OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 5 FEBRUARY 1981 [1]

Mr President,
Members of the Court,

Blanckaert & Willems, defendants and appellants in the appeal on a point of law in the main proceedings, run a furniture factory in Belgium. They, and apparently other Belgian furniture manufacturers, were represented under an oral agreement of 1960 by Hermann Bey [hereinafter referred to as "Bey"], a furniture agency in Aachen which acted as an independent commercial agent [Handelsvertreter (Vermittlungsvertreter) — negotiating business on their behalf]. Bey received in return a commission of 5 % on the value of each sale negotiated by it. Other activities on behalf of Blanckaert & Willems — organizing customs clearance and transport for the goods, recruiting other representatives — were recompensed by the firm with a special commission of 2% of the net turnover in the Federal Republic of Germany.

By a letter dated 30 November 1975 Bey engaged as another commercial agent for Blanckaert & Willems Mrs Trost of Aachen, who is the plaintiff and the respondent in the appeal on a point of law in the main proceedings. The text of the letter was as follows:

"On behalf of Blanckaert & Willems of Eeklo, Belgium, I hereby authorize you to represent the aforesaid undertaking in the Rhine and Ruhr, Eifel and South Westphalia area.

You will be working as the direct representative of Blanckaert & Willems. You will also receive from them a commission of 5%.

However, I would ask you kindly to send all orders exclusively to my address in Aachen.

Please be understanding about this. The reason is that as I am answerable for you I must be kept informed of each order.

Naturally, your name will appear on all copies as representative. I look forward to a profitable association with you . . .".

For the work brought in by Bey's collaboration with Mrs Trost, Blanckaert & Willems paid Bey what is known as a special commission.

From early in January 1977 Bey was apparently no longer working for Blanckaert & Willems. In a letter dated 14 December 1976 Blanckaert & Willems informed Mrs Trost that she, too, was to cease working for Blanckaert & Willems on 30 January 1977. The reason was evidently that Blanckaert & Willems were not satisfied with the amount of business brought by Mrs Trost and objected to the fact that she was also representing other furniture manufacturers.

Mrs Trost sued Blanckaert & Willems in the Landgericht [Regional Court] Aachen for payment of outstanding commission and for the agent's adjustment fees prescribed in Article 89 (b) of the German Commercial Code [Handelsgesetzbuch] on termination of a commercial agency relationship by way of consideration for the new custom obtained. In the course of those proceedings Blanckaert & Willems contested the international jurisdiction of the court. The Landgericht Aachen dismissed the action as inadmissible on

1 — Translated from the German.

the ground that neither the requirements of Article 5 (1) nor those of Article 5 (5) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters had been met. Those provisions state that:

"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;

(. . .)

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."

The Oberlandesgericht Köln [Higher Regional Court, Cologne] quashed that decision and referred the case back to the Landgericht. In its view the Landgericht Aachen had jurisdiction because Bey constituted an agency within the meaning of Article 5 (5) of the Convention and the dispute must be considered as arising out of the operations of that agency. The deciding factor for the decision lay in the fact that Bey described itself as an agency and had been a representative of Blanckaert & Willems for over 20 years. The court was of the opinion, moreover, that Bey had been instructed and authorized by Blanckaert & Willems to conclude a commercial agency agreement on a long-term basis with Mrs Trost, that Bey was subject to the direction and control of Blanckaert & Willems, that orders obtained by Mrs Trost were to be transmitted through Bey to Blanckaert & Willems and also that Bey had described itself as Blanckaert & Willems's sales manager.

In the appeal by Blanckaert & Willems on a point of law the Bundesgerichtshof [Federal Court of Justice] took the view that jurisdiction under Article 5 (1) of the Convention was excluded because under the relevant German law the place of performance for claims concerning commission and compensation was the place where the debtor had his place of business. As regards Article 5 (5) of the Convention, it must be assumed that Bey and Mrs Trost were commercial agents for Blanckaert & Willems and in that capacity they must be looked upon as independent businessmen within the meaning of Article 84 (1) of the German Commercial Code. In any case, it had not been established that Bey's status was that of an employee within the meaning of Article 84 (2) of the Commercial Code or that there was some other relationship of service or employment, even though in collecting and transmitting the orders negotiated by Mrs Trost it was subject to the direction and control of Blanckaert & Willems. The question therefore arose whether activities such as those of a commercial agent may be considered, despite the absence of full independence, as the operations of an agency within the meaning of Article 5 (5) of the Convention. If the answer was in the affirmative it must be ascertained whether the claims for payment of commission and agent's adjustment fees were based on a dispute arising out of the operations of Bey. If the answer to

that was in the negative then it must be asked whether a dispute between Mrs Trost's agency and the undertaking she represented may be considered as a dispute arising out of the operations of an agency within the meaning of Article 5 (5) of the Convention.

In view of those questions which concern the interpretation of the Convention on Jurisdiction and the Enforcement of Judgments the Bundesgerichtshof suspended the proceedings by an order of 21 March 1980 and referred the following questions to the Court for a preliminary ruling under Article 3 of the Protocol on the interpretation of that Convention:

1. Is a commercial agent [Handelsvertreter] who is a business negotiator [Vermittlungsvertreter] within the meaning of Article 84 et seq. of the Commercial Code [Handelsgesetzbuch] to be considered as an "agency" or "other establishment" within the meaning of Article 5 (5) of the European Communities' Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (hereinafter referred to as "the Convention")?

2. If the answer to Question 1 is in the affirmative:

   (a) Is there a dispute "arising out of the operations" of an agency or other establishment within the meaning of Article 5 (5) of the Convention if the agency or other establishment, acting under the authority of the undertaking in respect of which it operates as commercial agent, appoints a third person as an additional commercial agent for the undertaking, accepts against payment of a commission the documents relating to transactions negotiated by the third person and transmits them to the undertaking, and instructs and supervises the third person

   and

   if a dispute arises out of the activities of that third person in his capacity as a commercial agent between the undertaking and himself concerning his entitlement to commission and payment by way of adjustment on termination of the agency agreement?

   (b) If the answer to Question 2 (a) is in the negative:

   Does a dispute between the undertaking and the agency or other establishment concerning the latter's entitlement to commission and payment by way of adjustment on termination of the agency agreement fall within the concept of "a dispute arising out of the operations of ... [an] agency or other establishment" within the meaning of Article 5 (5) of the Convention?

My views on these questions are as follows:

1. Question 1

In replying to this question Mrs Trost, the respondent in the appeal on a point of law in the main action, relies principally on the decision in Case 14/76 (*Ets A. de Bloos SPRL* v *Société en comandite par actions Bouyer,* judgment of 6 October 1976 [1976] ECR 1497) in which it was stated that the essential characteristic of a branch or an agency is "the fact of being subject to the direction and control of the parent body" (paragraph 20). That requirement is certainly met in the case of Bey because it was bound in pursuing its business of selling the goods made by Blanckaert & Willems to follow the instructions of the latter in selecting contracting parties and determining the terms on which business was done, in soliciting, and serving the interests of, the clientele and in carrying out the business transactions. What was particularly significant here was that the agency agreement with Mrs Trost was made by Bey on behalf of, and in the name of, Blanckaert & Willems on the basis of instructions to that effect, as was shown, for instance, by the way in which

the extent of the area of representation was determined, that the orders obtained by Mrs Trost were collected by Bey and transmitted by it to Blanckaert & Willems and that Bey, likewise in accordance with the instructions of the parent body, also took part in fixing the rate of the commission. In the case of Bey which, as may be seen in a letter from Blanckaert & Willems, operated as the firm's intermediary, with a regular duty to furnish reports, it is therefore correct to say that there was a true relationship of dependency, a conclusion which is further borne out by the fact that Bey was forced to close its office when its contractual relationship with Blanckaert & Willems was terminated. A further argument in favour of the application of Article 5 (5) of the Convention in the case of Bey is the underlying purpose of that provision which is to place jurisdiction wherever a thorough investigation into the facts can most easily be made, which in the present case is surely the place where the relevant agreements were made and where the decisive stages in the transactions occurred. Last but not least, regard should be had, in interpreting Article 5 (5), to what might be termed "social considerations". These are based on the fact that as a rule only major business concerns have branches and agencies, whereas the other parties to agreements with them are for the most part small firms of limited means. It would not be fair to subject the latter to costly proceedings in another country.

Taking the opposite view the Commission, adopting the description of the legal relationships which was accepted by the court which has submitted the reference, believes that those concerned are commercial agents within the meaning of Article 84 of the German Commercial Code, that is to say, independent and legally autonomous persons, and that therefore the conditions which have been laid down in the case-law for the application of Article 5 (5) of the Convention have not been met. Admittedly such persons have a duty to observe certain guidelines in negotiating business, but within those guidelines they are independent and therefore not subject to the "direction" of those whom they represent. In those circumstances it is quite impossible for the conditions relating to Article 5 (5) of the Convention, as laid down in recent case-law (judgment in Case 33/78, *Somafer SA* v *Saarferngas AG*, 22 November 1978 [1978] ECR 2183), to have been satisfied, according to which the essential requirement is that it must be easy to ascertain from its external features that the undertaking in question is a branch, agency or other establishment, and that a branch, agency or other establishment must be a place where the parent body conducts business. The first condition is rarely met in the case of commerical agents, who often neither maintain an office nor use a trade name. As to the second point it is not important that Bey described itself in a letter of 14 October 1975 as a "sales manager" and that it collected the orders negotiated by Mrs Trost and passed them on, or in other words exercised a certain amount of supervision over Mrs Trost on behalf of Blanckaert & Willems. The significant factor is rather — and this prevents the conclusion that Bey was a place of business of Blanckaert & Willems — that business was *conducted* not by Bey but by Blanckaert & Willems.

In discussing this issue it should first be pointed out that, according to the case-law to date, not only are the concepts in Article 5 (5) of the Convention to be interpreted independently, that is to say, so as to have the same content in all the Member States, but also, as I have already pointed out in my opinion in Case 14/76 ([1976] ECR 1512), the interpretation to be adopted is a *narrow* one, bearing in mind that derogations from the principle in Article 2 of the Convention are permissible only in the interests of the due administration of justice.

Similarly, it is clear from the case-law of the Court that for all three of the concepts employed in Article 5 (5) of the Convention the same distinguishing criteria are to be retained which means that, for example, different standards cannot be applied with respect to agencies, as Wieczorek, for example, believed (Kommentar zur Zivilprozeßordnung, 2nd edition, Note B I (a) 1 on Article 21 of the Zivilprozeßordnung [Code of Civil Procedure]). The reference by Mrs Trost's representative in the course of the oral procedure to *insurance* agents is not relevant to the present question because special provisions relating to insurance agents are to be found in the second paragraph of Article 8 of the Convention.

If a solution is to be sought essentially in the earlier decisions, as was advocated in the course of the procedure, then of course the attempt must not be restricted to the decision in Case 14/76, as was done by the respondent in the main proceedings. All that was established in that case as far as the essential characteristics required by Article 5 (5) of the Convention are concerned was that the principal feature of a branch, agency or other establishment is that it is subject to the direction and control of the parent body, no further explanation having been required in that case.

In my view the interpretation of that provision was given fairly conclusive clarification in the judgment in Case 33/78. There is stated that what is most significant as far as Article 5 (5) is concerned is in the first place the material signs enabling the existence of the branch, agency or other establishment to be easily recognized (paragraph 11). It must be a place of business which has the appearance of permanency such as an extension of a parent body, has a management, and is materially equipped to negotiate business with third parties (paragraph 12). In addition third parties should be able to conclude their transactions at the place of business which constitutes the extension without having to deal directly with the parent body established in another country, even though they are aware that there may have to be some legal link with the latter.

That enables us to conclude that it is the objective activities of an agency or other establishment which are determinative and that therefore no significance can be attached to the description of itself adopted by Bey ("sales manager") and the various formulae used in individual letters ("profitable association") with Mrs Trost). The above-mentioned decision shows, furthermore, that in order to satisfy the requirements of Article 5 (5) of the Convention the existence of *some* restrictions on the representative's independence and *some* opportunity for the principal undertaking to exercise its influence is not sufficient. The agency or other establishment must actually be a kind of decentralized office with essentially the same ability to conduct business as the principal under-

taking, but restricted of course to the territory of the Member State in which it is situated. I think that is what is required by the words quoted above, in particular by the use of the words "place of business".

In a legal relationship of the kind in question in the main proceedings, therefore, it is not sufficient to consider the role of the agency or other establishment in attracting, and negotiating with, new customers. What is important is whether it also participates in conducting and executing transactions or whether that is exclusively the responsibility of the principal undertaking. A clear indication to that effect is to be found in the principle underlying the rule regarding jurisdiction in Article 5 (5) which is that a departure from the general rule regarding jurisdiction is only allowed where it is expedient for the purpose of conducting the proceedings, that is to say, only where there exists an exceptionally close connexion between the legal relationship in dispute and the place of jurisdiction of the court. It is important not to overlook the fact that proceedings involving, in connexion with commercial representatives, consideration of Article 5 (5) of the Convention usually occur in the course of *conducting* business. Consequently, where decisions concerning the conduct and execution of business are the responsibility of the principal undertaking the court having jurisdiction for the place where the undertaking has its principal place of business is naturally more appropriate than the court in the place in which the contractual relationship was solicited or entered into.

That is quite clearly the case in the main action. In the first place, it concerns payment of commission which, as we have been told, was always paid directly by Blanckaert & Willems and which pursuant to Article 87 (a) of the Commercial Code may be payable on conclusion of the transaction and receipt of payment. The main action also concerns agents' adjustment fees, payment of which depends according to Article 89 (b) of the Commercial Code on, *inter alia*, whether the principal undertaking continues to benefit from the new customers brought in by the agent, that is to say, whether it maintains business relationships with those customers.

"Branch, agency or other establishment" therefore certainly does not mean a typical commercial agent such as the respondent in the main proceedings. A certain amount of independence is his hallmark; in any case the fact that the undertaking he represents can direct him to a certain extent in matters concerning the preparation and conclusion of agreements does not link him sufficiently strongly to the principal undertaking to satisfy Article 5 (5) of the Convention.

The same must also apply in the case of Bey, however, whose responsibilities were even wider and who served in a certain sense as Blanckaert & Willems' "contact" in the Federal Republic of Germany. The fact that Bey was plainly acting for *several* undertakings already raises doubt as to whether it constituted a branch of Blanckaert & Willems. In any case the fact remains that its duties in connexion with the conclusion of representation agreements, supervision of the activities of other representatives, transmission of their orders and cooperation in calculating commission were not sufficient to enable it to have been considered as a place of business of Blanckaert & Willems, since decisions as to the nature and execution of transactions evidently lay exclusively within the province of the latter.

The answer to the first of the questions asked by the Bundesgerichtshof may therefore appropriately be, as the

Commission has suggested, in the negative. Such an answer may be given without there being any need to consider the additional problem raised in the course of the oral procedure of whether, as far as Bey is concerned, jurisdiction under Article 5 (5) of the Convention is precluded in any case because at the crucial time, that is to say, when the action was brought — I am referring to the observations in the Jenard report on the second paragraph of Article 8 of the Convention — Bey was no longer to be considered as an "agency" of Blanckaert & Willems since the contractual relationship between them had already been terminated.

2. Question 2 (a)

In the light of my observations as to the first question it is clear that consideration of the problem raised in the second question assumes subsidiary importance.

The respondent in the appeal in the main proceedings favours an answer in the affirmative for this question too. In her opinion it is significant that Bey concluded the representation agreement between Blanckaert & Willems and Mrs Trost and that the activities of Mrs Trost had a strong influence on Bey's business because, apart from the commission to which Bey thus became entitled, the orders obtained by Mrs Trost were given to Bey and transmitted by it to Blanckaert & Willems and because Bey had also to settle the commission due to Mrs Trost.

The Commission contends in particular that the claims by Mrs Trost which are the subject of the dispute are based on prior circumstances which must have arisen in the course of the operations of Blanckaert & Willems, that is to say, the conclusion and carrying-out of individual sales and the establishment of a clientele from which Blanckaert & Willems continues to benefit. Therefore it may only be said that the dispute on the matter relates exclusively to the operations of Blanckaert & Willems.

Permit me to say immediately that, as far as this disagreement is concerned, the view taken by the Commission has the most convincing arguments in its favour.

According to the judgment in Case 33/78 to which reference has already been made, application of Article 5 (5) of the Convention definitely requires the existence of a particularly close connecting factor between the dispute and the court which may be called upon to hear it (paragraph 7 of the decision). The subject-matter of the dispute relates to the operations of an agency if rights and duties concerning the actual management of the agency are at issue (for instance the renting of the property on which the agency stands, or the hiring of staff employed there). It does so likewise where the dispute involves undertakings entered into by the agency on behalf of the principal undertaking and which are to be performed in the Contracting State in which the agency is established, as well as in the case of non-contractual obligations arising from the activities pursued by an agency at its place of business on behalf of the principal undertaking.

The main proceedings in this case are not concerned with rights and duties relating to the actual management of the agency within the meaning of the examples cited from case-law. Nor do they concern obligations arising from the

activities of Bey, for the dispute concerns claims arising out of the fact that Mrs Trost negotiated business for Blanckaert & Willems and won them a clientele; those claims, however, are attributable to circumstances brought about by the operations of Blanckaert & Willems. Lastly, the dispute is equally unconcerned with commitments entered into by Bey on behalf of Blanckaert & Willems. The claims to payment of commission derive directly from the orders taken by Mrs Trost for Blanckaert & Willems; however, in so far as the agents' adjustment fees are attributable to a contract which Bey concluded on behalf of Blanckaert & Willems, the essential point is still that such claims, as the Bundesgerichtshof itself pointed out, are not to be satisfied in the State in which Bey (the "agency") was established.

Precisely because the close connexion required by the law expressed in past decisions between the claims advanced and a German court is not evident, the answer to Question 2 (a), should it still be required, must be in the negative.

3. Question 2 (b)

This question, too, requires only subsidiary treatment from me.

In my opinion on Case 14/76 I have already explained the view, to which I still adhere, that it is not the intention and purpose of the provision in question to lay down rules governing jurisdiction in actions brought by subsidiaries against their parent companies, but that the essential purpose is to enable *third parties* involved in legal relationships with undertakings which have branches or other subsidiary establishments to bring actions in the court nearest to the place in which the cause of action arose. In fact it is difficult to imagine disputes between subsidiary establishments within the meaning of Article 5 (5) of the Convention and their parent undertaking because strictly speaking branches do not, as a general rule, have legal personality and because where they do the principal undertaking may be assumed to exercise its influence in commercial matters in a manner which amounts to *de facto* control.

In order to be able to speak of disputes arising out of the operations of an agency it is also important that the dispute involves obligations incurred on the responsibility of the agency, acting for the principal undertaking. There can surely be no question of that in the present circumstances. There is no doubt but that the claims in question are to be acted upon by the principal undertaking itself, and this concerns not only the agents' adjustment fees but also, even though the agency was involved in helping to settle the commission, the claims for commission themselves.

4. In conclusion I propose, therefore, that the reference submitted by the Bundesgerichtshof for a preliminary ruling be answered as follows:

A commercial agent within the meaning of Article 84 et seq. of the Commercial Code whose activities are concerned with negotiating

transactions which are conducted and executed exclusively by the undertaking he represents is not to be considered as an agency or other establishment within the meaning of Article 5 (5) of the Convention on Jurisdiction. That remains true even where, on the full authority of the undertaking for which he acts, he appoints third parties to be additional commercial agents, accepts orders negotiated by those third parties against payment of commission and transmits those orders to the undertaking, and instructs and supervises the third parties.