REPORT FOR THE HEARING
delivered in Case 218/86 *

I — Facts and procedure

Law applicable

Article 5 of the Convention provides as follows:

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

1. . . .

2. . . .

3. . . .

4. . . .

5. 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.'

Background to the dispute

In the winter of 1981/82, the German undertaking Schotte GmbH conducted negotiations with Rothschild GmbH, Düsseldorf, whose directors at the time were Mr Rothschild and Mr Vehling. The negotiations resulted in the conclusion of an agreement concerning the production and delivery of atomizer pumps by Schotte GmbH for Parfums Rothschild SARL, Paris, a French undertaking which is a wholly-owned subsidiary of Rothschild GmbH. As agreed, Schotte GmbH submitted the invoices to Rothschild SARL. In 1983 Rothschild GmbH complained to Schotte GmbH that the atomizers did not satisfy customers' requirements. Those complaints led to extensive correspondence between Schotte GmbH and Rothschild GmbH. All the letters on Rothschild GmbH headed notepaper were signed by Mrs Rodaks, one of the two directors of Rothschild SARL, and by Mr Vehling, both before the conclusion of the contracts for individual deliveries and on the occasion of the subsequent complaints.

When the matter was not settled by the exchange of letters, Schotte GmbH claimed payment from Rothschild GmbH of DM 55 507.04 in respect of six invoices presented by Schotte GmbH to Rothschild SARL. Rothschild GmbH denied that it owed the money. Schotte GmbH therefore brought proceedings against Rothschild SARL before the Landgericht (Regional Court), Düsseldorf. Before that court Schotte GmbH claimed that Rothschild GmbH was in reality an 'establishment' of Rothschild SARL within the meaning of Article 5 (5) of the Brussels Convention. Rothschild SARL objected to the jurisdiction of the German courts. It contended that Rothschild GmbH was not an agency or establishment of Rothschild SARL; on the contrary, the latter was a wholly-owned subsidiary of Rothschild GmbH. Furthermore, there was no dispute arising out of the 'operations' of Rothschild GmbH since the contracts at issue were concluded exclusively with Rothschild SARL.

The Landgericht Düsseldorf considered that the requirements of Article 5 (5) of the Convention were not satisfied and it therefore had no jurisdiction to hear the action. Schotte GmbH appealed to the

* Language of the Case: German.

Oberlandesgericht Düsseldorf. Before that court the parties repeated their arguments concerning the jurisdiction of the Landgericht Düsseldorf.

Preliminary question

By an order of 10 July 1986 the Oberlandesgericht Düsseldorf decided to stay the proceedings and submit to the Court of Justice 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?'

In its order for reference, the Oberlandesgericht stated that in the light of the judgments delivered by the Court of Justice on the interpretation of Article 5 (5) of the Convention — in particular the judgments of 6 October 1976 in Case 14/76 *De Bloos* v *Boyer* [1976] ECR 1497, of 22 November 1978 in Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183 and of 18 March 1981 in Case 139/80 *Blanckaert v Trost* [1981] ECR 819 — it was inclined to answer that question in the affirmative. In its view, the activities of the directors of Rothschild SARL at the premises of and in the name of Rothschild GmbH could be regarded as the activities of an extension of Rothschild SARL which, although it might not clearly appear to be organized as such, did in fact operate as such an extension.

Furthermore, the Oberlandesgericht considered that if the *ratio legis* of Article 5 (5) was to enable a person whose legal relationship with a foreign undertaking was based on the extension of the parent body to bring an action in the courts of the place where the extension was established, those grounds should also apply in this case.

Lastly, the Oberlandesgericht stated that the objective of Article 5 (5) supported the application of that provision to a case such as the present. If the question asked were to be answered in the negative, a legal entity which did not wish to be sued in another Contracting State would be able to circumvent jurisdiction under Article 5 (5) by setting up its foreign branch in the legal form of an independent undertaking.

As regards the concept of 'operations', the Oberlandesgericht merely cited the judgment in Case 33/78, cited above, in which the Court stated that the term 'operations' covers actions relating to undertakings entered into at the place of business in the name of the parent body and to be performed in the Contracting State in which the place of business is established.

Procedure

The order for reference was lodged at the Court Registry on 7 August 1986.

Written observations were submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC by the Government of the Federal Republic of Germany, represented by C. Böhmer, acting as Agent, and by the Commission of the European Communities, represented by J. Pipkorn, Legal Adviser, acting as Agent, assisted by S. Pieri, an Italian civil servant seconded to the Commission under the exchange scheme for national civil servants.

Upon hearing the report of the Judge-Rapporteur and the view of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry. By decision of 11 February 1987 the Court assigned the case to the Sixth Chamber.

II — Written observations submitted to the Court

The *German Government* and the *Commission* consider that the question should be answered in the affirmative.

In their observations, the German Government and the Commission point out the danger of abuse already referred to by the Oberlandesgericht.

The *German Government* goes on to note that if a 'branch, agency or other establishment' clearly appears to be the effective extension of a parent body, legal certainty requires that Article 5 (5) of the Convention should apply. The German Government adds that the need to promote the efficacious conduct of proceedings militates in favour of the same solution. In that connection it refers to the judgment of 22 November 1978 in *Somafer*, cited above, in which the Court held that the cases of special jurisdiction contained in Article 5 were provided for in order to take account of a particularly close connection factor between a dispute and the court which might be called upon to hear it, with a view to the efficacious conduct of proceedings.

However, the German Government maintains that the question whether an installation is an 'effective extension' should be examined in each case, on the basis of the facts of the case and in the light of the criteria set out in the judgments of 22 November 1978 in *Somafer* and of 18 March 1981 in *Blanckaert*, cited above. In those judgments the Court ruled 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.

As regards the present case, the fact that the preliminary negotiations were conducted by Rothschild GmbH and that it participated in the completion and execution of the transactions should, according to the German Government, be decisive. The requirement that Rothschild GmbH should be legally independent is not of critical importance. Since the directors of the two companies, Rothschild GmbH and Rothschild SARL, are the same, it is difficult to establish the existence of any relationship of subordination between them.

The *Commission* also considers that Article 5 (5) applies to undertakings which, although they are in law independent companies, in practice display the characteristics of an extension.

First of all, the Commission refers to the wording of the provision in question. In its view it follows from the inclusion of the term 'other establishment' that the extensions covered by the Convention include installations which do not satisfy the definition of a 'branch'. In that connection the Commission also refers to the Italian version of the Convention, which speaks of 'qualsiasi altra filiale'. In Italian law, the concept of 'filiale' is very wide in scope and covers both branches and subsidiaries which are separate legal entities. More generally, it might be concluded that as a matter of economic reality, a subsidiary which is independent in law does not necessarily have greater independence as regards the parent body than a branch which is legally dependent on the main establishment. Consequently, the fact that the extension is independent in law does not prevent the application of Article 5 (5) of the Convention.

The Commission goes on to consider which factors must be taken into account in order to determine whether a legally independent installation should be regarded as the extension of an undertaking. According to the Commission, the fact that an extension is subject to the direction and control of the foreign undertaking need not necessarily be evidenced by organizational measures such as a majority holding on the part of the parent company, agreements on control or other similar provisions. The purpose of the provision in question, which is to enable those doing business with a foreign undertaking to bring an action before the national courts, implies that the conditions for jurisdiction under Article 5 (5) are satisfied when, so far as third parties are concerned, there are objectively identifiable factors which give rise to the impression that the foreign parent body has established an extension, as defined in the judgments of the Court, on national territory.

In conclusion, the Commission proposes that the preliminary question should be answered as follows:

'The jurisdiction conferred by Article 5 (5) of the Convention of 27 September 1968 in regard to an "other establishment" exists, where a company which is a legal entity established in accordance with the law of a Contracting State uses as an extension a company created in accordance with the law of another Contracting State which has the same name and is under the same management, permitting that undertaking to conduct business in its name and carry on negotiations prior to the conclusion of such business as well as subsequent negotiations concerning the due performance of a contract'.

T. Koopmans
Judge-Rapporteur