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**Judgment of the Court of 6 October 1976. - Industrie Tessili Italiana Como v Dunlop AG. - Reference for a preliminary ruling: Oberlandesgericht Frankfurt am Main - Germany. - Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Article 5 (1). - Case 12-76.**

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#### Keywords

- 1 . PROCEDURE - CONVENTIONS FOR WHICH PROVISION IS MADE IN ARTICLE 220 OF THE EEC TREATY - INTERPRETATION - NEW MEMBER STATES - OBSERVATIONS - PERMISSIBILITY  
( ACT OF ACCESSION , ARTICLE 3 ( 2 ) )
- 2 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - INTERPRETATION - GENERAL RULES .
- 3 . CONVENTION OF 27 SEPTEMBER 1968 - SPECIAL JURISDICTION - DISPUTE HAVING AN INTERNATIONAL CHARACTER - MATTER RELATING TO A CONTRACT - COURT HAVING JURISDICTION - PLACE OF PERFORMANCE OF THE OBLIGATION  
( CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 5 ( 1 ) )

#### Summary

- 1 . THE NEW MEMBER STATES ARE ENTITLED TO SUBMIT OBSERVATIONS IN THE CONTEXT OF PROCEEDINGS RELATING TO THE INTER- PRETATION OF ONE OF THE CONVENTIONS , FOR WHICH PROVISION IS MADE IN ARTICLE 220 OF THE TREATY , TO WHICH THEY ARE REQUIRED BY ARTICLE 3 ( 2 ) OF THE ACT OF ACCESSION TO BECOME PARTIES .
- 2 . THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED HAVING REGARD BOTH TO ITS PRINCIPLES AND OBJECTIVES AND TO ITS RELATIONSHIP WITH THE TREATY . AS REGARDS THE QUESTION WHETHER THE WORDS AND CONCEPTS USED IN THE CONVENTION MUST BE REGARDED AS HAVING THEIR OWN INDEPENDENT MEANING AND AS BEING THUS COMMON TO ALL THE MEMBER 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 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 .
- 3 . THE ' PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION ' WITHIN THE MEANING OF ARTICLE 5 ( 1 ) OF THE CONVENTION OF 27 SEPTEMBER 1968 IS TO BE DETERMINED IN ACCORDANCE WITH THE LAW WHICH GOVERNS THE OBLIGATION IN QUESTION ACCORDING TO THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS BROUGHT .

#### Parties

IN CASE 12/76

REFERENCE UNDER ARTICLE 1 OF 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 FRANKFURT AM MAIN FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

INDUSTRIE TESSILI ITALIANA COMO , WHOSE REGISTERED OFFICE IS IN COMO , ITALY ,

AND

DUNLOP AG , WHOSE REGISTERED OFFICE IS IN HANAU AM MAIN ( FEDERAL REPUBLIC OF GERMANY ) ,

#### Subject of the case

ON THE INTERPRETATION OF THE CONCEPT OF ' PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION ' WITHIN THE MEANING OF ARTICLE 5 ( 1 ) OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

#### Grounds

1 BY ORDER DATED 14 JANUARY 1976 , RECEIVED AT THE COURT REGISTRY ON 13 FEBRUARY 1976 , THE OBERLANDESGERICHT FRANKFURT AM MAIN REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ( HEREINAFTER REFERRED TO AS ' THE CONVENTION ' ) A QUESTION ON THE INTERPRETATION OF ARTICLE 5 ( 1 ) OF THE CONVENTION .

2 IT APPEARS FROM THE ORDER OF REFERENCE THAT AT THIS STAGE THE CASE , WHICH HAS BEEN BROUGHT AS AN APPEAL TO THE OBERLANDESGERICHT , RELATES TO THE JURISDICTION OF THE COURT OF FIRST INSTANCE AT HANAU TO HEAR A CASE BROUGHT BY AN UNDERTAKING ESTABLISHED WITHIN THE JURISDICTION OF THAT COURT AGAINST AN ITALIAN UNDERTAKING WITH ITS REGISTERED OFFICE AT COMO IN CONNEXION WITH THE PERFORMANCE OF A CONTRACT RELATING TO THE DELIVERY BY THE ITALIAN UNDERTAKING TO THE GERMAN UNDERTAKING OF A CONSIGNMENT OF WOMEN ' S SKI SUITS . IT APPEARS FROM THE FILE THAT THE GOODS WERE MANUFACTURED BY THE ITALIAN UNDERTAKING IN ACCORDANCE WITH

INSTRUCTIONS GIVEN BY THE GERMAN UNDERTAKING AND DELIVERED TO A CARRIER IN COMO APPOINTED BY THE GERMAN UNDERTAKING .

3 THE GERMAN UNDERTAKING AFTER TAKING DELIVERY OF THE GOODS AND SELLING SOME OF THEM CONSIDERS AS A RESULT OF COMPLAINTS FROM ITS CUSTOMERS THAT THE SUITS DELIVERED BY THE MANUFACTURER ARE DEFECTIVE AND DO NOT CORRESPOND TO THE SPECIFICATIONS AGREED BETWEEN THE PARTIES . FOR THIS REASON IT BROUGHT AN ACTION IN ITS LOCAL COURT AGAINST THE ITALIAN MANUFACTURER .

4 THE COURT BY INTERLOCUTORY JUDGMENT DATED 10 MAY 1974 DECLARED ITSELF TO HAVE JURISDICTION TO HEAR THE CASE WHEREUPON THE ITALIAN UNDERTAKING BROUGHT AN APPEAL BEFORE THE OBERLANDESGERICHT FRANKFURT AM MAIN . IN THE VIEW OF THIS LATTER COURT THE QUESTION OF JURISDICTION RAISED MUST BE SETTLED IN ACCORDANCE WITH THE PROVISIONS OF THE CONVENTION . IN ITS VIEW THERE IS NO VALID AGREEMENT BETWEEN THE PARTIES CONFERRING JURISDICTION WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION . ON THE OTHER HAND THE OBERLANDESGERICHT DOES NOT RULE OUT THE POSSIBILITY THAT THE COURT OF FIRST INSTANCE MAY HAVE JURISDICTION UNDER ARTICLE 5 ( 1 ) OF THE CONVENTION AS BEING THE PLACE ' OF PERFORMANCE OF THE OBLIGATION IN QUESTION ' . TO SETTLE THIS QUESTION IT ASKS THE COURT OF JUSTICE TO RULE ON THE INTERPRETATION OF THAT PROVISION .

#### PROCEDURE

5 THE REPUBLIC OF IRELAND AND THE UNITED KINGDOM SUBMITTED OBSERVATIONS DURING THE WRITTEN PROCEDURE AND THE COURT THEREFORE REQUESTED THE PARTIES IN THE MAIN ACTION , THE MEMBER STATES AND THE COMMISSION TO GIVE THEIR VIEWS ON THE QUESTION WHETHER THE NEW MEMBER STATES WHICH ARE NOT YET PARTIES TO THE CONVENTION ARE ENTITLED TO PARTICIPATE IN PROCEEDINGS RELATING TO ITS INTERPRETATION .

6 ARTICLE 3 ( 2 ) OF THE ACT OF ACCESSION PROVIDES THAT ' THE NEW MEMBER STATES UNDERTAKE TO ACCEDE TO THE CONVENTIONS PROVIDED FOR IN ARTICLE 220 OF THE EEC TREATY , AND TO THE PROTOCOLS ON THE INTERPRETATION OF THOSE CONVENTIONS BY THE COURT OF JUSTICE , SIGNED BY THE ORIGINAL MEMBER STATES , AND TO THIS END THEY UNDERTAKE TO ENTER INTO NEGOTIATIONS WITH THE ORIGINAL MEMBER STATES IN ORDER TO MAKE THE NECESSARY ADJUSTMENTS THERETO ' . THE FIRST PARAGRAPH OF ARTICLE 63 OF THE CONVENTION PROVIDES THAT ' THE CONTRACTING STATES RECOGNIZE THAT ANY STATE WHICH BECOMES A MEMBER OF THE EUROPEAN ECONOMIC COMMUNITY SHALL BE REQUIRED TO ACCEPT THIS CONVENTION AS A BASIS FOR THE NEGOTIATIONS BETWEEN THE CONTRACTING STATES AND THAT STATE NECESSARY TO ENSURE THE IMPLEMENTATION OF THE LAST PARAGRAPH OF ARTICLE 220 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY ' . THE NEW MEMBER STATES THUS HAVE AN INTEREST IN EXPRESSING THEIR VIEWS WHEN THE COURT IS CALLED UPON TO INTERPRET A CONVENTION TO WHICH THEY ARE REQUIRED TO BECOME PARTIES .

7 IT SHOULD FURTHER BE OBSERVED THAT ARTICLE 5 ( 1 ) OF THE PROTOCOL OF 3 JUNE 1971 STIPULATES THAT , EXCEPT AS OTHERWISE PROVIDED , ' THE PROVISIONS OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY AND THOSE OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE ANNEXED THERETO , WHICH ARE APPLICABLE WHEN THE COURT IS REQUESTED TO GIVE A PRELIMINARY RULING , SHALL ALSO APPLY TO ANY PROCEEDINGS FOR THE INTERPRETATION OF THE CONVENTION ' .

8 AS A RESULT THE NEW MEMBER STATES TO WHICH ARTICLE 177 OF THE EEC TREATY AND ARTICLE 20 OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE APPLY ARE ENTITLED TO SUBMIT OBSERVATIONS IN ACCORDANCE WITH THE SAID ARTICLES IN PROCEEDINGS FOR THE INTERPRETATION OF THE CONVENTION . NO VALID OBJECTION TO THIS CONCLUSION IS CONSTITUTED BY ARTICLE 4 ( 4 ) OF THE PROTOCOL OF 3 JUNE 1971 ON A SPECIAL PROCEDURE WHICH IS NOT RELEVANT FOR THE PRESENT PURPOSES . FURTHER IN THE CONTEXT OF THAT PROTOCOL , WHICH ORIGINATED BEFORE THE ENLARGEMENT OF THE EUROPEAN COMMUNITIES , THE WORDS ' CONTRACTING STATES ' REFER TO ALL THE MEMBER STATES . THE INTERPRETATION OF THE CONVENTION IN GENERAL

9 ARTICLE 220 OF THE EEC TREATY PROVIDES THAT MEMBER STATES SHALL , SO FAR AS NECESSARY , ENTER INTO NEGOTIATIONS WITH EACH OTHER WITH A VIEW TO SECURING FOR THE BENEFIT OF THEIR NATIONALS THE ESTABLISHMENT OF RULES INTENDED TO FACILITATE THE ACHIEVEMENT OF THE COMMON MARKET IN THE VARIOUS SPHERES LISTED IN THAT PROVISION . THE CONVENTION WAS ESTABLISHED TO IMPLEMENT ARTICLE 220 AND WAS 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 COURTS OF MEMBER 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 WITH THE TREATY .

10 THE CONVENTION FREQUENTLY USES WORDS AND LEGAL CONCEPTS DRAWN FROM CIVIL , COMMERCIAL AND PROCEDURAL LAW AND CAPABLE OF A DIFFERENT MEANING FROM ONE MEMBER 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 MEMBER 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 .

11 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 . IN ANY EVENT IT SHOULD BE STRESSED THAT THE INTERPRETATION OF THE SAID WORDS AND CONCEPTS FOR THE PURPOSE OF THE CONVENTION DOES NOT PREJUDGE THE QUESTION OF THE SUBSTANTIVE RULE APPLICABLE TO THE PARTICULAR CASE .

#### THE QUESTION RAISED BY THE NATIONAL COURT

12 ARTICLE 5 OF THE CONVENTION PROVIDES : ' 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 ' . THIS PROVISION MUST BE INTERPRETED WITHIN THE FRAMEWORK OF THE SYSTEM OF CONFERRMENT OF JURISDICTION UNDER TITLE II OF THE CONVENTION . IN ACCORDANCE WITH ARTICLE 2 THE BASIS OF THIS SYSTEM IS THE GENERAL CONFERRMENT OF JURISDICTION ON THE COURT OF THE DEFENDANT ' S DOMICILE . ARTICLE 5 HOWEVER PROVIDES FOR A NUMBER OF CASES OF SPECIAL JURISDICTION AT THE OPTION OF THE PLAINTIFF .

13 THIS FREEDOM OF CHOICE WAS INTRODUCED IN VIEW OF THE EXISTENCE IN CERTAIN WELL-DEFINED CASES OF A PARTICULARLY CLOSE RELATIONSHIP BETWEEN A DISPUTE AND THE COURT WHICH MAY BE MOST CONVENIENTLY CALLED UPON TO TAKE COGNIZANCE OF THE MATTER . THUS IN THE CASE OF AN ACTION RELATING TO CONTRACTUAL OBLIGATIONS ARTICLE 5 ( 1 ) ALLOWS A PLAINTIFF TO BRING THE MATTER BEFORE THE COURT FOR THE PLACE ' OF PERFORMANCE ' OF THE OBLIGATION IN QUESTION . IT IS FOR THE COURT BEFORE WHICH THE MATTER IS BROUGHT TO ESTABLISH UNDER THE CONVENTION WHETHER THE PLACE OF PERFORMANCE IS SITUATE WITHIN ITS TERRITORIAL JURISDICTION . FOR THIS PURPOSE IT MUST DETERMINE IN ACCORDANCE WITH ITS OWN RULES OF CONFLICT OF LAWS WHAT IS THE LAW APPLICABLE TO THE LEGAL RELATIONSHIP IN QUESTION AND DEFINE IN ACCORDANCE WITH THAT LAW THE PLACE OF PERFORMANCE OF THE CONTRACTUAL OBLIGATION IN QUESTION .

14 HAVING REGARD TO THE DIFFERENCES OBTAINING BETWEEN NATIONAL LAWS OF CONTRACT AND TO THE ABSENCE AT THIS STAGE OF LEGAL DEVELOPMENT OF ANY UNIFICATION IN THE SUBSTANTIVE LAW APPLICABLE , IT DOES NOT APPEAR POSSIBLE TO GIVE ANY MORE SUBSTANTIAL GUIDE TO THE INTERPRETATION OF THE REFERENCE MADE BY ARTICLE 5 ( 1 ) TO THE ' PLACE OF PERFORMANCE ' OF CONTRACTUAL OBLIGATIONS . THIS IS ALL THE MORE TRUE SINCE THE DETERMINATION OF THE PLACE OF PERFORMANCE OF OBLIGATIONS DEPENDS ON THE CONTRACTUAL CONTEXT TO WHICH THESE OBLIGATIONS BELONG .

15 IN THESE CIRCUMSTANCES THE REFERENCE IN THE CONVENTION TO THE PLACE OF PERFORMANCE OF CONTRACTUAL OBLIGATIONS CANNOT BE UNDERSTOOD OTHERWISE THAN BY REFERENCE TO THE SUBSTANTIVE LAW APPLICABLE UNDER THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS BROUGHT .

#### Decision on costs

#### COSTS

16 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE AND , AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE OBERLANDESGERICHT FRANKFURT AM MAIN , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT .

### Operative part

ON THOSE GROUNDS ,  
THE COURT

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE OBERLANDESGERICHT FRANKFURT AM MAIN BY ORDER DATED 14 JANUARY 1976 , HEREBY RULES :  
THE ' PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION ' WITHIN THE MEANING OF ARTICLE 5 ( 1 ) OF THE CONVENTION OF 27 SEPTEMBER 1968  
ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IS TO BE DETERMINED IN ACCORDANCE WITH THE LAW  
WHICH GOVERNS THE OBLIGATIONS IN QUESTION ACCORDING TO THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS  
BROUGHT .