OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 1 FEBRUARY 1983 [1]

Mr President,
Members of the Court,

1. This reference for a preliminary ruling concerns the interpretation of certain aspects of the expression "matters relating to a contract" which appears in Article 5 (1) of the Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. According to that provision, "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".

It must first be ascertained whether the above expression is to be interpreted independently or with reference to the *lex causae.* It must then be established whether the obligations incurred by a member of an association are of a contractual nature or not. This Court has already given rulings on other aspects of the same provision. I refer to the judgment of 6 October 1976 in Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497). In that case the Court defined the effect of the expression "obligation" and held that it referred to the contractual obligation forming the basis of the proceedings. I would also recall the judgment of the same date in Case 12/76 *Tessili* v *Dunlop* ([1976] ECR 1473) which interpreted the words "the place of performance of the obligation in question" by reference to the law which is applicable under the rules of the conflict of laws of the court before which the matter is brought. There are however no previous decisions which concern specifically the concept of "matters relating to a contract" on which the Court is now asked to give a ruling.

2. For the purposes of a proper understanding of the matters at issue in the dispute it is appropriate to note from the outset a number of details relating to the structure and function of the organization which is the appellant in the main proceedings. Its name is the Zuid Nederlandse Aannemers Vereniging [South Netherlands Contractors' Association] (hereinafter referred to as "the Association") and its registered office is in the Netherlands. It is a legal association of the construction undertakings which operate in the southern provinces of the Netherlands, in Limburg, North Brabant, Zeeland and in part of the province of Gelderland. As is stated in paragraph 1 of the judgment making the reference, the object of the Association "is to promote the economic, financial, legal and other interests of its members and of undertakings in the building industry in general in so far as those interests relate to ... price regulation in the context of invitations to tender for contracts and the consequences thereof for undertakings". So as to enable it to carry out those functions, the Association's documents of constitution specifically empower it both to adopt internal rules of a general character, which are binding upon the members, and to take decisions. Such decisions are also binding and are based

1 — Translated from the Italian.

on both the documents of constitution and the above-mentioned general rules. They concern solely the position of individual contractors.

Amongst the decisions of the first type, the "Guidelines on private tenders for public works and utilities" are of particular relevance for the purposes of the dispute in this case. They were adopted on 28 November 1972 and entered into force on 1 January 1973. They require that certain rules be complied with by those members who submit tenders for work within the Association's area of activity: in particular the members must inform the Association of their intention to tender (Article 3 of the Guidelines); and, if other contractors who are members of the Association propose to submit competing tenders for the same work, they must participate, directly or through a representative, in a special meeting of all contractors concerned organized by the central office of the Association (Article 4). The meeting is presided over by a representative of the Association and its purpose is to fix certain compensatory sums to be paid by the member to whom the contract is awarded. Such sums are contributions:

(a) amounting to 6 % or less of the value of the work, designed to cover "expenses and work of members connected with the tender for the work" (Article 11);

(b) intended to reimburse the Association for its expenses (Article 12 (1));

(c) intended for one or more contractors' organizations (Article 12 (2)).

The decisions which determine the amount of the contributions come under the second category of binding decisions which I have mentioned earlier: those which govern individual situations concerning the relations between members.

Therefore, as a result of those provisions, the contractor who finally carries out the work is automatically required to pay the Association the compensatory sums fixed in the course of the preliminary meeting. Payment must moreover be made within the period and in the manner prescribed by the Guidelines, that is to say in principle as soon as the member has started to carry out the work and, so far as the place of payment is concerned, at the Association's head office (Articles 18 and 19 of the Guidelines).

3. Having thus explained the context of the litigation in the main proceedings, I will now give a brief summary of the facts in the case.

The undertaking Martin Peters Bauunternehmung GmbH (hereinafter referred to as "Peters") has its registered office in Aachen, in the Federal Republic of Germany. After it had become a member of the Association Peters was awarded a contract to works which involved the construction of an office and industrial buildings for Medtronic in Kerkrade. It failed, however, to inform the Association of this and did not participate in the preliminary meeting which was organized by the Association and held in the prescribed manner at Heerlen on 3 May 1977. In the course of that meeting the contributions to be paid by the undertaking which had obtained the contract were determined. Subsequently, when it was established that Peters had started the work, it was asked by the Association to pay the contributions in relation thereto which had already been fixed. Peters refused to pay the contributions and by writ of 12 May 1978 the Association summoned it to appear before the Arrondissementsrechtbank [District Court], 's-Hertogenbosch, and sought an order against it for the payment of the sum of HFL 112 725, together with statutory interest and

costs, in respect of the contributions which it was required to pay as the successful tenderer. The German company contended that the above-mentioned court before which the proceedings are instituted did not have jurisdiction in view of the fact that the company's registered office was situated in the Federal Republic of Germany. It maintained that by virtue of Article 2 of the Brüssels Convention this factor prevented the Association from being able to sue it in a Netherlands court.

By judgment of 2 March 1979 the Arrondissementsrechtbank, 's-Hertogenbosch, dismissed the objection and held that the obligation which was the subject of the proceedings was contractual in nature and was to be performed at the Association's head office in the Netherlands. The Court, therefore, had jurisdiction under Article 5 (1) of the above-mentioned Convention which, as we know, provides that for contractual obligations the court which has jurisdiction is that for the place "of performance" of the obligation. Peters then appealed to the Gerechtshof [Regional Court of Appeal], 's-Hertogenbosch, which confirmed the judgment of the court of first instance. The undertaking then brought an appeal on a point of law in which it contested the contractual nature of the relationship which bound it to the Association. By judgment of 15 January 1982, the Hoge Raad [Supreme Court of the Netherlands] stayed the proceedings and referred to the Court of Justice the following question for a preliminary ruling:

"Does Article 5 (1) of the Convention apply to claims which are made by an association constituted under private law and possessing legal personality against one of its members in a matter relating to obligations in regard to the payment of a sum of money and which have their basis in the relationship between the parties by virtue of membership, such relationship arising from the defendant party's joining the association as a member by virtue of a legal transaction entered into for that purpose? Does it make any difference whether the obligations in question arise simply from the act of becoming a member, or from that act in conjunction with one or more decisions made by organs of the association?"

4. The first matter which has to be clarified concerns the scope of the expression "matters relating to a contract". It is well known that the expressions and legal concepts drawn from civil, commercial and procedural law which appear in the Brussels Convention may be interpreted in two ways. They may be given an independent meaning which is therefore common to all the Member States or they may be held to refer to the law applicable under the rules of conflict of laws of the court before which the matter was first brought. On that subject this Court has stated that "neither of these two options rule 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." (judgment of 6. 10. 1976 in Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473, at p. 1485, paragraph 11 of the decision).

It should, however, be added that the Court has adopted the second approach only in the above-mentioned judgment (which concerned, as we know, the definition of the "place of performance" of contractual obligations) and it did so in view of the "differences obtaining between national laws of contract and [having regard to] the absence at this stage of legal development of any unification in the substantive law

applicable", (ibid. paragraph 14 of the decision). In all the other judgments hitherto given in proceedings for preliminary rulings relating to the Brussels Convention, the first interpretation has been adopted. It is thus acknowledged in those judgments that the legal terms of art used in the Convention have a significance of their own which is therefore the same for the various Member States. Amongst the judgments to that effect I would recall the following: the judgments of 14 October 1976 in Case 29/76 *LTU* v *Eurocontrol* ([1976] ECR 1541) and of 16 December 1980 in Case 814/79 *The Netherlands* v *Rüffer* ([1980] ECR 3807) relating to the expression "civil and commercial matters" in Article 1; the judgment of 30 November 1976 in Case 21/76 *Bier* v *Mines de Potasse d'Alsace* ([1976] ECR 1735), on the concept of "the place where the harmful event occurred" which appears in Article 5 (3)); the judgment of 21 June 1976 in Case 150/77 *Bertrand* v *Ott* ([1976] ECR 1431), on the concept of "sale of goods on instalment credit terms" within the meaning of Article 13; the judgments of 22 November 1978 in Case 33/78 *Somafer* v *Saar-Ferngas* ([1978] ECR 2183) and 18 March 1981 in Case 13/80 *Blanckaert & Willems* v *Trost* ([1981] ECR 819), on the interpretation of the expression "operations of a branch, agency or other establishment" in Article 5 (5).

I consider that the expression "matters relating to a contract" to which the questions of the Netherlands court refer should be interpreted independently. I arrive at this conclusion by referring on the one hand to the general principles which on this matter may be derived from the national legal systems taken as a whole and, on the other, to the objectives and scheme of the Convention itself. In the latter respect, it is especially important to note that the aim of the Convention is to ensure, as far as possible, the equality and uniformity of the rights and obligations deriving from it, for the Contracting States and the persons to whom it applies. The importance of those interpretative criteria has been repeatedly emphasized by this Court; I refer, amongst others, to the judgments of 22 February 1979 in Case 133/78 *Gourdain* v *Nadler* ([1979] ECR 733), and of 16 December 1980 in Case 814/79 *Netherlands* v *Rüffer*, cited above (in particular, paragraphs 8 and 14 of the decision).

5. In almost all the legal systems of the Member States the relationships between an association and its members are recognized as being contractual in nature. Under Belgian, French, Italian, Danish and English law and under the law of Scotland contractual status attaches either to the act of becoming a member of the organization or to the rights and obligations resulting from membership. For example, according to French legal literature the creation of an association depends on the intention of the parties and in French case-law the relationships between an association and its members are considered to be "contractual". The Italian system follows the same line. Article 1420 of the Civil Code provides that the participation of more than two persons in an agreement (as in the case of an association's documents of constitution) is a genuine contract, even if "the contributions of each [member] are directed towards the achievement of a common aim". As regards the obligations laid upon the members as the result of their belonging to an

association, the Italian Corte di Cassazione [Court of Cassation] has held that the act which creates the bond between a member and an association brings about the same situation as that which normally exists under bilateral contracts; the association may therefore apply to the courts under Article 1453 of the Civil Code (on the dissolution of commutative contracts on grounds of non-performance) for the expulsion of those members who fail to fulfil their obligations (Court of Cassation, 2 March 1973, No 579). English law adopts the same position with reference both to an association's documents of constitution and to the obligations laid upon the members as the result of their belonging to that association. I would mention in this respect the case of *Lee* v *Showmen's Guild of Great Britain* [1952] 2 QB, 329, 341 in which Lord Denning emphasized the contractual nature of the relationship between a member and an association in order to show that the jurisdiction of the court was not restricted to the protection of proprietary rights.

As regards the German system, the courts and academic writers agree that the act by which a person becomes a member of an association is to be regarded as contractual. However, their views differ as to the relations which exist after membership has been acquired. The case-law seems to suggest that such relations are covered by the "institutional law" of the organization, whilst in legal literature the opinion of writers is divided, in the sense that some writers accept the contractual theory and others support the institutional theory. Finally, in the Netherlands under the new Civil Code the act by which an association is formed is regarded as a multilateral legal transaction *sui generis* and the relations which derive from membership of the association are similarly *sui generis* (or based on the institutional concept).

It follows from the above-mentioned factors, in brief, that with the exception of the Netherlands system, all the national legal systems consider the act by which an association is created to be a contract in the strict sense. A similar approach seems to be taken as regards the relationships which arise between the organization and its members as the result of membership. Apart from the so-called institutional theory for which the new Netherlands Civil Code and the case-law of the Federal Republic of Germany have opted (although I would recall that in German legal literature opinion is divided on the subject), under all the other systems these relationships are considered to be of a contractual nature. The Commission's representative drew attention to that situation in his written observations of 26 March 1982 (in particular, paragraph 6, p. 21). From this it is but a short step to saying that the prevailing tendency of the legal systems of Community States is to consider that both the act by which an association is created and the relationships between the members and the association are governed by the law of contract. In the present case that step is important for the purposes of my conclusion, namely that the obligations which directly or indirectly bind the members of an association are included in the concept of "matters relating to a contract" within the meaning of Article 5 (1) of the Brussels Convention. The correctness of that interpretation is moreover fully confirmed by reference to the objectives and the scheme of the Convention.

6. Articles 5 and 6 of the Convention list the situations in which a defendant may be sued in a Contracting State other than that in which he is ordinarily resident. As is noted in the Jenard Report (OJ C 59, 1979, p. 1 et seq., in particular p. 22), "the forums provided for in these articles supplement those which apply under Article 2", that is to say the courts of the Contracting State in whose territory the defendant is ordinarily resident. The introduction of alternative forums directly ascertainable by reference to the Convention (that is to say without its being necessary to refer to the rules of territorial jurisdiction in force under the *lex fori)* is essentially designed to meet a requirement of foreseeability or, if the term is preferred, of legal certainty. In that way, the report states (p. 22), it is intended "to facilitate implementation of the Convention" because "by ratifying the Convention, the Contracting States will avoid having to take any other measures to adapt their internal legislation to the criteria laid down in Articles 5 and 6". Indeed, it is clear that the most appropriate means of meeting the need for certainty to which I have alluded is the independent interpretation of the expression "matters relating to a contract" which results in a uniform concept applicable in the same manner in all the Member States.

However, as the report continues, there is another particularly important consideration which justifies "the adoption of special rules of jurisdiction", namely that there must be "a close connecting factor between the dispute and the court with jurisdiction to resolve it" (ibid. p. 22). In drafting Article 5 (1) (and the other provisions of that article and of the article which follows it) the authors of the Convention started from the premise that the court of the place "of performance of the obligation in question" has by virtue of its physical proximity to the relationship at issue the best chances of determining the nature of that relationship in the fullest possible knowledge of the facts of the case. That argument may be thought to be particularly persuasive when the question concerns, as in this case, the obligations to be fulfilled within an organization. It seems clear that, in cases of that kind, the court for the place in which the obligation is to be performed is in a better position than any other to obtain the appropriate information on the functioning of the creditor organization and, therefore, in a better position to rule on the issues which may be inherent in such obligations.

Such considerations support the so-called contractual theory. On the other hand, no arguments come to mind, and the parties have not suggested any, which might justify excluding the obligations arising from the bond between an association and its members from the sphere of application of Article 5 (1). On the contrary, the reasons for stipulating, for contractual obligations in general, the special forum of the place of performance are equally valid for obligations arising from that bond. In both cases an alternative forum is established founded on the jurisdiction of the court closest to the disputed relationship.

Following the same line of thought, a further consideration may be noted. I have already stated that according to this Court, the Convention is intended to guarantee as far as possible the equality and uniformity of the legal situations

arising from it for Member States and for the persons to whom it applies. That objective is attained with greater efficacy if the independent nature of the expression "matters relating to a contract" is recognized. It is obvious that if that expression is interpreted with reference to the *lex causae* which is applicable in each particular case, the functioning of the special forum provided for by Article 5 (1) will be as diverse as the different concepts of contractual obligation which prevail in the different systems whereas if, as I propose, the expression is given an independent interpretation it would represent a common criterion for all the Member States.

7. In the written procedure and at the hearing, attention was drawn to the connection between the Brussels Convention and the Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (OJ L 266, 1980, p. 1). Article 1 (e) of the latter Convention (which however is not yet in force) excludes from its field of application "questions governing the law of companies and other bodies corporate or incorporate and the personal liability of officers and members as such for the obligations of the company or body". Peters' representative argues on the basis of the above-mentioned rule that the obligations laid upon the members of an association as a result of their joining it do not have a contractual basis and that confirmation of their non-contractual nature is to be found precisely in the fact that they are excluded from the scope of the Convention which determines the laws applicable to contractual obligations. On the other hand, the Commission and the Federal Republic of Germany infer from the same conclusion that the obligations in question are contractual in character. They observe that to have foreseen the necessity of providing for that exclusion suggests a fear that in the absence of an express provision such obligations would by virtue of their contractual nature fall within the sphere of application of the Convention.

I do not think that arguments of that kind are in themselves decisive for the purpose of resolving, in one way or the other, the problem before the Court. However, in view of the considerations which I have put forward earlier concerning the aim of the Convention of 1968 and in particular of Article 5 (1), it seems to me that the argument *a contrario* which may be derived from the Rome Convention may at least amount to a confirmation of the view which I am advocating.

8. In addition to asking whether the claims which the association bases on the obligations arising from membership come within the scope of application of Article 5 (1), the Hoge Raad also asks whether it makes "any difference whether the obligations in question arise simply from the act of becoming a member, or from that act in conjunction with one or more decisions made by organs of the association". I consider that this second question should be answered in the negative. The obligations arising from a decision of such a body are founded on the agreement by which a bond of association is created. By means of such an agreement the contracting parties manifest their intention to accept the

internal rules of the association and therefore agree *inter alia* to be bound by the decisions taken by the organs of the association. In other words, it may be said that ultimately the binding effect of such decisions is, like that of the act of becoming a member, based on the contractual intention of the parties.

That being the case, it seems to me that from the theoretical point of view there is no difficulty in restoring the decisions of associations to the contractual sphere. Moreover it has already been seen that such a conclusion exactly reflects the prevailing tendency in the legal systems of the Member States.

9. In the light of all the considerations set out above I propose that the Court give the following answer to the question referred to it for a preliminary ruling by the Hoge Raad der Nederlanden by judgment of 15 January 1982 in the action which the Zuid Nederlandse Aannemers Vereniging brought, by writ dated 12 May 1978, against Martin Peters Bauunternehmung GmbH:

1. The expression "matters relating to a contract" which appears in Article 5 (1) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters should be interpreted as applying to the relationships between an association endowed with legal personality and its members where such relationships result from the act of becoming a member of the organization and involve the obligation to pay a sum of money to the organization or to perform a different service for its benefit.

2. It makes no difference, for the purposes of the above paragraph, whether the obligations derive directly from the act of becoming a member of the association or from that act in conjunction with subsequent decisions of the organs of the association.