JUDGMENT OF THE COURT (Sixth Chamber)
9 December 1987 *

In Case 218/86

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) Düsseldorf for a preliminary ruling in the proceedings pending before that court between

SAR Schotte GmbH, Hemer (Federal Republic of Germany),

and

Parfums Rothschild SARL, Paris (France),

on the interpretation of Article 5 (5) 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. 1),

THE COURT (Sixth Chamber),

composed of: O. Due, President of Chamber, G. C. Rodríguez Iglesias, T. Koopmans, K. Bahlmann and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

the Government of the Federal Republic of Germany, by Ch. Böhmer, acting as Agent,

* Language of the Case: German.

the Commission of the European Communities, by J. Pipkorn, a member of its Legal Department, acting as Agent, assisted by S. Pieri,

having regard to the Report for the Hearing and further to the hearing on 11 June 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 28 October 1987,

gives the following

Judgment

1 By an order of 10 July 1986, which was received at the Court on 7 August 1986, the Oberlandesgericht Düsseldorf 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 (hereinafter referred to as 'the Convention'), a question on the interpretation of Article 5 (5) of the Convention.

2 That question arose in the course of a dispute between a German undertaking, SAR Schotte GmbH, established at Hemer, and a French undertaking, Parfums Rothschild SARL, whose registered office is in Paris. The dispute concerns orders placed for the delivery by Schotte to the French undertaking of atomizer pumps and other accessories for perfumery articles. The purchaser complained that the atomizers did not work properly. When the matter was not settled by exchange of letters, Schotte brought an action before the Landgericht (Regional Court) Düsseldorf for payment of an amount representing six invoices which had not been paid.

3 It appears from the documents before the Court that the negotiations preceding the orders and deliveries were conducted by Schotte not with the French undertaking but with Rothschild GmbH, whose registered office is in Düsseldorf. Rothschild GmbH also exchanged extensive correspondence with Schotte concerning the complaints over the atomizers supplied. All the letters from Rothschild GmbH,

both in the preliminary negotiations and in connection with the complaints, were signed by two persons, one of whom was a director of Rothschild GmbH and Parfums Rothschild SARL and the other a director of Parfums Rothschild SARL.

4 Initially Schotte brought proceedings before the Landgericht against Rothschild GmbH. However, in the course of the proceedings Rothschild GmbH contended that it was not liable for the debts in question since they concerned only Parfums Rothschild SARL. Schotte therefore, with the leave of the Landgericht, amended its claim by substituting the French undertaking as defendant.

5 Before the Landgericht, Parfums Rothschild SARL contended that the German courts had no jurisdiction to determine the dispute. Schotte, however, claimed that they had jurisdiction on the basis of Article 5 (5) of the Convention, which provides that a defendant may be sued in a Contracting State other than that in which he is domiciled 'as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated'. In its submission, Rothschild GmbH should be regarded as an 'establishment' of Parfums Rothschild SARL within the meaning of that provision.

6 The Landgericht held that it had no jurisdiction on the ground that the conditions laid down in Article 5 (5) of the Convention were not satisfied. In particular, it considered that Rothschild GmbH could not be regarded as an agency or establishment of Parfums Rothschild SARL, since the latter was, on the contrary, a subsidiary of Rothschild GmbH.

7 On appeal, the Oberlandesgericht stayed the proceedings and asked the Court to give a preliminary ruling on the following question:

'Does the jurisdiction conferred by Article 5 (5) of the Convention in regard to a branch, agency or other establishment extend to the case where a legal entity under French law (a "société à responsabilité limitée"), whose registered office is in Paris, maintains no dependent establishment in another Contracting State (in this case, the Federal Republic of Germany) but where there is in that other Contracting State an independent legal entity under German law (a "Gesellschaft

mit beschränkter Haftung") which has the same name and identical management, negotiates and conducts business in the name of the French legal entity and is used by the latter as an extension of itself?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts, the course of the procedure and the written observations submitted to the Court by the German Government and the Commission, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 Article 5 (5) of the Convention confers jurisdiction to hear disputes arising out of the operations of a branch, agency or other establishment. This jurisdiction forms part of the 'special jurisdiction' provided for by Articles 5 and 6 of the Convention, which is justified in particular by the existence of a close connection between the dispute and the court which is called upon to hear it.

10 In its judgment of 22 November 1978 in Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183, the Court held that the concept of a branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.

11 The national court considers that these conditions might also be satisfied in a case such as the present, where the undertaking which acted as an extension of a company established in another Contracting State is not a subsidiary of that company but is an independent company or even its parent company.

12 The German Government and the Commission share that view on the ground, first, that legal certainty requires the application of Article 5 (5) of the Convention in any case in which an establishment which can negotiate business with third

parties clearly appears to be the effective extension of an undertaking established in another Contracting State and, secondly, that undertakings which are in law independent companies may nevertheless display all the characteristics of an extension.

13 The question referred concerns a case in which two companies bear the same name and are under common management, and in which one of those undertakings, although not a dependent branch or agency of the other, nevertheless enters into transactions on behalf of the other and thus acts as its extension in business relations.

14 It should be added that in the present case Rothschild GmbH not only took part in the negotiations and in the conclusion of the contract but was also responsible, during the performance of the contract, for ensuring that the deliveries contracted for were made and that invoices were paid. Moreover, the correspondence addressed to Schotte seemed to indicate that it was acting as a place of business of Parfums Rothschild SARL.

15 In such a case, third parties doing business with the establishment acting as an extension of another company must be able to rely on the appearance thus created and regard that establishment as an establishment of the other company even if, from the point of view of company law, the two companies are independent of each other.

16 The close connection between the dispute and the court called upon to hear it must be assessed not only on the basis of the legal relations between legal entities established in different Contracting States but also by reference to the way in which these two undertakings behave in their business relations and present themselves *vis-à-vis* third parties in their commercial dealings.

17 Consequently, it should be concluded that Article 5 (5) of the Convention must be interpreted as applying to a case in which a legal entity established in a Contracting State maintains no dependent branch, agency or other establishment in another Contracting State but nevertheless pursues its activities there through an independent company with the same name and identical management which negotiates and conducts business in its name and which it uses as an extension of itself.

Costs

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

On those grounds

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Oberlandesgericht Dusseldorf by order of 10 July 1986, hereby rules:

Article 5 (5) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as applying to a case in which a legal entity established in a Contracting State maintains no dependent branch, agency or other establishment in another Contracting State but nevertheless pursues its activities there through an independent company with the same name and identical management which negotiates and conducts business in its name and which it uses as an extension of itself.

Due Rodríguez Iglesias

Koopmans Bahlmann Kakouris

Delivered in open court in Luxembourg on 9 December 1987.

P. Heim
Registrar

O. Due
President of the Sixth Chamber