concerning the situation of the building where such entity is established or the local engagement of staff to work there;

— actions relating to undertakings which have been entered into at the above-mentioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body.

It is in each case for the court before which the matter comes to find the facts whereon it may be established that an effective place of business exists and to determine the legal position by reference to the concept of "operations" as above defined.

In Case 33/78

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 Saarbrücken for a preliminary ruling in the action pending before that court between

ÉTABLISSEMENTS SOMAFER SA, whose registered office is at Uckange (France),

and

SAAR-FERNGAS AG, whose registered office is at Saarbrücken-Schafbrücke (Federal Republic of Germany),

on the interpretation of the words "branch" and "agency" within the meaning of Article 5 (5) of the Convention of 27 September 1968,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The order making the reference to the Court and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The company Établissements Somafer, the defendant in the main action and appellant on the appeal (hereinafter referred to as "Somafer"), whose principal place of business is at Uckange (France) engages in demolition and blasting and in 1974, on behalf of the Ministry of the Interior of the Saarland, blew up a bunker. Since there were in the immediate vicinity of the bunker gas mains belonging to Saar-Ferngas AG (hereinafter referred to as "Ferngas"), the plaintiff in the main action and respondent to the appeal, the latter took safety measures, by agreement or without it — the parties are at variance on the issue — to protect the gas mains and sought reimbursement of the expenses from Somafer. In the Federal Republic of Germany Somafer uses in its dealings with its customers note-paper headed:

"SOMAFER
Vertretung für Deutschland [Representation for Germany]
6639 Beckingen (Saar)
Tel. 0 68 35/28 24
Bankverbindung [Bankers]: Crédit Lyonnais Saarbrücken Nr. [No] 10146"

At the bottom of this note-paper there appears "Hauptverwaltung Uckange (Frankreich)" ["Central Administration Uckange (France)]. A representative or employee of Somafer stays at Beckingen occasionally and Ferngas alleges that it was with him that it agreed the security measures to be taken. Since it did not receive satisfaction Ferngas summoned Somafer for payment before the Landgericht Saarbrücken. When Somafer demurred that the court had no jurisdiction, Ferngas countered by claiming first that the action related to enforcement of a contractual obligation which had to be performed in Germany so that under Article 5 (1) of the Convention of 27 September 1968 the German courts had jurisdiction and alternatively that it related to the operations of a branch, agency or other establishment within the meaning of Article 5 (5) of the said Convention and that this also gave the court jurisdiction.

In the view of Ferngas, the facts which it cites, namely the existence of an address with a telephone number and the presence of a representative show that Somafer has an establishment or agency at Beckingen or that at least by the establishment of this connexion it has created the appearance of such an establishment or agency. In both cases it must be inferred in the circumstances that the German courts have jurisdiction. Somafer maintains on the other hand that its representation is completely dependent on its principal place of business in Uckange and that its representative for Germany conducted the negotiations with the Saarland authorities in close co-ordination with Uckange. Furthermore it does not even have its own office accommodation and furniture in Beckingen, there is no separate accounting and it is not entered in the commercial register as a branch

(Zweigniederlassung) so that the German courts have no jurisdiction.

When the matter came before the Oberlandesgericht Saarbrücken by way of appeal the latter took the view that the case involved questions of the interpretation of the Convention of 27 September 1968 and by order of 21 February 1978 referred the following questions to the Court of Justice for a preliminary ruling:

'1. Are the conditions regarding jurisdiction in the case of "the operations of a branch, agency or other establishment" mentioned in Article 5 (5) of the said Convention to be determined:

(a) under the law of the State before the courts of which the proceedings have been brought; or

(b) under the law of the States concerned (qualification according to the law to be applied in the main action); or

(c) independently, i.e. in accordance with the objectives and system of the said Convention and also with the general principles of law which stem from the corpus of the national legal systems (Judgment of 14 October 1976 in Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG* v *Eurocontrol* [1976] ECR 1541)?

2. What criteria apply in the case of the last question (1 (c)) for interpreting the expressions "branch" and "agency" with reference to capacity to take independent decisions *(inter alia* to enter into contracts) and also to the extent of the outward manifestation?

3. In this connexion are the principles governing liability for holding oneself out in law to others, i.e. to third parties, to be applied to the question whether there is in fact a branch or agency, with the legal consequences that anyone who creates the appearance of such a situation is to be treated as having operated a branch or agency — as is for example the case under German law (cf. Article 21 of the Zivilprozessordnung [Code of Civil Procedure]) Baumbach, 36th Edition, Note 2 A, Stein-Jonas, 19th Edition, Note II 2; Oberlandesgericht Köln, Neue Juristische Wochenschrift 1953, 1834, Oberlandesgericht Breslau Höchstrichterliche Rechtsprechung 1939 (Case No 111)?

The order making the reference to the Court of Justice was lodged at the Court Registry on 13 March 1978.

The United Kingdom and the Commission of the European Communities submitted written observations under Article 5 of the Protocol of 3 June 1971 in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the United Kingdom

The first question.

After stating that in the present case in addition to domicile (Article 2 (2)) and operations of a branch, agency or other establishment (Article 5 (5)) other bases of jurisdiction may be in point such as the place of performance of a contract (Article 5 (1)), or the place of occurrence of the harmful event (Article 5 (3)), the United Kingdom observes that the basic principle of the Convention on territorial jurisdiction is contained in Article 2 and

the bases of juridiction listed in Section 2 of the Convention should therefore be construed restrictively as the Court has already recognized in Case 21/76 *Bier* v *Mines de Potasse d'Alsace* [1976] ECR 1735. Where such an exception is provided for there are considerable advantages in applying the law of the State before the courts of which the proceedings have been brought for the determination of grounds of jurisdiction. In interpreting the Convention according to its national law the court will avoid inconsistencies which would otherwise inevitably result from the fact that the same term has a different meaning in the Convention, that is to say for determining jurisdiction, from that in the law of the national court charged with deciding the substance of the action. The Convention itself recognizes this advantage by referring in Articles 52 and 53 to the national law of the court for the interpretation of the concept of domicile. However this method should not be applied to the interpretation of the provision in Article 5 (5). The forum which this provision establishes is mainly intended to be invoked in cases of a commercial nature arising from economic relations which are the objective of Article 2 of the EEC Treaty. Such relations could be hampered if the actions to which they give rise could be brought before different courts applying different laws. This is particularly so where the jurisdictional rules in some countries make it particularly easy to bring proceedings against foreign traders. Having regard to the fact on the one hand that the general rule of jurisdiction of the defendant's court offers sufficient protection within the scheme of the Convention to the plaintiff and on the other hand that the exceptions provided for in Article 5 (1) (contractual) and Article 5 (3) (tort) suffice in the majority of cases, the exceptional jurisdiction provided for in Article 5 (5) — which will need to be invoked only *where the transaction itself has no close links with the foreign country in question* — should be available only if the defendant had established in the foreign country a basis for conducting business of a *firm and lasting* character. National laws do not offer satisfactory criteria in this respect because they have been adopted in a different context, namely: to bring a defendant before a national court on the basis that the plaintiff has no guarantee of obtaining judgment elsewhere. The United Kingdom illustrates these considerations with an example from its national law from which it appears that the national provisions relating to an "agency" would provide an inappropriate test for the meaning to be given to the word "agency" in Article 5 (5) of the Convention and concludes therefore that tests should be applied uniformly by all courts.

The United Kingdom therefore considers that Questions 1 (a) and 1 (b) asked by the Oberlandesgericht Saarbrücken should be answered in the negative and that Question 1 (c) should be answered in the affirmative.

The second question

As regards the concepts of branch and agency, the United Kingdom considers that although the law of certain Member States and in particular the law of Scotland (Section 6 of the Sheriff Courts (Scotland) Act 1907) may provide valuable guidance, it is unlikely that the rules of national law command a wide consensus in the context of the Community. Fresh guiding lines therefore need to be formulated which should be directed to establishing (1) that the foreign firm should be conducting business of a continuing nature through one or more representatives operating from a base in the country of the court and (2) that that base should consist of premises firmly set up on a lasting basis.

As regards the independent decision of the agent, the question whether he has authority to bind his principals is not material so long as persons dealing with the representative, operating from an appropriate base, have reason to believe that in so doing they are dealing with the foreign firm.

The third question

In the United Kingdom's view the application of any rules regarding estoppel by conduct are a matter for the procedure of the court concerned and not a question arising on the interpretation of Article 5 (5).

B — Observations of the Commission

The first question

The question as to which law should govern interpretation of the concepts used in the Convention has been dealt with in various judgments of the Court of Justice. After declaring in paragraph 11 of the judgment of 6 October 1976 in Case 12/76 *Tessili* [1976] ECR 1473 that "neither of these two options (namely an independent interpretation or reference to the substantive rules of the law applicable under the rules of conflict of laws of the court before which the matter is first brought) rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention" the Court took the view in its judgments of 14 October 1976 in Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541 and 14 July 1977 in Joined Cases 9 and 10/77 *Bavaria* v *Eurocontrol* [1977] ECR 1517 at p. 1525, paragraph 4, that "the principle of legal certainty in the Community legal system and the objectives of the Brussels Convention ... require in all Member States a uniform application of the legal concepts and legal classifications developed by the Court in the context of the Brussels Convention". Finally the judgment of 12 November 1977 in Case 43/77 *Industrial Diamond Supplies* [1977] ECR 2175 gave a uniform and independent interpretation of the concept "ordinary appeal" within the meaning of Articles 30 and 38 of the Convention.

In view of the guiding lines of this case-law the Commission takes the view that the interpretation of the concept of "branch, agency or other establishment" must be uniform and based on the Convention. The Court of Justice rightly began in the judgment of 6 October 1976 in Case 14/76 *De Bloos* [1976] ECR 1497 to interpret the concepts in question in this way.

The second question

On the basis of the above-mentioned judgment in Case 14/76 *De Bloos* in which the Court declared (at paragraphs 20 and 21) "One of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body. It is clear ... that ... the Convention requires that the concept of 'establishment' appearing in the said article shall be based on the same essential characteristics as a branch or agency", the Commission considers that the concept of "direction and control of the parent body" should be defined. In its view this concept implies in respect of the organization: that there should be an outward manifestation of a certain significance such as premises, a bank account, a telephone number. As regards independent management: the manager of the branch, agency or other establishment should be authorized to transact business independently subject to the direction and control of the parent body in such a way as to bind the parent body in important transactions without having to consult it each time. As regards the permanent nature: the commercial activities of the branch should not be temporary.

The third question

In view of the fact that by no means all the Member States apply the principle of German law based on appearance, the Commission hesitates to recommend its extension to the Convention. Such interpretation does not facilitate the independent application of the Convention and risks resulting in the neglect, where arising, of the question of the existence of criteria of a branch, agency or other establishment.

The Commission therefore concludes that the simple appearance of a right is not sufficient to give jurisdiction.

At the hearing on 27 September 1968 the plaintiff in the main action, represented by Mr Sroka, of the Saarbrücken Bar, the defendant in the main action, represented by Mr Kammenhuber, also of the Saarbrücken Bar, and the Commission of the European Communities represented by its Agent Mr Wägenbaur, made oral observations.

The Advocate General delivered his opinion at the hearing on 11 October 1978.

Decision

1 By order dated 21 February 1978, received at the Court on 13 March 1978, the Oberlandesgericht Saarbrücken referred to the Court under the Protocol of 3 June 1971 concerning the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1978, No L 304, p. 77) (hereinafter referred to as "the Convention") three questions on the interpretation of Article 5 (5) of the Convention. According to the provision, interpretation of which is sought, a person domiciled in a Contracting State may, in another Contracting State, be sued: ... "(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".

2 The questions put must enable the national court to decide whether it has jurisdiction under the said provision — without prejudice to its jurisdiction on the basis of other provisions of the Convention — to try an action brought by a German undertaking against a French undertaking, the registered office of which is in French territory but which has an office or place of contact in the Federal Republic of Germany described on its notepaper as "Vertretung für Deutschland" ["Representation for Germany"], for the recovery of the expenses incurred by the German undertaking to protect gas mains belonging to it from any damage which might be caused by demolition work which the French undertaking was carrying out in the vicinity on behalf of the Saarland.

The first question

3 The first question asks

"Are the conditions regarding jurisdiction in the case of 'the operations of a branch, agency or other establishment' mentioned in Article 5 (5) of the said Convention to be determined.

(a) under the law of the State before the courts of which the proceedings have been brought; or

(b) under the law of the States concerned (qualification according to the law to be applied in the main action); or

(c) independently, i.e. in accordance with the objectives and system of the said Convention and also with the general principles of law which stem from the corpus of the national legal system (Judgment of 14 October 1976 in Case 29/76 *LTU Luftransportunternehmen GmbH & Co. KG* v *Eurocontrol* [1976] ECR 1541)?"

4 The Convention, concluded pursuant to Article 220 of the EEC Treaty, is intended according to the express terms of its preamble to implement the provisions of that article on the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and to strengthen in the Community the legal protection of persons therein established. In order to eliminate obstacles to legal relations and to settle disputes within the sphere of intra-Community relations in civil and commercial matters the Convention contains, *inter alia*, rules enabling the jurisdiction in these matters of the courts of Contracting States to be determined and facilitating the recognition and execution of courts' judgments. Accordingly the Convention must be interpreted having regard both to its principles and objectives and to its relationship within the Treaty.

5 The Convention frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Contracting State to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Contracting States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought. The answer to this question must ensure that the Convention is fully effective in achieving the objectives which it pursues.

6 The meaning of the words "dispute arising out of the operations of a branch, agency or other establishment", which are the basis of the jurisdiction give

by Article 5 (5), are different from one Contracting State to another, not only in the respective laws but also in the application given to bilateral conventions on the recognition and enforcement of foreign judgments.'

7 Their function in the context of the Convention must be decided in relation to the general rule conferring jurisdiction contained in Article 2 (1) of the Convention which states "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State". Although Article 5 makes provision in a number of cases for a special jurisdiction, which the plaintiff may choose, this is 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. Multiplication of the bases of jurisdiction in one and the same case is not likely to encourage legal certainty and the effectiveness of legal protection throughout the territory of the Community and therefore it is in accord with the objective of the Convention to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2. This is all the more so since in national laws or in bilateral conventions the similar exception is frequently due, as the United Kingdom rightly points out in its written observations, to the notion that a national State serves the interests of its nationals by offering them an opportunity to escape the jurisdiction of a foreign court and this consideration is out of place in the Community context, since the justification for the exceptions contained in Article 5 to the general rule of jurisdiction in Article 2 is solely in the interests of due administration of justice.

8 The scope and limits of the right given to the plaintiff by Article 5 (5) must be determined by the particular facts which either in the relations between the parent body and its branches, agencies or other establishments or in the relations between one of the latter entities and third parties show the special link justifying, in derogation from Article 2, the option granted to the plaintiff. It is by definition a question of factors concerning two entities established in different Contracting States but which in spite of this must be considered in the same way, whether from the point of view of the parent body or of an extension or extensions which the parent body has established in the other Member States or from that of the third parties with whom legal relations are created through such extensions. In these circumstances 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 requires an independent interpretation, common to all the Contracting States, of the concepts in Article 5 (5) of the Convention which are the subject of the reference for a preliminary ruling.

The second and third questions

9 In the event of the words referred to being interpreted independently, the second question asks what criteria apply with reference to the capacity to take independent decisions (*inter alia* to enter into contracts) and also to the extent of the outward manifestation. The third question asks

"Are the principles governing liability for holding oneself out in law to others, i.e. to third parties, to be applied to the questions whether there is in fact a branch or agency, with legal consequences that anyone who creates the appearance of such a situation is to be treated as having operated a branch or agency — as is for example the case under German law (cf. Article 21 of the Zivilprozeßordnung [Code of Civil Procedure] Baumbach, 36th Edition Note 2 A, Stein-Jonas, 19th Edition, Note II 2; Oberlandesgericht Köln Neue Juristische Wochenschrift 1953, 1834, Oberlandesgericht Breslau Höchstrichterliche Rechtsprechung 1939 (Case No 111))?"

10 These two questions must be taken together.

11 Having regard to the fact that the concepts referred to give the right to derogate from the principle of jurisdiction of Article 2 of the Convention their interpretation must show without difficulty the special link justifying such derogation. Such special link comprises in the first place the material signs enabling the existence of the branch, agency or other establishment to be easily recognized and in the second place the connexion that there is between the local entity and the claim directed against the parent body established in another Contracting State.

12 As regards the first issue, the concept of 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.

13 As regards the second issue the claim in the action must concern the operations of the branch, agency or other establishment. This concept of operations comprises on the one hand actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or

the local engagement of staff to work there. Further it also comprises those relating to undertakings which have been entered into at the above-mentioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body. It is in each case for the court before which the matter comes to find the facts whereon it may be established that an effective place of business exists and to determine the legal position by reference to the concept of "operations" as above defined.

14 The above considerations make it unnecessary to answer the third question.

Costs

15 The costs incurred by the Government of the United Kingdom and by the Commission of the European Communities, which have submitted written observations to the Court, are not recoverable and as the proceedings are, so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Oberlandesgericht Saarbrücken by order of 21 February 1978, hereby rules:

1. **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 requires an independent interpretation, common to all the Contracting States, of the concepts in Article 5 (5) of the Convention.**

2. **The concept of 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.**

3. **The concept of "operations" comprises:**

   — **actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there;**

   — **actions relating to undertakings which have been entered into at the above-mentioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body.**

4. **It is in each case for the court before which the matter comes to find the facts whereon it may be established that an effective place of business exists and to determine the legal position by reference to the concept of "operations" as above defined.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner

Pescatore Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 22 November 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 11 OCTOBER 1978 [1]

Mr President,
Members of the Court,

I — Établissements Somafer, Uckange, Lorraine, submitted a tender pursuant to an invitation to tender by the Ministry of the Interior of the Saarland to carry out certain demolition work on the perimeter of the Röchling-Burbach factories.

Since the security measures proposed by the French undertaking appeared inad-

1 — Translated from the French.