objective of the Convention which is to concentrate the jurisdiction of courts.

In conclusion the Commission considers that in an action relating to the consequences of the breach by an employer of a contract of employment as a representative the obligation to be taken into account for the purposes of applying Article 5 (1) of the Convention is the main obligation which the contract places on the employer, having regard to the law of the country where the representative carries out his work. The place of performance of the main obligation of the employer must determine the jurisdiction of the court for that place in respect of all actions brought by the representative and based upon the breach of that obligation.

In this case "the main obligation on the defendant" consists in the observance of the obligation as employer laid upon him by the provisions of the Code of Employment applicable in the place of performance of the contract, namely the place where the representative carries out his work.

III — Oral procedure

At the sitting on 3 February 1982 oral argument was presented by Mr Schwab, the defendant in the main action, represented by Roger L. Catrice, Advocate at the Cour de Paris, and the Commission of the European Communities, represented by Jacques Delmoly, a member of its Legal Department, acting as Agent.

The Advocate General delivered his opinion at the sitting on 11 May 1982.

Decision

1 By judgment of 2 April 1981, received at the Court on 3 June 1981, the French Cour de Cassation referred to the Court of Justice for a preliminary ruling pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1978 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, a question on the interpretation of Article 5 (1) of the Convention.

2 That question was raised in proceedings between Mr Ivenel, who resides in Strasbourg, and the undertaking Schwab Maschinenbau, whose place of establishment is at Oettingen in Bavaria, relating to an alleged breach of a contract for representation which gave rise to a claim for payment of commission, compensation for goodwill, in lieu of notice and in respect of paid holidays.

3 The Conseil de Prud'hommes, Strasbourg, before which the claim was brought, dismissed the two objections founded on lack of jurisdiction which were raised by Mr Schwab. It based its jurisdiction *ratione materiae* on the fact that in its opinion the contract between the parties was to be considered as a contract of employment. As regards its jurisdiction *ratione loci* it considered that, according to Article 5 (1) of the Convention, in matters of contract an action might be brought against a defendant ordinarily resident in the territory of another Member State before the court for the place where the obligation was, or was to be, performed and that in the case in point the obligation to be taken into account was that of the work carried out by the representative who had his office in Strasbourg where he collated orders and attended to their execution.

4 When an appeal by Schwab was brought before the Cour d'Appel, Colmar, that court, whilst confirming the judgment of the Conseil de Prud'hommes in so far as it found that there was a contract of employment, set aside that judgment for lack of jurisdiction *ratione loci*. The Cour d'Appel considered that the obligation to be taken into account for the purpose of applying Article 5 (1) of the Convention was that which constituted the basis of the court action. In the case in point that obligation was the payment of the commission and other amounts claimed from Schwab, which were payable at the address of the debtor and not the creditor.

5 Mr Ivenel appealed in cassation against that judgment and maintained that the Cour d'Appel had infringed Article 5 (1) of the Convention.

6 The Cour de Cassation took cognizance of the grounds relied on by the Cour d'Appel in deciding that the French courts had no jurisdiction in the case but nevertheless considered that since the action related to the performance of a contract for representation involving mutual obligations some of which at least were performed in France the question which was the place of performance of the obligation within the meaning of Article 5 (1) raised an issue of interpretation. It therefore stayed the proceedings and asked the Court for a ruling on the interpretation to be given to that provision.

7 It must be observed that, as the Court of Justice has already stated, in particular in its judgment of 6 October 1976 in Case 12/76 *Tessili* [1976] ECR 1473, the "place of performance" within the meaning of Article 5 (1) of the Convention is to be determined in accordance with the law which governs the obligation in question according to the conflict rules of the court before which the matter is brought.

8 The question raised by the national court concerns the obligation to be taken into account for the purposes of that definition when the claim before the court is based on different obligations under a single contract for representation which has been classified by the courts concerned with the substance of the case as a contract of employment.

9 In its judgment of 6 October 1976 in Case 14/76 *de Bloos* [1976] ECR 1497 the Court has already stated that the obligation to be taken into account for the purposes of Article 5 (1) of the Convention in the case of a claim based on a contract granting an exclusive sales concession between two commercial undertakings is that which forms the basis of the legal proceedings. The problem raised by this case is whether the same criterion must be applied to cases of the kind described by the national court.

10 It is appropriate to examine that problem in the light of the objectives of the Convention and the general scheme of its provisions.

11 Adoption of the special rules of jurisdiction as contained in Articles 5 and 6 of the Convention is justified *inter alia* by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it. The report drawn up by the committee of experts (Official Journal 1979, C 59, p. 1) which drafted the text of the Convention stresses that connection by stating *inter alia* that the court for the place of performance of the obligation will be useful in proceedings for the recovery of fees since the creditor will have a choice between the courts of the State where the defendant is ordinarily resident by virtue of the general provisions contained in Article 2 of the Convention and the courts of another State within whose jurisdiction the services were provided, particularly where, according to the appropriate law, the obligation to pay must be performed where the services were provided.

12 The above-mentioned report also refers to the reasons why those drafting the Convention did not consider it appropriate to insert into the Convention a provision giving exclusive jurisdiction in contracts of employment. According to the report it is desirable as far as possible for disputes to be brought before the courts of the State whose law governs the contract whereas at the time the Convention was being drafted work was in progress to harmonize the application of the rules of employment law in the Member States of the Community. The report concludes that at present the existing provisions of the Convention, such as Article 2 stipulating the forum for the place where the defendant is ordinarily resident and Article 5 (1) the forum for the place of performance of the obligation, are likely to satisfy the relevant interests.

13 It should be noted that on 19 June 1980 a Convention on the law applicable to contractual obligations was opened for signature by the Member States (Official Journal 1980, L 266, p. 1). Article 6 thereof provides that a contract of employment is to be governed, in the absence of choice of the applicable law, by the law of the country in which the employee habitually carries out his work in performance of the contract unless it appears from the circumstances as a whole that the contract is more closely connected with another country.

4 The experts' report on the Convention on the law applicable to contractual obligations (Official Journal 1980, C 282, p. 1) explains in that respect that the adopting of a special conflict rule in relation to contracts of employment was intended to provide an appropriate arrangement for matters in which the interests of one of the contracting parties were not the same as those of the other and to secure thereby adequate protection for the party who from the socio-economic point of view was to be regarded as the weaker in the contractual relationship.

5 It follows from the foregoing account that in the matter of contracts Article 5 (1) of the Convention is particularly concerned to attribute jurisdiction to the court of the country which has a close connection with the case, that in the case of a contract of employment the connection lies particularly in the law applicable to the contract; and that according to the trend in the conflict rules in regard to this matter that law is determined by the obligation characterizing the contract in question and is normally the obligation to carry out work.

16 It emerges from an examination of the provisions of the Convention that in establishing special or even exclusive jurisdiction for insurance, instalment sales and tenancies of immovable property those provisions recognize that the rules on jurisdiction, too, are inspired by concern to afford proper protection to the party to the contract who is the weaker from the social point of view.

17 Those factors must be taken into account in answering the question which has been put to the Court.

18 In a case such as the one in point, where the national court has before it claims relating to obligations under a contract for representation, some of which concern remuneration due to the employee from an undertaking established in one State and others concern compensation based on the manner in which the work has been done in another State, it is necessary to interpret the provisions of the Convention in such a way that the national court is not compelled to find that it has jurisdiction to adjudicate upon certain claims but not on others.

19 Such a result would be even less compatible with the objectives and general structure of the Convention in the case of a contract of employment for which, as a general rule, the law applicable contains provisions protecting the worker and is normally that of the place where the work characterizing the contract is carried out.

20 It follows from the foregoing considerations, taken as a whole, that the obligation to be taken into account for the purposes of the application of Article 5 (1) of the Convention in the case of claims based on different obligations arising under a contract of employment as a representative binding a worker to an undertaking is the obligation which characterizes the contract.

Costs

21 The costs incurred by the Comission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main action are concerned, in the nature of 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 the question submitted to it by the French Cour de Cassation by judgment of 2 April 1981, hereby rules:

The obligation to be taken into account for the purposes of the application of Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in the case of claims based on different obligations arising under contract of employment as a representative binding a worker to an undertaking is the obligation which characterizes the contract.

Mertens de Wilmars Bosco Touffait Due

Mackenzie Stuart O'Keeffe Koopmans Chloros Grévisse

Delivered in open court in Luxembourg on 26 May 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

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