JUDGMENT OF THE COURT (First Chamber)
7 March 1985 *

In Case 48/84

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 Oberlandesgericht [Higher Regional Court] Koblenz for a preliminary ruling in the action pending before that court between

Hannelore Spitzley

and

Sommer Exploitation SA,

on the interpretation of Articles 17 and 18 of the aforementioned Convention of 27 September 1968,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, T. Koopmans and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

after considering the observations submitted on behalf of the Federal Republic of Germany, by Christof Böhmer, acting as Agent, the United Kingdom, by J. R. J. Braggins, acting as Agent, and the Commission of the European Communities, by Johannes F. Buhl, Legal Adviser, and by Jörn Pipkorn, a member of its Legal Service, acting as Agents,

after hearing the Opinion of the Advocate General delivered at the sitting on 17 January 1985,

gives the following

* Language of the Case: German.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 3 February 1984, which was received at the Court on 24 February 1984, the Oberlandesgericht [Higher Regional Court] Koblenz 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 several questions concerning the interpretation of Articles 17 and 18 of that Convention.

2 Those questions were raised in the context of an action between Sommer Exploitation SA (hereinafter referred to as 'Sommer'), a manufacturer of felt cloth, whose registered office is at Neuilly (France), and Hannelore Spitzley, the owner of an undertaking established in the Federal Republic of Germany, relating to payment for felt cloth purchased from Sommer by Mrs Spitzley.

3 In proceedings before the Landgericht [Regional Court] Koblenz Mrs Spitzley did not dispute that Sommer's application was well founded. However, she claimed a right to set off sums owed by Sommer to her husband, Wolfgang Spitzley.

4 She claimed that those sums were owed by Sommer to Mr Spitzley in respect of commission under a commercial agency contract concluded in 1976 and had subsequently been assigned to Mrs Spitzley.

5 In the proceedings before the Landgericht, Sommer contested the substance of the claim for a set-off made by Mrs Spitzley. The Landgericht, giving judgment on the merits of the case, allowed a set-off only in respect of a limited amount and ordered Mrs Spitzley to pay the remainder of the sum claimed by Sommer.

6 Both Mrs Spitzley and Sommer appealed to the Oberlandesgericht Koblenz which considered the question whether the German courts had jurisdiction to hear Mrs Spitzley's claim for a set-off. In that respect it noted that Clause VII of the commercial agency contract made between Mr Spitzley and Sommer conferred jurisdiction on the courts of the place where Sommer had its registered office, that is to say the French courts, in all disputes arising out of the contract.

7 In the order for reference the Oberlandesgericht states that while the presence and interpretation of that clause would seem to mean that the German courts do not have jurisdiction, the conduct of Sommer, which has not relied on that clause at all but has instead submitted arguments relating to the substance of the action, may have amounted to the conferring of jurisdiction on the German courts by virtue of the principle laid down in Article 18 of the Convention.

8 Consequently the Oberlandesgericht considered it necessary to refer the following questions to 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 a valid 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 without raising any objection?'

9 Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice observations were lodged by the Government of the Federal Republic of Germany, the United Kingdom and the Commission of the European Communities which all took the view that the questions must be answered by affirming the first meaning proposed by the Oberlandesgericht.

10 By the questions it referred to the Court the Oberlandesgericht seeks to know, in substance, whether the prorogation of jurisdiction arising, according to the terms of Article 18 of the Convention, when a defendant enters an appearance before a

court without contesting the jurisdiction of that court occurs in the following circumstances:

when the lack of jurisdiction of the court seised of the proceedings does not relate to the application made by the plaintiff but to the claim for a set-off made by the defendant;

when the lack of jurisdiction of the court seised of the proceedings arises from a clause conferring jurisdiction in accordance with the requirements laid down by Article 17 of the Convention.

11 Article 18 of the Convention states as follows:

'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.'

12 Article 17 provides as follows:

'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.

Agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

If the agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.'

13 Those two provisions form Section 6 — headed 'Prorogation of jurisdiction' — of Title II of the Convention. Whereas Article 17 is concerned with prorogation of

jurisdiction by agreement, Article 18 deals with implied prorogation resulting from a defendant's entering an appearance without contesting the jurisdiction of the court seised of the proceedings.

14 The inclusion of those two provisions indicates that the Convention allows the parties, so far as is possible and subject to the limits laid down in the second paragraph of Article 17 and in the second sentence of Article 18, to choose the court to which they intend to submit the settlement of their disputes.

15 Article 18 in particular is based on the idea that, by entering an appearance before the court seised of the proceedings by the plaintiff, without contesting that court's jurisdiction, the defendant is by implication signifying his consent to the hearing of the case by a court other than that designated by the other provisions of the Convention.

16 The Oberlandesgericht asks first whether Article 18 is applicable to a case such as that before it, where it is the plaintiff who enters into a dispute on the substance of the case before the court seised of an action by the plaintiff himself in relation to a claim for a set-off made by the defendant and in respect of which the said court would otherwise have no jurisdiction.

17 The doubts expressed in that connection by the Oberlandesgericht arise from the wording of Article 18. That provision only refers expressly to the prorogation of jurisdiction as a consequence of the defendant's entering an appearance before the court seised of the proceedings by the plaintiff.

18 Nevertheless, from an interpretation of Article 18 in the light of its purpose and context, as already defined, it may be concluded that a case such as that referred to by the Oberlandesgericht also falls within the scope of application of Article 18.

19 A plaintiff who, when faced with a claim for a set-off made by the defendant and in respect of which the court seised of the proceedings does not have jurisdiction, submits arguments relating to the substance of that claim without contesting the jurisdiction of the said court is in a similar position to that expressly referred to in Article 18 of a defendant who enters an appearance before the court seised of the proceedings by the plaintiff without contesting that court's jurisdiction.

20 Consequently, in a case such as that considered by the Oberlandesgericht, the plaintiff's conduct should be held to constitute the prorogation of jurisdiction, pursuant to Article 18 of the Convention, in favour of the court seised of the proceedings in so far as the other conditions for the application of that provision as defined in particular in the Court's judgment of 24 June 1981 (Case 150/80 *Elefanten Schuh* v *Jacqmain* [1981] ECR 1671) are fulfilled.

21 As the United Kingdom rightly points out that interpretation corresponds, moreover, to the need to avoid superfluous procedure which, as the Court recognized in its judgment of 9 November 1978 (Case 23/78 *Meeth* v *Glacetal* [1978] ECR 2133), forms the basis of the Convention as a whole of which Article 18 is part.

22 The aforementioned conclusion is not affected by the fact, emphasized in the order for reference, that the defendant's claim for a set-off is not based on the same contract or subject-matter as the main application. That fact relates to the admissibility of a claim for a set-off which depends on the law of the State in which the court seised of the proceedings is situated.

23 The second question considered by the Oberlandesgericht is whether Article 18 is applicable when the lack of jurisdiction of the court seised of the proceedings stems from the fact that there is, in relation to the subject-matter of the claim for a set-off, an agreement conferring jurisdiction on the courts of a Contracting State other than that in which the court seised of the proceedings is situated.

24 It should be recalled that, according to the second sentence of Article 18, the rule in the first sentence does not apply where another court has exclusive jurisdiction by virtue of Article 16 of the Convention. The case envisaged in Article 17 is not therefore one of the exceptions which Article 18 allows to the rule which it lays down.

25 As the Court has already stated in the said judgment of 24 June 1981 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.

26 It follows that the fact that an agreement conferring jurisdiction within the meaning of Article 17 designates the court which is to have jurisdiction does not preclude the application, where appropriate, of Article 18 where another court is seised of the proceedings.

27 Consequently the reply to the questions referred to the Court by the Oberlandesgericht Koblenz must be that the court of a Contracting State before which the applicant, without raising any objection as to the court's jurisdiction, enters an appearance in proceedings relating to a claim for a set-off which is not based on the same contact or subject-matter as the claims in his application and in respect of which there is a valid agreement conferring exclusive jurisdiction on the courts of another Contracting State within the meaning of Article 17 of the Convention, has jurisdiction by virtue of Article 18 of the Convention.

Costs

28 The costs incurred by the Government of the Federal Republic of Germany, by the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in answer to the questions referred to it by the Oberlandesgericht Koblenz, by order of 3 February 1984, hereby rules:

The court of a Contracting State before which the applicant, without raising any objection as to the court's jurisdiction, 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 the claims in his application and in respect of which there is a valid agreement conferring exclusive jurisdiction on the courts of another Contracting State within the meaning of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters has jurisdiction by virtue of Article 18 of that Convention.

Bosco Koopmans Joliet

Delivered in open court in Luxembourg on 7 March 1985.

P. Heim
Registrar

G. Bosco
President of the First Chamber