OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 31 January 2002 [1]

I — Introduction

1. In this case the Corte Suprema di Cassazione (Supreme Court of Cassation) (Italy) has referred a question concerning the interpretation of Article 2, the first subparagraph of Article 5(1), and Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [2] (hereinafter: 'the Convention'). In order to be able to determine which court has jurisdiction to settle a dispute, the national court seeks to ascertain how an action for pre-contractual liability must be classified. Does such an action fall within the scope of matters relating to delict or quasi-delict under Article 5(3) of the Convention or must such an action be regarded as falling with the scope of matters relating to a contract under Article 5(1) thereof? That national court also considers the possibility that Article 5 of the Convention is not applicable in its entirety.

2. Under Article 5 of the Convention, a person domiciled in one Contracting State may be sued in a court of another Contracting State. Article 5(1) states that the courts for the place of performance of the obligation in question have jurisdiction in matters relating to a contract. The parties to the contract may themselves agree that a particular court is to have jurisdiction to settle a dispute. Under Article 5(3), in matters relating to tort, delict or quasi-delict, the courts for the place where the harmful event occurred have jurisdiction to hear and determine the dispute.

3. The Court has already, on several occasions, dealt with the interpretation of the Convention, and Article 5 thereof in particular. However, this is the first time that it has been requested, in relation to this Convention, to answer a question concerning the liability which can arise in connection with the conduct of the parties in negotiations over a contract.

4. In this Opinion I will — after setting out the legal background and the factual and procedural background — first of all

1 — Original language: Dutch.

2 — OJ 1972 L 299, p. 32. The consolidated version of the Convention, which has since been amended, is to be found in OJ 1978 C 27, p. 1.

analyse the relevant case-law of the Court. I will then give an account of the observations which the parties have submitted to the Court. In essence these observations relate to how pre-contractual liability must be classified in the light of this case-law of the Court. I will then turn to the various characteristics of pre-contractual liability itself. In the absence of any Community case-law in this respect I will take account of inter alia the national legal systems. That will then bring me to the actual appraisal of the question referred to the Court.

II — Legal background

5. Under Article 1 thereof, the Convention is to apply in civil and commercial matters whatever the nature of the court or tribunal. As regards legal jurisdiction, the general principle contained in Article 2 applies, that is to say that persons domiciled in a Contracting State must, whatever their nationality, be sued in the courts of that State. Under Article 3, persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this title concerning 'jurisdiction'. Of these provisions, Articles 5 and 17 are of relevance to this case.

6. Article 5 of the Convention provides as follows:

'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;

...'.

7. Article 17 of the Convention provides inter alia:

'If the parties, one or more of whom is domiciled in a Contracting State, have

agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

or

(b) in a form which accords with practices which the parties have established between themselves;

or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.'

8. As of 1 March 2002 the Convention was superseded by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [3] The 11th and 12th recitals in the preamble to this regulation state as follows:

'(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

Strictly speaking, these recitals are not applicable to the present case. Neverthe-

3 — OJ 2001 L 12, p. 1.

less, they do provide clarity as to the purpose of provisions of the Convention.

National law

9. Article 1337 of the Codice Civile provides that parties must act in good faith during negotiations over entering into a contract.

III — Factual and procedural background

The factual background

10. The facts in the main proceedings are as follows.

11. Fonderie Officine Meccaniche Tacconi (hereinafter: 'Tacconi') and HWS Heinrich Wagner Sinto Maschinenfabrik GmbH (hereinafter: 'HWS') negotiated a contract for the sale to Tacconi of an automatic moulding plant. HWS is the manufacturer of the moulding plant. The contract was to be concluded by B.N. Commercio e Finanza Spa (hereinafter: 'BN'), a leasing company, and HWS. Tacconi had, with the consent of HWS, concluded a leasing contract in respect of the moulding plant with BN. The moulding plant was subsequently never delivered.

12. The parties disagree as to whether or not a contract was entered into between BN and HWS. Tacconi takes the view that it was not because HWS refused to sell the moulding plant to BN. Tacconi also claims that during the negotiations HWS rejected each of the offers made. Then, following protracted negotiations, it had suddenly broken off negotiations. HWS, on the other hand, takes the view that a contract was indeed entered into.

Proceedings

13. On 23 January 1996 Tacconi summoned HWS, which is established in Germany, to appear before the Tribunale di Perugia in Italy. Tacconi asked the court to declare that the contract between BN and HWS for the purchase of the plant had not been concluded. It based its claim on what it considered to be HWS's unjustified refusal to sell the plant to BN. Tacconi submitted that during the negotiations HWS had failed to fulfil its obligations and act in good faith by rejecting each of

the offers made and then, following protracted negotiations, suddenly breaking off negotiations. The legitimate expectation held by Tacconi, which had trusted that the contract would be concluded, had thereby been dashed. Consequently, Tacconi claimed that HWS had incurred pre-contractual liability under Article 1337 of the Codice Civile.[4] At first instance Tacconi claimed that the court should order HWS to redress all the damage caused to it, calculated at ITL 3 000 000 000.

14. In its defence HWS contended that it had concluded a contract with Tacconi and claimed that the Italian courts lacked jurisdiction on account of the arbitration clause, contained in the general terms and conditions of the contract, under which a foreign court was chosen. In the alternative, it asked the Tribunale di Perugia to declare that, under Article 5(3) of Convention, Tacconi lacks *locus standi*. With regard to the substance, it contended that the court should dismiss the applicant's claims. By way of further alternative and as a counterclaim, HWS contended that the court should order Tacconi to pay DEM 450 248.39.

15. It should be noted that HWS does not dispute Tacconi's claim that it broke off negotiations suddenly. Nor does it do so in the proceedings before this Court.

4 — In this connection Tacconi claims that there is *culpa in contrahendo* on the part of HWS.

16. On 16 March 1999 Tacconi brought an action before the Corte Suprema di Cassazione under Article 41 of the Codice di Procedura Civile for a declaration as to which court has jurisdiction. It claimed that the court should declare that the Italian courts have jurisdiction to hear and determine the dispute. Tacconi contended that the decision on awarding jurisdiction had to be taken in accordance with the rules of the Convention. The action which it had brought concerned a matter relating to delict or quasi-delict within the meaning of Article 5(3) of the Convention. Under this article, the court for the place where the harmful event occurred has jurisdiction. 'Harmful event' means the losses to the person claiming to have suffered damage. On those grounds, according to Tacconi, the action was properly brought before the Tribunale di Perugia. Tacconi is established in Perugia and that is the place where the damage which Tacconi is claimed to have suffered occurred.

17. HWS made a counterclaim in which it submitted that the contract was entered into by letter of 28 April 1995 which was sent to confirm Tacconi's order of 27 April 1995. Consequently, the Italian courts lack jurisdiction since a foreign forum was awarded jurisdiction in the general terms and conditions of the contract.

The question referred for a preliminary ruling

18. By order of 9 June 2000, lodged at the Court Registry on 11 September 2000, the

Corte Suprema di Cassazione (Italy) referred the following question for a preliminary ruling:

'Does an action against a defendant for pre-contractual liability fall within the scope of matters relating to delict or quasi-delict (Article 5(3) of the Convention)? If not, does it fall within the scope of matters relating to a contract (Article 5(1) of the Convention)? If it does, what is "the obligation in question"? Otherwise, is the general criterion of "domicile of the defendant" the only criterion applicable?'

19. In the order for reference the national court takes the view that the liability does not derive from a contract. According to Tacconi, no contract was concluded with HWS. Nevertheless, in Italy pre-contractual liability is governed by the law on contracts. Consequently, it is linked to matters relating to a contract within the meaning of Article 5(1) of the Convention. The criterion for special jurisdiction provided for in this provision does not appear, however, to be applicable to pre-contractual liability. In the view of the national court, such liability does not arise from the failure to fulfil a contractual obligation but rather from the failure to observe the legal requirement to act in good faith when negotiating and agreeing a contract.

Proceedings before the Court

20. The parties to the main proceedings and the Commission have submitted written observations to the Court. No hearing has been held.

IV — Case-law of the Court

21. The answer to the question referred for a preliminary ruling is determined to a large degree by the case-law of the Court concerning the Convention. Therefore, in this part of my Opinion I will give an account of this case-law, naturally in so far as it may have a bearing on the answer given. This account will primarily cover the most important characteristics of the Convention and then the provisions which are of particular relevance to this case.

The nature of the Convention

22. The principal rule is set out in Article 2 of the Convention. A defendant can always be summoned to appear before the court for his place of domicile. In a number of

well-defined cases, which must be regarded as derogations from the principal rule, a claimant may also bring an action before another court. Article 5(1) and Article 5(3) constitute such derogations.

23. According to the preamble, the Convention seeks to strengthen the legal protection of persons established in the European Union. [5] To that end, the Convention specifies which court has jurisdiction to hear and determine a particular civil case. According to the Court, the legal protection is reinforced by allowing the claimant easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued. [6] The rules of jurisdiction must be highly predictable, as the 11th recital in the preamble to Regulation No 44/2001 makes clear. This also reinforces legal certainty, which is also an objective of the Convention.

24. In the light of foregoing, the purpose of the Convention is inter alia to harmonise the rules of the Contracting States relating to the international jurisdiction of courts. However, the scope of the Convention is limited. The conditions relating to the assessment of a harmful event and the evidence of the existence and extent of harm are not governed by the Convention. These conditions are governed by the substantive law determined by the national conflict of law rules of the court seised, provided that the effectiveness of the Convention is not thereby impaired. [7]

25. The Court takes the view that in general the concepts used in the Convention are to be interpreted independently. Regard must be had, in interpreting these concepts, primarily to the objectives and general scheme of this Convention, in order to ensure that it functions properly. These concepts cannot therefore be taken to refer to how the legal relationship in question before the national court is classified by the relevant national law. [8]

26. In this connection, the Court considered in *Peters* [9] that having regard to the objectives and the general scheme of the Convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, the concept of matters relating to a contract (within the meaning of Article 5(1)) should not be interpreted simply as referring to the national law of

5 — Furthermore, Regulation No 44/2001 considers that the sound operation of the internal market is a principal objective.

6 — Case C-295/95 *Farrell* v *Long* [1997] ECR I-1683, paragraph 13.

7 — Case C-68/93 *Shevill and Others* v *Presse Alliance* [1995] ECR I-415, paragraph 39.

8 — See inter alia Case C-51/97 *Réunion européenne and Others* v *Spliethoff's Bevrachtingskantoor and Another* [1998] ECR I-6511, paragraph 15.

9 — Case 34/82 *Peters* [1983] ECR 987, paragraph 9.

one or other of the States concerned. [10] Independent meaning must also be placed on the concept of matters relating to tort, delict or quasi-delict (within the meaning of Article 5(3)). [11]

27. Furthermore, the Convention seeks to avoid, so far as possible, creating a situation in which a number of courts have jurisdiction in respect of one and the same legal relationship. The simultaneous jurisdiction of several courts would heighten the risk of irreconcilable decisions. This requirement, which the Court laid down in *De Bloos*, [12] serves to protect legal certainty.

28. In *Peters* the Court considered that Article 5(1) of the Convention should make it possible for all the difficulties which may arise on the occasion of the performance of a contractual obligation to be brought before the same court. That case concerned the courts for the place of performance. In this regard the Court is guided by the maxim *accessorium sequitur principale*. [13] According to that principle, the claimant is always entitled to bring his action in its entirety before the courts for the domicile of the defendant. Moreover, Article 22 of the Convention allows the first court seised, in certain circumstances, to hear the case in its entirety provided that there is a connection between the actions brought before the different courts. [14]

29. However, this power to bring an action in its entirely before the same court is not unlimited. A court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based. [15]

30. This brings me to the following characteristic of the Convention. In *Peters* [16] the choice of the court with jurisdiction is related to the close links created by a contract between the parties thereto. Thus, the Court applies the principle that special jurisdiction must based on the existence of a close connecting factor between the dispute and courts other than those of the defendant's domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious con-

10 — This the Court confirmed inter alia in Case 9/87 *Arcado* v *Haviland* [1988] ECR 1539, paragraph 11, and Case C-26/91 *Handte* v *Traitements Mécano-chimiques des Surfaces* [1992] ECR I-3967.

11 — See Case 189/87 *Kalfelis* v *Bankhaus Schröder, Münchmeyer, Hengst and Co. and Others* [1988] ECR 5565, paragraph 15.

12 — Case 14/76 *De Bloos* v *Société en commandite par actions Bouyer* [1976] ECR 1497, paragraph 9.

13 — Case 266/85 *Shenavai* v *Kreischer* [1987] ECR 239, paragraph 19.

14 — *Kalfelis*, cited in footnote 11, paragraph 20.

15 — *Kalfelis*, cited in footnote 11, paragraph 19.

16 — Cited in footnote 9, paragraph 12 of the judgment.

duct of proceedings.[17] The proximity of the court with jurisdiction is also referred to in connection with Article 5 of the Convention.[18] The proximity of the Court to the place of execution of the obligation is intended to simplify the taking of evidence. In brief, there must be — as the 12th recital in the preamble to Regulation No 44/2001 makes clear — a close link between the court with jurisdiction and the action concerned.

Article 2

31. Article 2 provides that defendants domiciled in a Contracting State are, whatever their nationality, to be sued in the courts of that State. This article is based on the maxim *actor sequitur forum rei*. The jurisdictional rule in Article 2 is a general principle. Article 2 is therefore intended to protect the rights of the defendant. It is easier for a defendant to defend himself before the courts of the State where he is domiciled than before the courts of a foreign State. Article 2 thus serves as a counterpoise to the facilities provided by the Convention with regard to the recognition and enforcement of foreign judgments.[19] This facility with regard to recognition is clear from the first paragraph of Article 26 of the Convention which provides that a judgment given in a Contracting State is to be recognised in the other Contracting States without any special procedure being required.

Article 5 of the Convention and restrictive interpretation

32. Article 5 specifies the cases in which a person domiciled in a Contracting State may be sued in another Contracting State. The choice of court lies with the claimant and is evident from the initiation of proceedings. The claimant's freedom of choice gives rise to a risk of forum shopping and therefore also of law shopping.[20] That is because in choosing a court with jurisdiction the claimant may be guided by the law which is most favourable to it.

33. According to established case-law of the Court, derogations from the principle laid down in Article 2 must be interpreted restrictively on account of the general nature thereof.[21] This naturally also applies to Article 5 which makes it possible

17 — Case 21/76 *Bier* v *Mines de potasse d'Alsace* [1976] ECR 1735 and Case C-220/88 *Dumez France and Tracoba* v *Hessische Landesbank and Others* [1990] ECR I-49.

18 — See the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-440/97 *GIE Groupe Concorde and Others* v *The Master of the vessel 'Suhadiwarno Panjan' and Others* [1999] ECR I-6307, paragraphs 64 and 65.

19 — Case 220/84 *AS-Autoteile Service* v *Malhé* [1985] ECR 2267, paragraph 15.

20 — See, in that regard, P. Vlas, *Forumshopping in EEX en EVEX, Aansprakelijkheid en Verzekering*, volume 3, 1995, p. 112-118.

21 — *Kalfelis*, cited in footnote 11, paragraph 19.

for a person domiciled in a Contracting State to be sued in the courts of another Contracting State. The requirement relating to a restrictive interpretation means that the jurisdictional rule in Article 5 cannot be applied by analogy so that it goes beyond the cases envisaged by the Convention. [22] In *Dumez France and Tracoba* the Court points out that this applies in particular in so far as the Convention allows the defendant to be sued in the courts of the Contracting State in whose territory the claimant is domiciled. The court considers that, save for the cases expressly provided for, the Convention displays an obvious hostility towards the attribution of jurisdiction to the courts of the claimant's domicile. [23]

34. In his recent Opinion in *Gabriel* [24] Advocate General Jacobs disputes the contention that Community law contains a general principle that any derogation must be interpreted restrictively. In general I share his view. However, as regards Article 5 of the Convention the need for a restrictive interpretation is not at issue. The need stems independently from the objectives of the Convention, that is to say to protect legal certainty.

35. On the other hand, the restrictive nature of the interpretation cannot go so far as to deprive Article 5 of its practical effect. [25] I interpret the case-law as meaning that the requirement relating to restrictive interpretation has the effect of excluding application by analogy in this case but that the wording of the derogating provision is otherwise decisive.

Article 5(1): matters relating to a contract

36. Under Article 5(1), a person may, in matters relating to a contract, be sued in the courts for the place of performance of the obligation in question. The phrase 'matter relating to a contract' is to be understood as meaning the contractual obligation which forms the actual basis of legal proceedings. [26] In the case of a claim based on different obligations, which are probably to be performed at different places, the obligation which characterises the contract is to be taken into account. [27]

37. The Court places stringent requirements on the applicability of Article 5(1).

22 — See, for example, Case C-89/91 *Shearson Lehman Hutton v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen* [1993] ECR I-139, paragraph 16, and *Handte*, cited in footnote 10, paragraph 14.

23 — Cited in footnote 17, paragraphs 16 and 19. That judgment was concerned with the provisions regarding agreements concluded by consumers. See, to the same effect, Case C-412/98 *Group Josi Reinsurance Company v Universal General Insurance Company* [2000] ECR I-5925, paragraph 50.

24 — Opinion in Case C-96/00 *Gabriel v Schlank & Schick* [2002] ECR I-6367.

25 — See Case 38/81 *Effer v Hans-Joachim Kantner* [1982] ECR 825, paragraph 7, and the Opinion of Advocate General Reischl in that case.

26 — *De Bloos*, cited in footnote 12, paragraph 11, and confirmed in *Shenavai*, cited in footnote 13, paragraph 20.

27 — Case 133/81 *Ivenel v Schwab* [1982] ECR 1891.

In the case-law, the aspect of freedom is decisive. This is evident inter alia from *Handte* in which the Court ruled that the phrase 'matters relating to a contract' is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another. If the requirement relating to free assumption is not fulfilled, Article 5(1) cannot be applied. However, the Court holds that Article 5(1) can in fact apply if the existence of the contract itself is in dispute. In the view of the Court, it is not possible for one of the parties to a contract to escape the application of Article 5(1) merely by claiming that no contract has been entered into. [28]

38. The limited applicability of Article 5(1) also follows from *De Bloos*. [29] Not every obligation arising out of a contract falls within the scope of Article 5(1). It must be a contractual obligation which forms the actual basis of legal proceedings. The Court emphasises the reciprocity of the obligation: the proceedings relate to the obligation which corresponds to the contractual right on which the claimant's action is based.

39. Under Article 5(1), the defendant can be summoned to appear before the court for the place of performance of the contract. According to the framers of the Convention, this place must be physically proximate to the relationship at issue. [30] The Court has upheld this view, ruling that the place in which the obligation is to be performed usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it. It is this connecting factor which explains why it is the court of the place of performance of the obligation which has jurisdiction. [31] Moreover, the Court has held that the place of performance of the obligation was chosen as the criterion of jurisdiction because, being precise and clear, it fits into the general aim of the Convention, which is to establish rules guaranteeing certainty as to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought. [32]

40. Earlier, in *Tessili*, the Court held that in accordance with Article 5(1) it is for the court before which the matter is brought to establish under the Convention whether the place of performance is situated 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. [33] This rule, which refers to the applicable national law, con-

28 — See *Effer*, cited in footnote 25, paragraph 7.

29 — Cited in footnote 12. See paragraphs 10 and 11 of the judgment.

30 — Advocate General Lenz shares this view. See Opinion in Case C-288/92 *Custom Made Commercial* v *Stawa Metallbau* [1994] ECR I-2913.

31 — *Peters*, cited in footnote 9.

32 — See *Custom Made Commercial*, cited in footnote 30, paragraph 15.

33 — See Case 12/76 *Industrie Tessili Italiana Como* v *Dunlop* [1976] ECR 1473, paragraph 13.

stitutes a derogation from the principle that the concepts used in the Convention are to be interpreted independently.

Article 5(3): matters relating to tort, delict or quasi-delict

41. In the view of the Court, the term 'matters relating to tort, delict or quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1). [34] It is thereby established that Articles 5(1) and 5(3) cannot be applied simultaneously.

42. The material scope of Article 5(3) of the Convention is defined by the concepts 'matters relating to tort, delict or quasi-delict' and 'place where the harmful event occurred'. These concepts are also interpreted independently by the Court. In *Marinari* it points out that the Convention does not intend to link the rules on territorial jurisdiction laid down in Article 5(3) with national provisions concerning the conditions under which non-contractual civil liability is incurred. That is because an interpretation whereby account had to be taken of applicable law on non-contractual civil liability would make delimitation of the court's jurisdiction dependant on uncertain factors. This is also incompatible with the objective of the Convention, which is to provide for a clear and certain attribution of jurisdiction. [35]

43. In interpreting this article, the Court takes account of the rationale for Article 5(3) of the Convention. Just as in the case of Article 5(1), there must be a particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile. This connecting factor is expressed in the territorial link which is decisive from the point of view of the jurisdiction of the court. [36]

44. It is possible that the place where the damage occurred as a consequence of a tort, delict or quasi-delict is not the same as the place of the event giving rise to the damage. In *Bier* the Court ruled that both places can constitute an obvious connecting factor from the point of view of jurisdiction. Each of these connecting factors can, depending on the circumstances, be helpful from the point of view of the taking of evidence and of the conduct of the proceedings. The Court added that to decide in favour only of the place of the event giving

34 — See *Kalfelis*, cited in footnote 11, paragraph 18.

35 — Case C-364/93 *Marinari* v *Lloyds Bank and Zubaidi Trading Company* [1995] ECR I-2719, paragraph 18.

36 — See *Bier*, cited in footnote 17, paragraph 11.

rise to the damage would, in a large number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3), so that the latter provision would lose its effectiveness. [37]

45. However, this does not mean that the place where the harmful event occurred can be understood as meaning any place where the harmful effects can be felt of an event which has already caused actual damage elsewhere. Article 5(3) merely refers to the place where the event giving rise to the damage produced directly harmful effects. [38] In *Marinari* the Court held that place where the harmful event occurred thus must be interpreted in the sense that it does not cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State. [39]

V — Observations submitted

46. Tacconi contends that pre-contractual liability must be regarded as non-contractual and therefore constitutes a delict or quasi-delict. It adds that during the pre-contractual stage there is no contractual link between the parties.

47. Tacconi construes the case-law of the Court as meaning that the concept 'matters relating to a contract' cannot cover a situation in which there is no obligation freely assumed by one party towards another. [40] Tacconi contends that at the pre-contractual stage there is no contractual link between the parties and if no agreement results from the negotiations no contractual obligation can arise therefrom in respect of the parties.

48. HWS argues that, according to the case-law of the Court, the Convention must be interpreted independently, that is to say without having regard to the interpretation thereof in accordance with applicable national law. Consequently, HWS considers that no importance is attached to academic writings and Italian case-law according to which pre-contractual liability is equivalent to liability arising from a delict or quasi-delict. HWS recalls *Kalfelis* which held that it must be recognised that the concept of 'tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1). [41] In the view of HWS, Article 5(1) of the Convention does not apply because it presupposes the existence

37 — Cited in footnote 17, paragraph 20.

38 — See *Bier*, cited in footnote 17, paragraph 15 et seq.

39 — Cited in footnote 35, paragraph 21.

40 — It refers to *Handte*, cited in footnote 10, paragraph 15.

41 — Cited in footnote 11, paragraph 17.

of a contract and the action brought by Tacconi relates precisely to the fact that no contract was entered into.

49. Furthermore, HWS contends that the difference between pre-contractual liability and liability arising from a delict and quasi-delict within the meaning of Article 5(3) is that the latter applies to any person who infringes the general rule of *neminem laedere* (inflict no damage on another), and thus any person who commits an offence or infringes an absolute right. Pre-contractual liability, on the other hand, can only be invoked against a person who has a particular relationship with the injured party, that is to say a person involved in negotiations over a contract. HWS considers that a person entering into negotiations with another accepts the risk that the other party might infringe the rules relating to good faith and thereby cause it damage.

50. HWS concludes that the criteria of special jurisdiction do not apply to pre-contractual liability and therefore the general rule of jurisdiction in Article 2 is applicable in this case.[42] Consequently, it should have been sued in a German court.

51. In its observations the Commission gives an account of the case-law of the Court. It points to the restrictive interpretation of Article 5 of the Convention, the independent meaning of the concepts of 'matters relating to a contract' and 'matters relating to tort, delict or quasi-delict' and the requirement that a normally well-informed defendant be able reasonably to predict before which courts, other than those of the State in which he is domiciled, he may be sued. In the view of the Commission, it is also evident from *Handte* that the concept 'matters relating to a contract' does not cover a situation in which there is no obligation freely assumed by one party towards another.[43] If this concept did cover such a situation, it would be contrary to the principle of legal certainty. In the view of the Commission, the Court considers that therefore the element of freedom forms the basic condition governing entering into a contract.

52. The Commission further contends that the concept 'matters relating to a contract' is open to a literal interpretation. The concept 'matters relating to tort, delict or quasi-delict', however, is not. It takes the view that the Court used liability as a common denominator in respect of tort, delict or quasi-delict for that reason. This means that actions which do not explicitly form part of contractual law are covered by 'matters relating to tort, delict or quasi-delict'. This interpretation provides clear criteria for the application of special jurisdiction.

42 — HWS has clearly abandoned its view that pre-contractual liability is connected with contractual obligation.

43 — Cited in footnote 10, paragraph 15.

53. The Commission considers that it is advisable to draw a distinction between actions aimed at enforcing contractual obligations and actions aimed at establishing the liability of the defendant. With regard to the first category of actions, the particular nature of the contractual obligation justifies the choice of bringing proceedings before the courts for the place of performance of the obligation in question. As regards the second category of actions, the courts for the place where the harmful event occurred are, in general, best placed to entertain such proceedings.

54. In the light of the foregoing, the Commission concludes that an action for pre-contractual liability falls within the scope of matters relating to delict or quasi-delict within the meaning of Article 5(3).

VI — Pre-contractual liability

55. It follows from the principle of freedom of contract that each person is free to choose with whom and on what matter he wishes to enter into negotiations and the point to which he wishes to continue negotiations. Therefore, in principle persons are free to break off negotiations whenever they wish to so without incurring liability in that regard. However, the freedom to break off negotiations is not absolute. Article 2.15 of the UNIDROIT principles provide that 'a party who... breaks off negotiations in bad faith is liable for losses caused to the other party'. According to the explanatory note to this article, negotiations can reach a point after which they may no longer be broken off abruptly and without justification. When such a point is reached depends firstly on the extent to which the other party, as a result of the conduct of the first party, had reason to rely on the positive outcome. Secondly, it depends on the number of issues on which the parties had already reached agreement. However, where a party breaks off negotiations abruptly and without justification, it must compensate for the loss incurred by the other party.

56. Thus, pre-contractual liability arises where negotiations on a contract are broken off without justification.

57. This is the first time that the Court has had to deal, in connection with the Convention, with the legal nature of the liability which can arise between two potential contracting parties during negotiations over a contract. The Convention lays down no rules on liability arising from pre-contractual relations per se. The clearest indication is still to be found in the Evrigenis Report which provided clarification on the Convention on the occasion of

the accession of Greece. This report states that pre-contractual relations can fall within the scope of Article 5(1).[44] However, the report does not state the foundation on which this view is based. Furthermore, there are extensive academic writings on pre-contractual liability in the Member States and also in connection with international private law. The academic writings do not follow the same lines in all the Member States.

58. In most legal systems a party which breaks off negotiations without just cause, having created an expectation on the part of the other party that a contract will be entered into, is liable for the negative contractual interest. In general, such interest includes not only the expenses but also the lost opportunities to conclude another contract with a third party. Negotiations which are broken off dash an expectation that they will lead to a result. In this respect I will briefly examine some of these legal systems below. This brief account of the law relating to pre-contractual liability is certainly not intended to provide an exhaustive picture of the law in the Member States as it now stands, but merely serves as an illustration. The Court may use national law as a source of inspiration when answering the questions referred to it.

59. In Italian law Article 1337 of the Codice Civile contains a specific provision governing pre-contractual liability. Parties must act in good faith during negotiations over and the formation of a contract. A party who breaks off negotiations without just cause, having created an expectation that a contract will be entered into, is liable for the negative contractual interest. Such negative interest specifically includes lost opportunities in addition to expenses.[45] The positive interest is not compensated for, that is to say the other party need not be placed in the situation in which it would have been had the contract actually been concluded. The legal requirement which is not observed when negotiations are broken off abruptly is intended to prevent the other party suffering harm as a result of the fact that it is involved in negotiations and not because the negotiations did not ultimately result in a contract. Fault is not required.

60. In German law a party who culpably breaks off negotiations without just cause

44 — The Evrigenis Report, OJ 1986 C 298, paragraph 49.

45 — According to the UNIDROIT Principles, losses are to be understood as meaning expenses incurred by the other party and the lost opportunity to conclude another contract with a third person.

or on irrelevant grounds, having created an expectation on the part of another party that a contract will certainly be entered into, is liable for the negative contractual interest. Usually the liability is based on the doctrine of *culpa in contrahendo*: a party who suddenly breaks of negotiations is liable for the culpable non-fulfilment of the obligation to take account of the other party's interests.[46] Therefore, in German law almost the same criterion applies as in Italy, except that the requirement relating to fault has a role to play.

61. French law does not lay down provisions on pre-contractual negotiations and entering into contracts. Pre-contractual liability is based on the doctrine of abuse of rights in conjunction with reasonableness and equity. It arises wherever a party suddenly breaks off negotiations without just cause at a time when the other party could legitimately expect that a contract would be entered into. As long as no contract has been entered into, the harm which results from the pre-contractual stage is regarded as covered by the law governing tort, delict or quasi-delict. The loss suffered by the other party must be compensated for. It is uncertain whether this also covers lost opportunities ('perte d'une chance') because it is not established that a contract with a third party has actually been entered into. Furthermore, the French courts appear reluctant to declare that pre-contractual liability exists as they do not wish to curb the principle of freedom of contract.

62. Netherlands law is different. Liability is possible before the other party can legitimately expect that the contract will be entered into. Under Netherlands law, a stage can be reached in negotiations at which they may no longer be broken off. However, where this occurs, liability for positive contractual interest is possible.[47] Three stages in the negotiations are identified. In the first stage negotiations may be broken off without liability being incurred. This is followed by a stage during which negotiations may be broken off, but the costs incurred by the other party must be compensated for. Finally, there is the concluding stage at which negotiations may no longer be broken off. This is reached when the other party can legitimately expect that a contract will be entered into or there are no other circumstances which justify the negotiations being broken off. If a party breaks off negotiations at this stage, it can

46 — In Germany there is no consensus as to whether and to what extent fault is required.

47 — See judgment of the Hoge Raad of 18 June 1982, *Nederlandse Jurisprudentie* 1983, p. 723 (Plas/Valburg).

even be liable for lost profit. In Netherlands academic writings it is argued that at this stage actions may be subsumed under Article 5(1) of the Convention on account of the 'closeness of the links' which has developed between the parties. [48]

63. Liability arising from negotiations which have been broken off has not been recognised in United Kingdom law since time immemorial. The risk that a party will break off negotiations before a contract has been entered into is regarded as a 'business loss'. The continental notion of pre-contractual good faith per se is unknown in the United Kingdom. There is no obligation to negotiate in conformity with the requirements of reasonableness and equity. However, neither of these facts mean that there are no rules governing conduct during the pre-contractual stage. For example, liability can be based of the doctrine of 'misrepresentation'. [49] However, I consider that the legal concept of 'estoppel by representation' [50] is more important. In accordance with this legal concept, a party may not withdraw a previous statement if the other party has suffered harm as a result of that statement. Thus, this legal concept is — albeit not identical — comparable with notions in continental law such as the protection of good faith and legitimate expectations. Finally, it should be noted that in so far as liability arises as a result of negotiations which have been broken off, this is based on actions which constitute a 'tort'. A clear distinction must be drawn between such liability and liability in connection with failure to fulfil contractual obligations.

64. I now turn to the relevance of the abovementioned legal principles to the answer to the question which has been referred in the light of the Convention.

65. To that end, I will divide the negotiation process into two stages. During the first stage freedom of contract is paramount. The parties may break off negotiations. However, during the second stage the parties may no longer break off negotiations. The expectation which been created on the part of the other party and the harm which it suffers because negotiations are broken off can give rise to liability. In any event, that liability includes the negative contractual interest, that is to say the expenses incurred and the opportunities lost. In general this liability does not go so far as to enable the other party to demand that the contract nevertheless be concluded. [51]

48 — See the note by Schultz on the *Peters* judgment (cited in footnote 9), *Nederlandse Jurisprudentie* 1983, p. 644, and J.E.J.Th. Deelen, *IPR en de afgebroken onderhandelingen*, Studiekring 'Prof. Mr. J. Offerhaus', *Reeks Handelsrecht* No 18, 1984, p. 126.

49 — Compare this with the continental doctrine of error.

50 — In addition, United Kingdom law also provides for 'promissory estoppel'. In accordance with this legal concept, a party can be held to a promise which it made to another party. 'Promissory estoppel' is usually invoked in existing contractual relations. Normally it cannot be used in respect of pre-contractual liability.

51 — This also applies — and to an even greater extent — to the system in the United Kingdom which applies different legal principles from the continental legal systems described above.

66. It is possible that a further, third stage should be identified — which I deduce from the legal principles in the Netherlands. It is possible that the links between the parties are so close that a positive contractual interest can also be claimed. This involves either an action for the contract nevertheless to be concluded or compensation which is the equivalent thereto.

parties concerned must be able to predict which court will have jurisdiction.

— The principal rule is formed by Article 2 of the Convention: the courts of the Member State in which the defendant is domiciled have jurisdiction to settle civil cases. Article 5 provides the claimant with an alternative in certain well-defined cases.

VII — Assessment

— A strict interpretation must be placed on Article 5 in the sense that it cannot be declared applicable by analogy.

The general background

67. In its case-law the Court has interpreted the scheme of the Convention in so far as it is relevant to this case (see Section IV of this Opinion). I summarise as follows:

— It is necessary to avoid multiplication of the bases of jurisdiction in relation to one and the same legal relationship.

— In general the concepts in the Convention are to be interpreted independently; their relevance is not subject to the interpretation which is placed thereon in the national law of the Member States.

— Jurisdiction referred to in Article 5 must be based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile.

— In interpreting the concepts, regard is to be had to the Convention's objective of strengthening legal protection. The

— Article 5 itself forms a closed scheme. In disputes concerning liability under

civil law either Article 5(1) or Article 5(3) applies.

— The decisive factor as regards the applicability of Article 5(1) is whether or not obligations have been freely assumed.

68. These factors form the background against which the question must be answered. I would also single out two further points in addition to the above.

69. In my view, the first point is that the jurisdiction and the applicable law must be harmonised as much as possible. Naturally, it is preferable for a court to apply the law of its own country. It is pre-eminently qualified to do so. This prevents an Italian court having to assess the possible liability of HWS under German law — I cite the case in question as an example.

70. As far as possible, regard must be had to the interest of the parties. This forms the second point. It should be borne in mind that Article 5 was laid down in the interest of the claimant in a case. The claimant must not be required to bring proceedings in a court of the place of the defendant's domicile in all cases. Although the Convention does not go so far as to enable the claimant to choose the court of his own place of domicile,[52] it does provide him with alternatives which are intended to bring out a procedural balance between the parties.

The relationship between Article 5(1) and Article 5(3)

71. As I have said, in matters of liability under civil law the Convention provides for a closed scheme: whatever the case, either Article 5(1) or Article 5(3) applies. The provisions can never apply simultaneously.

72. As regards this closed scheme, I concur with the Commission's assessment of the relationship between Article 5(1) and Article 5(3). The Commission contends that, unlike the concept of 'matters relating to tort, delict or quasi-delict', the concept

52 — Indeed, the framer of the Convention was clearly hostile towards this (see *Dumez France and Tracoba*, cited in footnote 17, and *Group Josi*, cited in footnote 23).

of 'matters of contract' is open to a literal interpretation.

73. In brief, according to the case-law of the Court, the scope of Article 5(1) is precisely defined. Where a matter does not fall within the scope of Article 5(1), Article 5(3) applies. In this sense Article 5(3) is a residual category. Thus, it is necessary to establish in which cases a matter falls within the scope of Article 5(1). In that respect the aspect of freedom is central. According to *Handte*,[53] the phrase 'matters relating to a contract' is not 'to be understood as covering a situation in which there is no obligation freely assumed by one party towards another'. Whether an obligation is freely assumed is determined primarily by the principle of legal certainty as applied inter alia in *Handte*. Must a normally well-informed individual foresee that he has assumed an obligation?

74. The precise definition of the scope of Article 5(1) is important for another reason. Article 5(1) includes the possibility of choice of forum. Under Article 17 of the Convention, the parties to a contract may confer jurisdiction on another court or even a forum which has exclusive jurisdiction to settle a possible dispute. The parties thereby freely renounce the jurisdiction of the court which would be competent in their case. The decision to waive such a fundamental right can be made only on the basis of a well-considered choice.

The importance of pre-contractual relations

75. As the national court emphasises, the pre-contractual liability derives from the failure to observe a legal requirement and not from the failure to fulfil a contractual obligation. That is because there is no contract. In the present case the legal requirement derives from Article 1337 of the Italian Codice Civile under which parties must act in good faith during negotiations over a contract.

76. I consider that this requirement is a generally applicable rule of conduct enshrined in law which does not differ from other rules of conduct derived from law. Under certain circumstances failure to comply with such rules of conduct can constitute a delict or quasi-delict. Consequently, Article 5(3) of the Convention should apply.

53 — Cited in footnote 10, paragraph 15.

77. That would make it possible to give a simple answer to the question referred by the national court. However, I consider that the issue of pre-contractual liability is more complex in nature. In my view, the decisive factor as regards the application of the Convention is whether an agreement has been entered into between the parties. Have the parties assumed *obligations* towards one another? Where an obligation has been freely assumed, Article 5(1) applies. I would draw a distinction between obligations and expectations — legitimate or otherwise — which the parties have in relation to one another. Such expectation can consist in the negotiations not being broken off suddenly or, for example, negotiations being held at the same time — but not openly — with a competitor. I consider that the dashing of such expectations constitutes a delict or quasi-delict.

78. The obligation referred to in the above paragraph need not relate to the actual contract on which negotiations are being held. It can also relate to a preformation contract under which one of the parties makes a start on performance. By way of illustration, I refer to the case in the main proceedings. Even before there is a complete contract for delivery of the moulding plant by HWS, which also lays down all the financing terms and conditions, for example, an agreement may possibly exist between the parties under which HWS is to make a start on performance by, for example, reserving production capacity or ordering materials. Disputes which subsequently arise could, possibly, fall within the scope of Article 5(1) of the Convention.

79. The criteria laid down in Article 17 of the Convention could also be relevant in answering the question concerning the time at which an obligation arises. This relates in particular to the criteria referred to at Article 17(b) and (c). Where there is no agreement in writing (or evidenced in writing), the existence of an obligation can be inferred from:

— the practices which the parties have established between themselves, or,

— in international trade or commerce, the usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

80. I will clarify my view by reference to the various stages in the negotiating process which I identified in Section VI of this Opinion. [54]

81. During the first stage of the negotiating process the parties may break off negotiations without incurring liability. At this stage Article 5 of the Convention is irrelevant. There is no delict or quasi-delict, or an agreement.

82. During the second stage an expectation has been created which can result in harm. At this point a party may no longer break off negotiations suddenly. If it nevertheless does so, it commits, under certain circumstances, a delict or quasi-delict. It can then be ordered to compensate for the expenses incurred by the other party or to compensate for the opportunities lost by the other party.

83. The third stage is the stage at which there is still no (signed) contract, but at which it can be inferred from the circumstances that an obligation has been assumed between the parties. At this stage Article 5(1) of the Convention can apply. Such circumstances might lie in the fact that agreement has been reached on the main aspects of a contract — the draft of the contract and the price — but negotiations are still under way on the other terms and conditions. It is also possible that one of the party has already made a start on performing the contract since it was able to deduce from the conduct of the other party that it intended to conclude a contract. Finally, I refer to the circumstances set out in Article 17 of the Convention.

84. I am aware that at the third staged described here there is almost a complete contract. The extent to which this stage is regarded as pre-contractual depends on the content of national private law.

85. I conclude that an action for pre-contractual liability can be regarded as falling within the scope of matters relating to delict or quasi-delict within the meaning of Article 5(3) of the Convention. Where such action relates to an obligation which the other party has assumed towards the claimant, it must also be regarded as falling within the scope of matters relating to a contract within the meaning of Article 5(1) of the Convention.

54 — See paragraphs 65 and 66 above.

VIII — Conclusion

86. In the light of the foregoing, I propose that the Court should answer the question referred by the Corte Suprema di Cassazione as follows:

An action for pre-contractual liability can be regarded as falling within the scope of matters relating to delict or quasi-delict within the meaning of Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. Where such action relates to an obligation which the other party has assumed towards the claimant, it must also be regarded as falling within the scope of matters relating to a contract within the meaning of Article 5(1) of that Convention.