OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 17 December 1987

My Lords,

SA Haviland, which is incorporated and has its registered office in France, appointed (it seems in 1967) SA Agecobel as its agent for the sale of Haviland's products in Belgium and Luxembourg. By 1978 Haviland had, it alleges, received many complaints about Agecobel and accordingly it terminated the agency agreement with effect from the end of October 1978. Agecobel brought proceedings against Haviland in the Tribunal de commerce in Brussels for outstanding commission and for compensation for the unlawful termination of the agreement. Haviland objected that the court had no jurisdiction to hear the claim and counterclaimed for monies due on unpaid invoices.

The Tribunal de commerce accepted that it had jurisdiction by virtue of Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Convention') and ordered Haviland to pay compensation and outstanding commission. Haviland was held entitled to the monies due on unpaid invoices.

SPRL Arcado, apparently incorporated in and having its registered offices in Belgium, has, in a way which is not explained, succeeded to the rights and obligations of Agecobel. As such successor it became party to an appeal from the judgment of the Tribunal de commerce to the Court of Appeal in Brussels in which the amount of commission and of the compensation awarded at first instance are in issue. Haviland objected in reply that the claim being made for compensation for unlawful termination was a matter 'relating to tort, delict or quasi-delict' within the meaning of Article 5 (3) of the Convention and that the Brussels courts had no jurisdiction.

The Court of Appeal took the view that whereas the claim for payment of commission clearly suggested that the proceedings were contractual in nature there was room for doubt as to whether a claim for compensation for unlawful repudiation was within Article 5 (1) of the Convention if that Article was to be given an independent meaning. If it was to be construed in accordance with Belgian or French law it seemed that the claim would properly be categorized as relating to a contract.

Accordingly the Court of Appeal asked for a preliminary ruling on the question:

'Are proceedings relating to the unlawful repudiation of an (independent) commercial

agency agreement and the payment of commission due under such an agreement proceedings in matters relating to a contract within the meaning of Article 5 (1) of the Brussels Convention of 27 September 1968?'

Article 5 of the Convention, by way of derogation from the basic rule linking jurisdiction with domicile set out in Article 2, provides 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;

...

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred'.

Whether phrases in the Convention are to be construed as such so that they apply uniformly in all Member States or whether they are to be taken as requiring courts before which disputes come to apply their own conflict of laws rules has already been much debated. On the one hand, it is said that to apply an 'independent' interpretation ensures a uniform and equal body of rules applicable throughout the Member States party to the Convention. On the other hand, an interpretation which leaves it to the conflict of laws rules of Member States to decide issues like the present does not by any means necessarily conflict with the overriding aims of the Convention to facilitate the automatic recognition and enforcement of judgments given in circumstances which are wholly acceptable as bases for jurisdiction.

The Court has recognized in Case 12/76 (*Tessili* v *Dunlop* [1976] ECR 1473) that, 'Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the Treaty' and taking national law including its conflicts rules may be necessary in view of the 'differences obtaining between national laws of contract and ... the absence at this stage of legal development of any unification in the substantive law applicable'.

Whether words or concepts which may have a different meaning in different Member States should be given an independent meaning, or decided by reference to the substantive law accepted as applicable by the conflict of laws rules of the court seized of the matter, must be decided according to which of them is likely to be most effective in enabling the Convention to achieve the objectives it pursues. This is so not least since the derogations in Article 5 are created 'because of the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings' (Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183, at p. 2191, paragraph 7).

If the matter were free from authority, it seems to me that where claims are made in respect of alleged contracts there is much to be said for adopting a rule that the court in which the proceedings are brought should decide what is the proper law governing the circumstances in dispute and then decide under that law whether the matter relates to a contract and where is the place of performance of the obligation in question. This might well produce different results in different courts as to whether the matter did or did not relate to a contract. On the other hand, it would avoid the conflict which can arise if an independent interpretation decides that the matter is one relating to a contract whereas under the proper law governing the circumstances, or the law of the place of performance of the obligation, there is no contract at all.

The matter, however, is not free from authority. The term 'civil and commercial matters' in Article 1 of the Convention was held to be an independent concept which must be construed with reference first to the objectives and scheme of the Convention and secondly to the general principles which stem from the corpus of the national legal systems (Case 814/79 *Netherlands* v *Rüffer* [1980] ECR 3807, at p. 3819, paragraph 7) following Case 29/76 (*Luftransportunternehmen (LTU)* v *Eurocontrol* [1976] ECR 1541, at p. 1551, paragraph 3). Similarly, in Case 33/78 *Somafer* the Court held that the need to ensure legal certainty and equality of rights and obligations for the parties as regards the power to derogate from the general jurisdiction of Article 2 required an independent interpretation, common to all the Member States, of the concepts contained in Article 5 (5) *(Somafer,* p. 2191, paragraph 8). In particular, the Court has already held in Case 34/82 (*Martin Peters* v *ZNAV* [1983] ECR 987) that the phrase 'matters relating to a contract' in Article 5 (1) should be regarded as a Community concept and interpreted in the light of the Convention and its aims (at p. 1002, paragraphs 9 and 10).

The approach of the Court has therefore been that concepts contained in the Convention relating to the scope of the Convention and the scope of the derogations, under Article 5, from the general rule contained in Article 2(1) should be defined independently in accordance with the objectives and system of the Convention, rather than be defined by reference to individual national laws. By contrast, the place of performance of the obligation to be taken into account 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 (Case 133/81 *Ivenel* v *Schwab* [1982] ECR 1891, at p. 1899 (paragraph 7), following Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473). That approach is also confirmed by Case 266/85 *(Shenavai* v *Kreischer* ECR 239), judgment of 15 January 1987. The identification of the scope of the derogation and the determination of the place in which it is to be performed have thus been treated as separate issues; and the Court has adopted different approaches.

In the light of these decisions it seems to me that the question posed has to be answered

by reference to the Convention rather than by reference to a specific national law.

As already indicated the Convention itself must be interpreted with reference first to the objectives and scheme of the Convention and secondly to the general principles which stem from the corpus of national legal systems (Case 814/79 *The Netherlands* v *Rüffer*, supra). In many cases it may be necessary, as it was in *Peters*, to refer in detail to the legal systems of Member States to see whether the claim made is to be treated as relating to a contract. That examination in detail may not always be necessary in clear cases. Thus in Case 14/76 *(De Bloos* v *Bouyer* [1976] ECR 1497) the Court accepted, without a detailed comparison, a claim by the grantee of an exclusive sales concession against the grantor, claiming unilateral breach, dissolution of the contract by the court and payment of damages, as being matters relating to a contract.

It seems to me that if proceedings are brought which as an essential element of the claim allege the existence of what it is agreed would be a contract if it was made (even if the existence of the contract is in dispute (Case 38/81 *Effer SpA* v *Kantner* [1982] ECR 825)) then they are to be regarded as covering 'matters relating to a contract' for the purposes of Article 5 (1) of the Convention.

That test is clearly satisfied in the present case. The claim for commission due under the commercial agency agreement is now agreed by the parties to be, and plainly is, a matter relating to a contract. So in my view is the claim for compensation for what is said to be a premature and sudden termination of the agreement. The essence of that claim is that the contract itself required reasonable notice of the termination; that term of the contract was broken; compensation is claimed for the breach.

Accordingly, in my opinion the question referred falls to be answered on the following lines:

'Proceedings relating to the wrongful repudiation of an (independent) commercial agency agreement and the payment of commission due under such an agreement are proceedings in matters relating to a contract within the meaning of Article 5 (1) of the Brussels Convention.'

The costs of the parties to the main proceedings are a matter for the national court. The costs of the Commission and of the Member States which have submitted observations in these proceedings are not recoverable.