OPINION OF ADVOCATE GENERAL LÉGER delivered on 14 December 2004 [1]

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1 — Original language: French.

1. Does the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [2] preclude a court of a Contracting State which is seised of an action against a person domiciled in the territory of that State and therefore has jurisdiction to hear such an action on the basis of Article 2 of the Convention from exercising, under its national law, a discretion to decline to exercise such jurisdiction, on the ground that a court of a non-Contracting State would be a more appropriate forum to determine the dispute?

2. That is, in essence, the question submitted by the Court of Appeal (England and Wales) (Civil Division) in these proceedings. The question is not totally new since the Court of Justice already had referred to it, about 10 years ago, a similar question from a national court of last instance, the House of Lords. However, the Court of Justice did not have an opportunity to give a ruling on that point because the question was finally withdrawn by the national court after the parties settled their differences amicably. [3]

3. As in that earlier case, the Court of Justice now has an opportunity to examine the compatibility of the *forum non conveniens* doctrine with the Brussels Convention. According to that doctrine, which is well known in the common law countries, a court is entitled to decline to exercise jurisdiction conferred on it by law where it considers that the forum of another State would be more appropriate to deal with the case.

2 — OJ 1978 L 304, p. 36, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended text — p. 77), by the Convention on 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1, hereinafter 'the Brussels Convention' or 'the Convention'). A consolidated version of the Convention, as amended by the four Accession Conventions mentioned above, can be found in OJ 1998 C 27, p. 1.

3 — The case was C-314/92 *Ladenmor* (removed from the register by order of 21 February 1994). That case is often cited as *Harrods*, and I shall cite it thus.

4. In this case, as in the earlier one, the question of the compatibility of the doctrine of *forum non conveniens* with the Brussels Convention arises only in regard to relations between a court of a Contracting State and a court of a non-Contracting State, to the exclusion of relations between courts of different Contracting States. This issue therefore prompts questions as to the territorial scope of the Brussels Convention and the persons to whom it applies. In that connection, although the issues here are considerably different, a comparison may be drawn with the Opinion procedure, still pending, concerning the future revised Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. [4]

5. Also, it is interesting to note that the Court recently examined another mechanism that is well known in common law countries, commonly known as 'anti-suit injunctions'. That device enables a national court to issue an injunction to restrain a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another State, where it appears that the party in question is acting in bad faith in order to impede proceedings already pending. The House of Lords sought a ruling from the Court of Justice on the compatibility of such a device with the Brussels Convention when it is used in relations between courts of different Contracting States. In its judgment in *Turner*, [5] the Court's answer was negative.

6. That judgment deserves attention, although the purpose of and the conditions for applying the mechanism of 'anti-suit injunctions' and the *forum non conveniens* doctrine differ considerably and, in contrast to this case, the *Turner* case raised no question of the territorial scope of or persons covered by the Brussels Convention. As Advocate General Ruiz-Jarabo Colomer emphasised in his Opinion in *Turner*, those two mechanisms 'presuppose some assessment of the appropriateness of bringing an action before a specific judicial authority'. [6]

4 — Opinion 1/03. The Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments and Civil and Commercial Matters is referred to as being 'parallel' to the Brussels Convention, since its content is almost identical to that of the Brussels Convention. The Lugano Convention is binding on all the Member States of the Community (parties to the Brussels Convention) and on the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Republic of Poland. The issue is the revision of that Convention in order to align it with the content of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2000 L 12, p. 1) which, as we shall see in due course, recently replaced the Brussels Convention. The request for an Opinion from the Court seeks to determine whether the conclusion of the draft revised Convention falls within the exclusive competence of the Community or competence shared between the Community and the Member States. That question leads on in particular to an examination of the extent to which the territory and persons covered by the Convention coincide with those covered by that regulation. This issue is not unconnected with the issue of the territorial and personal scope of the Brussels Convention, since the regulation which replaced that Convention essentially reproduces its provisions.

5 — Case C-159/02 [2004] ECR I-3565.

6 — See point 35.

I — Legal background

A — *The Brussels Convention*

7. Adopted on the basis of Article 220 of the Treaty establishing the European Economic Community (which became Article 220 of the EC Treaty and then Article 293 EC), [7] the Brussels Convention seeks, according to its preamble, 'to strengthen in the Community the legal protection of persons therein established'.

8. Its sole recital states that 'it is necessary for this purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements'.

9. Thus, the Brussels Convention constitutes what is commonly known as a 'double' Convention, in that it includes not only rules for recognition and enforcement but also rules on direct jurisdiction which are applicable in the Contracting State of origin, that is to say at the stage of the proceedings for the adoption of the judicial decision capable of being recognised and enforced in another Contracting State.

10. As regards the rules on direct jurisdiction, they apply where the dispute in some way involves or is linked with the territory of a particular Contracting State. That involvement or link derives most frequently from the *domicile of the defendant* and, in certain cases, the *subject-matter of the dispute* or the *will of the parties*.

11. As far as the *defendant's domicile* is concerned, it is the basis for a general rule of jurisdiction. The first paragraph of Article 2 of the Brussels Convention states that '[s]ubject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State'. Thus, where the defendant is domiciled in a Contracting State, the courts of that State in principle have jurisdiction.

12. Article 3 of the Convention clarifies the scope of that general rule. First, the opening paragraph provides that '[p]ersons 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'. Second, in accordance with that

7 — That article provides that 'Member States shall, so far as is necessary, enter into negotiations with a view to securing for the benefit of their nationals ... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals ...'.

logic, the second paragraph of that article prevents the plaintiff from invoking against such persons rules of jurisdiction which are known as 'exorbitant' (in force in the Contracting States), that is to say rules which have the effect of removing those persons from the jurisdiction in principle enjoyed by the courts of the Contracting State of their domicile, as provided in Article 2 of the Convention.

13. As regards Sections 2 to 6 of Title II of the Convention (to which the first paragraph of Article 3 refers), they list, first, a series of jurisdictional rules of an optional nature, which enable a plaintiff to choose to bring his action before a court of a Contracting State other than that of the domicile of the defendant. [8]

14. They then lay down certain jurisdictional rules which either require proceedings to be brought in the courts of a Contracting State, to the exclusion of those of any other Contracting State (including that of the defendant's domicile), [9] or allow a court of a Contracting State to adjudicate even though it would normally not have jurisdiction to do so under the rules laid down by the Convention. [10]

15. The latter jurisdictional rules (appearing in Articles 16, 17 and 18 of the Convention) are based on the existence of a connecting factor other than that of the defendant's domicile. That connecting factor derives either from the *object of the dispute* (Article 16 of the Convention) or the *will of the parties* (Articles 17 and 18 of the Convention.

16. Where the dispute is not located within the territory of a particular Contracting State by reason of the defendant's domicile, the actual object of the dispute, or the will of the parties, exorbitant jurisdictional rules in force in the Contracting States in principle remain operative. Indeed, the first paragraph of Article 4 of the Convention provides that '[i]f the defendant is not domiciled in a

8 — Those optional jurisdictional rules apply, in particular, in matters of contract (Article 5(1): concurrent jurisdiction of the court of the place of performance of the obligation on which the claim is based), in matters relating to tort, delict or quasi-delict (Article 5(3): concurrent jurisdiction of the court of the place where the harmful event occurred), in relation to consumer contracts (Article 14, first paragraph: concurrent jurisdiction of the courts of the Contracting State in whose territory the consumer is domiciled), and where there are a number of defendants (Article 6(1): concurrent jurisdiction of the court of the domicile of one of the defendants).

9 — Those jurisdictional rules apply, in particular, to rights *in rem* in immovable property and tenancies of immovable property (Article 16(1)(a): exclusive jurisdiction of the courts of the Contracting State where the immovable property is situated), and in situations where jurisdiction is expressly conferred (Article 17: jurisdiction vested only in the court or courts designated by the parties under a clause conferring jurisdiction, subject in particular to compliance with the rules on exclusive jurisdiction contained in Article 16).

10 — Article 18 of the Brussels Convention confers jurisdiction on the court of the Contracting State before whom a defendant enters an appearance, even if he is not domiciled in that State, unless the purpose of entering an appearance is to contest the jurisdiction of the court seised or where another court has exclusive jurisdiction by virtue of Article 16 of the Convention. Such cases are referred to as involving tacit prorogation of jurisdiction.

Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State'. [11]

17. In the light of that set of provisions concerning the conferral of jurisdiction, the Brussels Convention provides for a number of procedural mechanisms governing implementation of the rules on jurisdiction. Those mechanisms, concerning *lis pendens* and related actions, are designed to obviate conflicting decisions given by courts of different Contracting States.

18. Thus, Article 21 of the Convention, which is concerned with *lis pendens*, provides that '[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established', and if it is so established, it must decline jurisdiction in favour of that court.

19. With regard to related actions, Article 22 of the Convention provides that, where related actions are brought in courts of different Contracting States and are pending at first instance, the court second seised may either stay its proceedings or decline jurisdiction on the application of one of the parties, provided that the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions. According to the third paragraph of Article 22 of the Convention, that mechanism is limited to 'actions ... so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

20. Within the scheme of the provisions on the conferral of jurisdiction or the implementation of jurisdiction, the Brussels Convention set up, in Title III, a simplified mechanism for the recognition and enforcement of judgments. That mechanism applies to decisions given by courts of a Contracting State for the purposes of their recognition and enforcement in another Contracting State.

21. After the Treaty of Amsterdam brought judicial cooperation in civil matters into the Community sphere, the Council adopted Regulation No 44/2001 on the basis of Article 61(c) EC and Article 67(1) EC. That regulation, designed to replace the Brussels Convention, repeats the bulk of its provisions whilst at the same time making certain adjustments.

11 — Although Regulation No 44/2001 is not applicable to the dispute in the main proceedings, I should point out that it added, in Article 4, an additional reservation affecting the operation of exorbitant rules of jurisdiction relating to the will of the parties.

22. That regulation applies in all the Member States, except Denmark, [12] for actions brought on or after the date on which it entered into force, namely 1 March 2002. In this case, the proceedings were commenced before 1 March 2002, so that only the Brussels Convention is applicable to it, and not Regulation No 44/2001.

B — *The doctrine of* forum non conveniens *in English law*

23. The doctrine of *forum non conveniens* first manifested itself in Scottish law, that is to say in what is an essentially civil law system. It did not appear there in its most complete form until the end of the 19th century, and then it became established, in various forms, in other countries, mainly the common law countries, in particular England, Ireland and the United States of America.

24. In English law, the *forum non conveniens* doctrine has developed constantly and significantly.

25. At present, it is applied under the conditions which were laid down in 1986 by the House of Lords in *Spiliada Maritime Corporation* v *Cansulex Ltd.* [13]

26. That court laid down the principle that 'a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice'. [14] Contrary to what might be inferred from the expression *forum non conveniens*, it is not, for the court seised, a simple question of practical or personal 'convenience', associated in particular with the burdening of the court, but rather a question concerning the objective appropriateness of the forum for trial of the dispute. [15]

12 — This special situation derives from the protocol on the Kingdom of Denmark's situation annexed to the EU and EC Treaties. As a result, Regulation No 44/2001 is not applicable in Denmark, but the Brussels Convention continues to apply as between that Member State and the other Member States which are bound by the regulation. A comparable situation was created for the United Kingdom and Ireland by a protocol specific to them, also annexed to the EU and EC Treaties. However, under Article 3(1) of that protocol, the United Kingdom and Ireland gave notice of their wish to participate in the adoption and application of Regulation No 44/2001, with the result that it is applicable to them.

13 — Hereinafter '*Spiliada*'. [1987] AC 460. The principles laid down by *Spiliada* correspond, it appears, to those followed in Jamaica. See, to that effect, the observations of Mr Jackson, the first defendant in the main proceedings (paragraph 25).

14 — *Spiliada*, at p. 476.

15 — Ibid., at p. 474. In that connection, the *forum non conveniens* principle, applicable to an action brought against a defendant present in England (bringing into play, in English law, a rule of jurisdiction described as an 'ordinary' rule) may be compared with the *forum conveniens* principle. According to the latter, where an action is brought against a defendant absent from England (bringing into play, in English law, a rule of jurisdiction known as an 'extraordinary' rule), the English court may refuse to authorise service of process outside the jurisdiction, provided that the foreign judge constitutes the *forum conveniens*, so that the proceedings in question cannot be pursued in England. In that regard, see pp. 480 to 482.

27. According to *Spiliada*, the steps to be taken by the English court are as follows.

28. First, the court must determine whether a foreign forum is 'clearly or distinctly more appropriate'. [16] That exercise enables the 'natural or appropriate forum for the trial' to be identified, that is to say 'that with which the action [has] the most real and substantial connection'. [17] The connecting factors to be taken into account include not only factors affecting convenience or expense (such as the availability of witnesses), [18] but further factors such as the law governing the relevant transaction and the places where the parties reside or carry on business. [19]

29. Secondly, once the court seised has identified a foreign court which is 'clearly or distinctly more appropriate', it must verify that it is certain that the claimant 'will obtain justice' in that forum, [20] and more specifically that 'substantial justice' will be done. [21] That condition is construed restrictively. Thus, as a general rule, a stay of proceedings cannot be refused simply because the claimant would be deprived of an advantage available under English law, such as a higher scale of damages, an effective system of taking of evidence, or more generous rules of limitation than in the foreign country in question. [22] According to the House of Lords, 'to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach' inherent in the *forum non conveniens* doctrine. [23] However, in certain very special circumstances, account has been taken of legal or practical limitations concerning the possibility of obtaining the services of a lawyer before the foreign court and the impossibility of obtaining legal aid to pursue an action before that court whilst such assistance is available in England and it is clear that, without such aid, the claimant would abandon his action. [24]

30. In English law, the court seised does not undertake such an examination on its own initiative but only on application by one of the parties. [25] It is for a defendant who raises an objection of *forum non conveniens* in order to oppose continuation of the proceedings before the competent court in question to demonstrate that a foreign court is also competent and is clearly and distinctly more

16 — *Spiliada*, p. 477, paragraph (c).

17 — Ibid., pp. 477 and 478, paragraph (d).

18 — It should be borne in mind that, in common law countries, particular importance is attached to taking oral testimony in court from witnesses, in particular expert witnesses.

19 — *Spiliada*, p. 478, paragraph (d).

20 — Ibid., p. 482.

21 — This expression was used by the House of Lords in a judgment subsequent to *Spiliada*, *Lubbe* v *Capeplc* (2000, 1 WLR, 1545, HL), (hereinafter '*Lubbe*').

22 — Idem.

23 — *Spiliada*, p. 482.

24 — See, to that effect, the case-law of the House of Lords cited by A. Nuyts, *L'exception de forum non conveniens (étude de droit international privé comparé)*, ULB Thesis, 2001-2002, Vol. II, paragraph 218. See, more specifically, the judgments in *Cornelly* v *RTZ Corporation plc* ([1998] AC 854, pp. 873 and 874), and *Lubbe*.

25 — See A. Nuyts, paragraph 202.

appropriate.[26] Where that first condition is satisfied, it is incumbent on a claimant wishing to escape the effect of the procedural objection to prove that he will not be able to obtain justice in the foreign court in question, in other words that the second condition for the objection to be upheld is lacking.

31. Those conditions for application of the *forum non conveniens* doctrine are examined by the court seised on a discretionary basis, in so far as the court enjoys a considerable degree of latitude in this matter.

32. As English law stands at present, the application of the doctrine results in a stay of proceedings, in other words provisional suspension of the action, but without the case being removed from the court. As a result, the proceedings may be resumed in the English court if it proves, for example, that the foreign court does not ultimately have jurisdiction to hear the case or that the claimant does not have access to effective justice in that forum. It is incumbent on a claimant who wishes to have the proceedings resumed to produce the necessary evidence in that regard.

33. Traditionally, the decision to stay proceedings is not accompanied by an order transferring or referring the case to the foreign court. Such a procedure would tend to impose on the foreign court the requirement of declaring that it has jurisdiction and of exercising such jurisdiction. However, it is commonly accepted that the courts of a State can decide only as to their own jurisdiction and not as to that of the courts of another State. Consequently, it is incumbent on the claimant, in pursuit of his claims, to take all the steps necessary to bring a new action in the foreign court.

34. A decision of a court of first instance, which examines on a discretionary basis the objection of *forum non conveniens*, is not in principle capable of being overturned on that point by an appellate court unless the latter considers, in its examination of the grounds relied on by the court of first instance, that the latter manifestly abused its broad discretion.[27]

C — *The doctrine of* forum non conveniens *since the entry into force of the Brussels Convention in the United Kingdom*

35. The Brussels Convention, as amended by the 1978 Accession Convention, entered into force in the United Kingdom on 1 January 1987.

26 — In English law, since the reform of the rules of civil procedure in 1998, the objection of *forum non conveniens* must be raised at the outset, that is to say before any defence on matters of substance, and not at any stage of the procedure. In that connection, see A. Nuyts, paragraph 204.

27 — See A. Nuyts, paragraph 208.

36. For that purpose, the Civil Jurisdiction and Judgments Act 1982 was enacted. Section 49 provides that '[n]othing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it on the ground of *forum non conveniens* ... where to do so is not inconsistent with the 1968 Convention ...'.

37. That reference to the possible incompatibility of the *forum non conveniens* doctrine with the Brussels Convention has given rise to very divergent assessments on the part of English courts, in particular where the doctrine falls to be applied in relations between a Contracting State and a non-Contracting State.

38. Thus, in contrast to the High Court of Justice of England and Wales (Chancery Division),[28] the Court of Appeal accepted, in *Harrods (Buenos Aires) Ltd*,[29] that it is possible for English courts, under the doctrine of *forum non conveniens*, to decline to exercise the jurisdiction they derive from Article 2 of the Convention (by reason of the defendant's domicile in the United Kingdom) where there is a more appropriate forum in a non-Contracting State and the jurisdiction of the courts of a Contracting State other than the United Kingdom is not in any way involved. The arguments relied on by the Court of Appeal in reaching that decision may be summarised as follows.

39. First, according to Article 220 of the EEC Treaty, on the basis of which the Brussels Convention was adopted, the jurisdictional rules contained in it fall to be applied only to relations between Contracting States.[30]

40. Moreover, in the event of Article 2 of the Convention having a mandatory effect in relations between a Contracting State and a non-Contracting State, an English court — which would have jurisdiction by virtue of that article — could not stay its proceedings, for reasons relating to the existence of a jurisdiction clause or *lis pendens* or related actions, if the alternative court were not located in a Contracting State. Articles 17, 21 and 22 of the Brussels Convention, which lay down mechanisms for sharing jurisdiction inspired by such reasons, are applicable only in relations between the courts of different

28 — See, to that effect, *Berisford plc* v *New Hampshire Insurance Co.* ([1990] 2 QB 631), and *Arkwright Mutual Insurance Co.* v *Bryanston Insurance Co. Ltd* ([1990] 2 QB 649). In those judgments the High Court held that to apply the *forum non conveniens* doctrine would be contrary to the binding nature of Article 2 of the Brussels Convention and would detract from uniform application of the rules on jurisdiction in the Contracting States.

29 — Hereinafter '*Harrods*' ([1992] Ch. 72, CA). That judgment was given in a dispute between a company incorporated under English law, with its registered office in England, but carrying on all its business in Argentina where its central management and control were exercised (the company Harrods Buenos Aires) together with its majority shareholder (the Swiss company Intercomfinanz), its minority shareholder (the Swiss company Ladenmor), regarding a dispute about the management of the said English company.

30 — Ibid., pp. 96 and 103.

Contracting States. According to the Court of Appeal, such results would be contrary to the intention of the authors of the Brussels Convention. It follows that Article 2 of the Brussels Convention cannot be endowed with mandatory force where the only conflict of jurisdiction involved involves courts of a single Contracting State and those of a non-Contracting State. [31]

41. Finally, application of the *forum non conveniens* doctrine in relations between an English Court and a court of a non-Contracting State would not be contrary to the objective of free movement of judgments in Europe pursued by the Convention precisely because, if the English court in question declines to exercise its jurisdiction, it will not give any judgment on the substance which would qualify to be recognised and enforced in other Contracting States. [32]

42. The Court of Appeal concluded that the Brussels Convention does not prevent an English court from staying its proceedings, pursuant to the *forum non conveniens* doctrine, 'where the only alternative forum is in a non-Contracting State'. [33]

43. In appeal proceedings against that judgment, the House of Lords decided to seek a ruling from the Court of Justice on that point. [34] As already stated, those questions were ultimately withdrawn following an amicable settlement between the parties to the dispute.

44. Some years later, in *Lubbe*, [35] the House of Lords took care to emphasise that it did not 'consider the answer to that question to be clear', but it preferred not to refer the matter to the Court of Justice again since, in any event, whatever the answer given, the *forum non conveniens* principle would not fall to be applied in that case because the

31 — Ibid., pp. 97 and 98.

32 — Ibid., p. 97.

33 — Ibid., p. 103, paragraph (d).

34 — The questions were as follows:

'(1) Does the 1968 Convention apply to govern the jurisdiction of the court of a Contracting State in circumstances where there is no conflict of jurisdiction with the courts of any other Contracting State?

(2)(a) Is it inconsistent with the 1968 Convention where jurisdiction is founded on Article 2 for a court of a Contracting State to exercise a discretionary power available under its national law to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State, if the jurisdiction of no other Contracting State under the 1968 Convention in is question?

(b) If so, is it inconsistent in all circumstances or only in some and, if so, which?

(3)(a) If the answer to question (2) is yes, is it nevertheless consistent with the 1968 Convention for the court of a Contracting State to exercise a discretionary power available under its national law to decline to hear those proceedings against a co-defendant not domiciled in a Contracting State in favour of the courts of a non-Contracting State?

(b) Is the answer to question (3) different if the effect of declining to hear those proceedings against a co-defendant is that the claim against the domiciled defendant would have to be dismissed?'

35 — See footnote 21.

claimants had no access to the 'alternative' court. [36]

45. Certain commentators have perceived in that incidental remark by the House of Lords the expression of serious doubts as to the merits of the Court of Appeal's decision in *Harrods*. [37]

II — The facts and the main proceedings

46. On 10 October 1997, Andrew Owusu, a British national living in England, suffered a serious accident whilst on holiday in Jamaica. When diving into the sea at a place where the water was waist deep, he struck his head on a submerged sand bank and suffered a fracture to his fifth cervical vertebra which rendered him tetraplegic.

47. Following the accident, Mr Owusu brought proceedings in England for compensation against Mr Jackson, who is also domiciled in England. [38] Mr Jackson had rented to the claimant the villa where he stayed in Jamaica, near which he was injured. In support of his action, Mr Owusu claims that the contract, which provided that he would have access to a private beach, implicitly envisaged that the beach would be reasonably safe or free of hidden dangers.

48. In his defence, the first defendant raised an objection of *forum non conveniens* and therefore requested that proceedings be stayed. Besides the fact that the dispute displayed closer links with Jamaica than with England, the defendant contended, first, that his insurance policy covering the provision of accommodation in Jamaica would not cover damages awarded by a non-Jamaican court and, second, that the issues of responsibility and compensation for damage would be disposed of largely in the same way in Jamaica as in England.

49. Mr Owusu also sought to establish the liability of several Jamaican companies in the English courts. That action relates in particular to the Mammee Bay Club Ltd (the owner and operator of the Mammee Bay beach to which Mr Owusu was granted access), [39] The Enchanted Garden Resorts & Spa Ltd (which operates a holiday centre near the beach in question, to which access

36 — See point 28 of this Opinion.

37 — See, in particular, A. Nuyts, paragraph 181, and R. Fentiman, 'Ousting Jurisdiction in the European Judicial Area', *Cambridge Yearbook of European Legal Studies*, 2000, p. 109, and *Stays and the European Conventions: End-Game?*, CLJ 10, 2001, p. 11.

38 — Hereinafter 'the first defendant'.

39 — Hereinafter 'the third defendant'.

was also granted),[40] and Town & Country Resorts Ltd (the operator of a large hotel next to the beach in question, which held a licence for access to it subject to providing for management, maintenance and supervision thereof).[41]

50. All those Jamaican companies were proceeded against on the basis of tort, delictual or quasi-delictual liability. They are criticised for failing to take the measures necessary to warn swimmers of the dangers of submerged sand banks, such measures being particularly necessary because a similarly serious accident had occurred two years earlier in similar circumstances, in which a British holidaymaker was injured, and which also gave rise to proceedings for compensation before the Jamaican courts (all the defendants being domiciled in that State).

51. Under the English rules of civil procedure, Mr Owusu sought leave to summon the Jamaican companies concerned to appear before the English courts. Leave was granted by an English judge (Deputy District Judge Beevers). However, it seems that process was served only on three of those companies (the third, the fourth and the sixth defendants).

52. Those defendants challenged the jurisdiction of the English court before which the action had been brought. Some also asked that the English court should decline jurisdiction and authorise proceedings abroad. In their view, only the Jamaican courts have jurisdiction by view of the various factors connecting the dispute to Jamaica.

53. By order of 16 October 2001, Judge Bentley QC (sitting as Deputy High Court Judge in Sheffield) dismissed all the defendants' objections.

54. With regard to the objection of *forum non conveniens* put forward by the first defendant, he considered that the judgment of the Court of Justice of 13 July 2000[42] prevented a stay of proceedings on the sole ground that the court seised was not appropriate to try the case. In that judgment, the Court of Justice held that, in principle, the jurisdictional rules of the Brussels Convention apply to a dispute provided that the defendant's registered office or domicile is in a Contracting State.[43] According to the court at first instance, that interpretation of the Brussels Convention by the Court of Justice goes against the view taken several

40 — Hereinafter 'the fourth defendant'.

41 — Hereinafter 'the sixth defendant'.

42 — Case C-412/98 *Group Josi* [2000] ECR I-5925.

43 — Judge Bentley QC refers in particular to paragraphs 59 to 61 of the *Group Josi* judgment.

years earlier by the Court of Appeal in the *Harrods* case. [44] Not being entitled to seek a preliminary ruling from the Court of Justice to clarify this point, [45] he held that, in the light of the *Group Josi* judgment, he could not stay proceedings vis-à-vis the first defendant (Mr Jackson) because he was domiciled in a Contracting State.

55. As regards the arguments put forward by the other defendants (the third, fourth and sixth) in their defence, the lower court rejected them as well, although, first, the jurisdictional rules of the Brussels Convention did not apply to those defendants in the proceedings in question and, second, Jamaica clearly constituted a more appropriate forum than England for trial of the action.

56. In its view, since proceedings cannot be stayed as regards the first defendant, the same should apply to the other defendants. If that were not the case, there would be a risk that different courts in two States (United Kingdom and Jamaica) would be called on to adjudicate on the same facts on the basis of identical or similar evidence and might reach different conclusions. In those circumstances, the court at first instance considered that England, not Jamaica, was the appropriate forum for trial of the action.

57. That order of the court at first instance was the subject of an appeal to the Court of Appeal by the first, third, fourth and sixth defendants.

58. They contend that the Brussels Convention is not applicable to the circumstances at issue, so that it cannot be relied on in this case to preclude operation of the doctrine of *forum non conveniens*. In support of that view, the defendants put forward various arguments which, in essence, reiterate those set out by the Court of Appeal in *Harrods*.

59. Thus, they maintain that the system for sharing jurisdiction set up by the Brussels Convention applies only in relations between Contracting States and not in relations between a Contracting State and a non-Contracting State where no question of sharing jurisdiction with another Contracting State arises.

60. They also maintain that, in the event of Article 2 of the Convention being mandatory — even in relations between a Contracting State and a non-Contracting State — the

44 — See paragraphs 35 to 39 of this Opinion.

45 — That is in fact the result of Article 2 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.

English court would have to assume jurisdiction to hear an action against a person domiciled in England even though identical or similar proceedings were already pending before the courts of a non-Contracting State or a clause attributing jurisdiction had been agreed in favour of the latter. That result would thus be contrary to the spirit of the Convention.

61. For his part, Mr Owusu maintains that the Brussels Convention does not concern only conflicts of jurisdiction between the courts of Contracting States. To limit the application of the Convention to such conflicts would detract from the main objective of Article 2 of the Convention, namely to guarantee legal certainty through foreseeability of the court having jurisdiction.

62. In addition, relying on the *Group Josi* judgment, Mr Owusu claims that the general jurisdictional rule in Article 2 of the Convention is mandatory and cannot be derogated from except in situations expressly envisaged by the Convention, and the present case does not constitute such a situation.

63. However, in his view, certain derogations from Article 2 might be allowed in special circumstances (not corresponding to those of the main proceedings), even though such derogations are not expressly envisaged by the Convention. That might apply either where a dispute brought before a court of a Contracting State was already pending before a court of a non-Contracting State or where the dispute concerned rights *in rem* in immovable property in a non-Contracting State, or where the parties had agreed to submit their differences to the courts of such a State.

III — The meaning and scope of the questions referred to the Court of Justice

64. Having regard to the views put forward by the parties, the Court of Appeal decided to stay its proceedings and seek a preliminary ruling from the Court of Justice on the following questions:

'(1) Is it inconsistent with the Brussels Convention on Jurisdiction and the Enforcement of Judgments 1968, where a Claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled

in that State in favour of the courts of a non-Contracting State:

(a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;

(b) if the proceedings have no other connecting factors to any other Contracting State?

(2) If the answer to question (1)(a) or (1)(b) is yes, is it consistent in all the circumstances or only in some and if so in which?'

65. According to the Court of Appeal, no precise answer to those questions is to be found in the case-law of the Court, including the judgment in *Group Josi*. In those circumstances, it states that it has had several opportunities to examine such questions and to follow *In re Harrods*, whether in relation to the Brussels Convention or to the Lugano Convention. [46]

66. Also, the national court draws the attention of the Court of Justice to the fact that, if the latter were to adopt the interpretation of Article 2 of the Convention contended for by the claimant, and if it (the referring court) considered that the dispute between the claimant and the first defendant was real (and not purely imaginary), the question which would then arise of the joinder of the other defendants to the English proceedings would be liable to raise particular difficulties.

67. In the event of joinder, the judgment given in England disposing of the substance of the case and which would be intended to be enforced in Jamaica would be liable to fall foul of certain rules in force in that country regarding the recognition and enforcement of foreign judgments. Moreover, in the opposite case, where there was no joinder, the English court and the Jamaican court might give irreconcilable decisions, even though giving judgment in the same dispute on the basis of the same or similar evidence. [47]

68. Those considerations concerning the third, fourth and sixth defendants are mentioned by the national court only by way of context to draw the Court's attention to the possible impact of the interpretation which might be given by it of Article 2 of the Brussels Convention, concerning the situation of the first defendant alone, as regards determination of the dispute as a whole. It is common ground that the part of the dispute

46 — See paragraph 47 of the order for reference.

47 — See paragraphs 33 to 35 of the order for reference.

relating the third, fourth and sixth defendants cannot fall within the scope of Article 2 of the Brussels Convention, since they are domiciled in a non-Contracting State.

69. In order further to delimit the scope of the questions, it is important to emphasise, as the Commission has done, [48] that the main proceedings do not constitute a case of *lis pendens* or of a connection with proceedings pending before the court of a non-Contracting State commenced before the matter came before a court of a Contracting State, nor a case of a jurisdiction conferment clause in favour of the courts of a non-Contracting State. It is not therefore necessary to consider whether, as the defendants in the main proceedings suggest (echoing the *In re Harrods* judgment of the Court of Appeal), whether the application of Article 2 of the Brussels Convention is liable to be excluded in their case.

70. Moreover, as Mr Owusu has emphasised, [49] although the dispute in the main proceedings does in fact have a connection with a non-Contracting State, it is undisputed that the connecting factor is different from those which establish the exclusive jurisdiction of a court of a Contracting State, under Article 16 of the Brussels Convention.

48 — See paragraphs 47 and 48 and 82 to 88 of the Commission's written submissions.

49 — See paragraph 32 of his written observations.

In those circumstances, it is likewise unnecessary to consider whether, in this case, the application of Article 2 of the Brussels Convention is liable to be excluded, in particular as a result of a possible 'reflex effect' of the exclusive jurisdiction rules in Article 16, where the connecting factors with which that article is concerned are located in the territory of a non-Contracting State.

71. Like Mr Owusu, the Commission and the United Kingdom Government (which all presented oral argument concerning those various cases), I consider it appropriate to limit the scope of the Court's answer to what is strictly necessary for judgment to be given in the main proceedings.

72. Accordingly, I propose, first, to reformulate the first question submitted, whilst highlighting the various stages of the issues to be examined, and, second, to suggest that the second question be declared inadmissible.

73. As regards the first question, I consider that it is appropriate to divide it into two separate questions, one being preliminary to the other, so that it is important to answer that one before going onto the next one. Before considering whether the Brussels Convention prevents a court of a Contracting State from declining to exercise the jurisdiction which it derives from Article 2 of the Brussels Convention on the ground that

a court of a non-Contracting State is better placed to deal with the substance of the case, it is necessary to ascertain whether, as the claimant submits, Article 2 of the Convention is in fact applicable in the circumstances of this case, so that that article can serve as a basis for the jurisdiction of the court seised.

74. Consequently, I consider that the first question should be regarded as comprising two parts, in the following terms.

75. First, by this question, the referring court seeks essentially to ascertain whether Article 2 of the Brussels Convention is applicable where the claimant and the defendant are domiciled in the same Contracting State and the dispute between them, before the courts of that Contracting State, displays certain factors connecting it with a non-Contracting State, and not with another Contracting State, so that the only question of sharing jurisdiction which is likely to arise in this dispute involves only relationships between the courts of a Contracting State and those of a non-Contracting State, and not relations between the courts of different Contracting States.

76. In other words, it is a question of determining whether the circumstances of the main proceedings fall, from the point of view of the territory involved or the persons covered, within the scope of Article 2 of the Brussels Convention.

77. Next, if that introductory question is answered affirmatively, the national court seeks to ascertain, essentially, whether the Brussels Convention prevents a court of a Contracting State — whose jurisdiction is based on Article 2 of that Convention — from exercising a discretion to decline to exercise that jurisdiction on the ground that a court of a non-Contracting State would be better placed to deal with the substance of the case, where the latter has not been designated by any agreement conferring jurisdiction and has not previously been seised of any claim liable to give rise to *lis pendens* or related actions and the factors connecting the dispute with that non-Contracting State are not of the kind referred to in Article 16 of the Brussels Convention.

78. In other words, it is a question of determining whether the Brussels Convention precludes applying the *forum non conveniens* doctrine in a situation such as that of the main proceedings.

79. It is only if that last question is answered in the affirmative that the national court seeks to ascertain, in the terms of its second question, whether the Brussels Convention prevents application of that doctrine in all circumstances or only certain circumstances and, if so, what circumstances. In my view, the second question must be declared inadmissible.

80. Indeed, from a reading of the order for reference, there is every reason to think that the second question is designed above all to determine whether the Court's answer to the preceding question would be different if the main proceedings involved a situation of *lis pendens* or a connection with proceedings pending before a court of a non-Contracting State, or where there was a clause conferring jurisdiction on such a court, or there was a connection to that State of the same kind as those covered by Article 16 of the Brussels Convention. [50] However, as I stated earlier, those are factual situations not present in the main proceedings.

81. Construed in that way, the second preliminary question is hypothetical, and must therefore be declared inadmissible. In preliminary-ruling proceedings, it is for the Court of Justice, for the purpose of determining its own jurisdiction, to examine the circumstances in which a case has been referred to it by a national court. In that regard, the Court has consistently emphasised that '[t]he spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions'. [51] It follows that, according to settled case-law, such questions are inadmissible. I propose therefore that the second question be declared inadmissible.

IV — Analysis

82. Initially, I shall examine the question of the territorial and personal scope of Article 2 of the Brussels Convention (that is to say, the first part of the first question). Thereafter, taking account of the answer to that preliminary question, I shall examine the compatibility of the *forum non conveniens* doctrine with the Convention (that is to say the second part of the first question).

A — *The territory and the persons to which Article 2 of the Brussels Convention applies*

83. It will be remembered that the national court seeks, essentially, to ascertain whether

50 — That appears to be the purport of paragraphs 44 and 45 of the order for reference, and paragraphs 48 (subparagraph 5), 55 and 56, which set out the arguments of the parties to the main proceedings, which, it will be remembered, correspond broadly to those developed in the *Harrods* case and on which the Court of Appeal has already given a decision.

51 — See, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18; Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 16; and Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 54.

Article 2 of the Brussels Convention is applicable where the claimant and the defendant are domiciled in the same Contracting State and the dispute between them, before the courts of that Contracting State, displays certain links with a non-Contracting State, and not with any other Contracting State, so that the only question of sharing jurisdiction liable to arise in the proceedings involves relations between the courts of a Contracting State and those of a non-Contracting State, and not relations between courts of different Contracting States.

84. Schematically, this question boils down to whether the application of Article 2 of the Brussels Convention is conditional upon the existence of a legal relationship involving different Contracting States.

85. Since the territorial application of that article is not precisely defined by the Convention, this question has given rise to much discussion, mostly amongst legal writers, in particular since the Court of Appeal gave its decision on this point about 10 years ago in the famous *Harrods* case.

86. Certain parties to the main proceedings take the view that an answer to this question could be clearly inferred from Mr Jenard's report on the Brussels Convention [52] (as originally adopted on 27 September 1968).

87. I shall therefore deal first with Mr Jenard's report and the discussions to which it gave rise, in particular among legal writers. I shall then examine in turn the wording of Article 2, the general scheme of the Convention and the aims which it pursues. Finally, I shall examine various arguments put forward by certain parties opposing the application of Article 2 of the Convention to the dispute in the main proceedings.

1. Mr Jenard's report and the wide-ranging debate to which it gave rise

88. As I have already stated, according to the sole recital in the preamble to the Convention, its aim is to 'determine *the international jurisdiction* [of the] courts [of the Contracting States] ...'.

89. In his report, Mr Jenard draws the following conclusions from those words: [53]

'[The Brussels Convention] alters the rules of jurisdiction in force in each Contracting State only where an international element is involved. It does not define this concept,

52 — OJ 1979 C 59, p. 1.

53 — See p. 8 of the report.

since the international element in a legal relationship may depend on the particular facts of the proceedings of which the court is seised. Proceedings instituted in the courts of a Contracting State which involves only persons domiciled in that State will not normally be affected by the Convention; Article 2 simply refers matters back to the rules of jurisdiction in force in that State. It is possible, however, that an international element may be involved in proceedings of this type. This would be the case, for example, where the defendant was a foreign national, a situation in which the principle of equality of treatment laid down in the second paragraph of Article 2 would apply, or where the proceedings related to a matter over which the courts of another State had exclusive jurisdiction (Article 16), or where identical or related proceedings had been brought in the courts of another State (Articles 21 to 23)'.

90. The defendants in the main proceedings and the United Kingdom Government rely on that report to support the view that the only questions of international jurisdiction which fall within the rules laid down by the Brussels Convention are those which arise between Contracting States in their mutual relations. It follows that the Convention, in particular Article 2 thereof, is not applicable to a dispute which does not display factors connecting it to more than one Contracting State, that is to say to a legal relationship that is purely internal to a Contracting State or is an extra-Community or not a purely intra-Community relationship, in other words one which is not confined to Contracting States but involves a Contracting State and a non-Contracting State.

91. According to the first defendant in the main proceedings and the United Kingdom Government, that view is supported by the case-law of the Court. In its judgments in *Tessili*, [54] and in *Hagen*, [55] the Court stated, in general terms, that the rules of jurisdiction laid down by the Convention apply in *intra-Community* relations.

92. In my view, it is excessive to perceive in that case-law the expression of a general principle enabling the territorial or personal scope of all the jurisdictional rules in the Convention to be determined in all possible cases.

93. Neither of those cases raised a question of that kind, so that it was not necessary for the Court to give a decision on the matter. Moreover, those cases concerned only Articles 5(1) and 6(2) of the Convention, and not Article 2 as in the main proceedings in this case. As we shall see later, [56] Articles 5(1) and 6(2) of the Convention do not raise any particular problem of interpretation as regards their territorial scope since, clearly, they relate to situations which necessarily involve two or more Contracting States.

54 — Case 12/76 [1976] ECR 1473, paragraph 9.

55 — Case C-365/88 [1990] ECR I-1845, paragraph 17.

56 — See points 99 and 100 and 126 to 131 of this Opinion.

94. It follows, in my view, that the Court of Justice has never made any pronouncement supporting the view put forward in Mr Jenard's report and contended for by the defendants in the main proceedings and by the United Kingdom Government, in line with certain English legal writers. [57]

95. Moreover, it is interesting to note that that view is far from unanimously accepted by legal writers. It might even be said that a strong trend is apparent in favour of a diametrically opposed thesis. That is the view put forward by Mr Droz, who, like Mr Jenard, took part in the drawing up of the Brussels Convention. [58]

96. According to that view, which is shared by numerous authors, [59] the words contained in the preamble (regarding determination of the *international jurisdiction* of the courts of the Contracting States) should not be construed as meaning that the application of Article 2 of the Convention is conditional upon fulfilment of a specific condition regarding the international nature of the legal relationship concerned.

97. Indeed, according to Mr Droz, there would be no benefit in limiting the application of the Convention to international legal relations unless certain jurisdictional rules contained in it were liable to interfere with the internal legal order. However, Article 2 confines itself to referring to the internal jurisdictional rules in force in the Contracting State of the defendant's domicile, that is to say to the rules for the sharing of territorial jurisdiction within that State. There is therefore no risk that the rule in Article 2 might have a direct impact in the internal legal order.

98. That author concluded that, as far as the application of Article 2 of the Convention is concerned, it is of no importance whether or not the claimant is domiciled in the Contracting State of the defendant's domicile and whether or not a distinction is drawn between international relations and internal relations. [60]

57 — For that view in the English legal literature, see L. Collins, 1990, 106 LQR, p. 538 and 539, cited by the Court of Appeal in *Harrods* (p. 103), and P. Kaye, *Civil jurisdiction and enforcement of foreign judgments*, Professional Books Limited, 1987, pp. 216 to 225.

58 — See G. Droz, *Compétence judiciaire et effets des jugements dans le marché commun (Étude de la convention de Bruxelles du 27 septembre 1968)*, 1972, pp. 23 to 25.

59 — See, in particular, in Belgium, F. Rigaux and M. Fallon, *Droit international privé*, Maison Larcier, 2nd consolidated edition, 1993, volume II, *Droit positif belge*, p. 173; M. Weser, *Convention communautaire sur la compétence judiciaire et l'exécution des décisions*, CIDC, and A. Pédone, 1975, pp. 215 to 217; in Germany, R. Geimer and R. Schütze, *Internationale Urteilsanerkennung*, C.H. Beck'Sche Verlagsbuchhandlung, 1983, I. Band 1. Halbband, pp. 220 to 222; R. Geimer, 'The right of access to the Courts under the Brussels Convention', *Civil Jurisdiction and Judgments in Europe, Proceedings of the Colloquium on the Interpretation of the Brussels Convention by the Court of Justice considered in the context of the European Judicial Area, Luxembourg, 11 and 12 march 1991*, Butterworths, 1992, pp. 39 and 40 (regarding the Court of Appeal's judgment in *Harrods*); in the Netherlands, H. Duintjer Tebbens, 'The English Court of Appeal in *re Harrods*: An unwelcome Interpretation of the Brussels Convention', *Law and Reality: Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil*, Martinus Nijhoff Publishers, 1992, p. 47 et seq.

60 — According to Mr Droz, the same should apply to the rules on exclusive jurisdiction contained in Article 16 of the Convention.

99. In pursuance of that approach, he added that, by contrast with the general rule on jurisdiction in Article 2, the special jurisdictional rules in Article 5 designate, for certain disputes, a given court, for example, in matters of tort, delict or quasi-delict, the court of the place where the harmful event occurred. He stated that the same applies to rules on jurisdiction concerning insurance (Title II, Section 3 of the Convention) and to those concerning consumer contracts (Title II, Section 4 of the Convention).

100. Mr Droz emphasised that precisely in those various hypotheses, the context is necessarily international since they concern only cases in which a defendant domiciled in the territory of a Contracting State is brought before a court of another Contracting State. In other words, the word 'international' appearing in the preamble to the Convention has, as far as those provisions are concerned, a purely declaratory and non-determinative scope, in that it does no more than note the existence of a fact already established, so that it is not necessary to make it a requirement in order to be certain of its existence.

101. Finally, in his view, the only case where the term in question might be of interest, that is to say be determinative in its scope, would be a case where the parties to the dispute were domiciled in the same Contracting State and had designated a court of that State to deal with their differences, in circumstances where the substance of the dispute did not display any international character.

102. Although Article 17 of the Convention allows exclusive jurisdiction of a court or courts designated in an agreement conferring jurisdiction only under certain conditions, it does not expressly require the legal relationship concerned to display any foreign element. If the provision is construed solely according to its terms, the possibility is not therefore excluded that Article 17 may apply to purely internal relations. It is only in such a case that it would be possible to invoke the reference to the international aspect of the rules on jurisdiction appearing in the preamble to the Brussels Convention in order to exclude the application of Article 17. [61]

103. To summarise, it may be concluded from that thesis that the application of Article 2 of the Convention is not subject to the existence of any international legal relationship, whatever its form, that is to say whether the legal relationship involves a Contracting State and a non-Contracting State or two Contracting States.

61 — According to a majority of writers, the same must apply where the forum chosen is in a Contracting State other than that of the parties' domicile. Agreements conferring jurisdiction are generally viewed with disfavour in internal law, so that their acceptance, under Article 17 of the Convention, should be limited to legal relations which are intrinsically international in character, regardless of where the chosen forum is located. See, to that effect, H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, LGDJ, 3rd Edition, 2002, p. 97, in which there are several references to other authors.

104. Some writers have put forward an intermediate view according to which, if it is assumed that the international nature of the legal relationship concerned constitutes a condition for the applicability of Article 2 of the Convention, there is no reason to consider that the international element deriving from a relationship involving a Contracting State and a non-Contracting State would not be sufficient for that condition to be fulfilled.[62] That view has been advocated by the German Government.[63]

105. The foregoing review of the various theses put forward shows that the views expressed in Mr Jenard's report concerning the territorial or personal scope of the Convention are far from widely supported.

106. In my opinion, the view which emerges from the report in question does not stand up to an in-depth examination of the Convention. Neither the wording of Article 2 nor the general scheme of the Convention prevents that article from applying to a legal relationship involving a Contracting State and a non-Contracting State. Moreover, on the contrary, the aims pursued by the Convention preclude the application of Article 2 being made conditional on the existence of a legal relationship involving two or more Contracting States, so that in a dispute involving a Contracting State and a non-Contracting State the application of that article is ruled out.

2. The wording of Article 2 of the Convention

107. Article 2 of the Convention provides: 'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.'

108. It must be pointed out that nothing in the wording of that article indicates that the

62 — See, in particular, J. Kropholler, *Europaisches Zivilprozeßrecht — Kommentar zu EuGvO und Lugano-Übereinkommen*, Verlag Recht und Wirtschaft GmbH, 2002, p. 106.

63 — In the present case, the Commission has confined itself to maintaining that the application of Article 2 of the Convention is not ruled out by the fact that the claimant is domiciled in the same Contracting State as the first defendant and that the main proceedings concern a relationship between a Contracting State and a non-Contracting State. It has not taken a clear position on the question whether or not the application of Article 2 requires the dispute to be international and, if it does so require, whether it is sufficient for the required element of foreignness to be located in a non-Contracting State. In those circumstances, I would point out that, in the Opinion 1/03 procedure concerning the future revised Lugano Convention, it stated (at paragraph 170 of its written observations) that any dispute referred to a court of a Member State and having a connecting factor linking it with another State, whether a Member State or a non-Member State, is covered by Regulation No 44/2001. It added that that rule does not leave any dispute that is not purely internal (where all the connecting factors are located in the same State) outside its scope.

application of the jurisdictional rule contained in it is subject to any condition regarding the existence of a legal relationship involving two or more Contracting States. The only condition laid down for its application is that of the defendant's domicile. If the wording of Article 2 is adhered to, it is therefore sufficient for the defendant to be domiciled in a Contracting State for that article to apply.

109. Thus, it is expressly stated that the defendant's nationality is a matter of indifference. It is of little importance whether the defendant has the nationality of the Contracting State where he is domiciled, that of another Contracting State or that of a non-Contracting State.

110. Although Article 2 does not expressly so provide, the same necessarily applies to a claimant: his domicile and his nationality are of scant importance.

111. That was what the Court made clear in its *Group Josi* judgment, concerning a dispute between a Canadian insurance company established in Vancouver (the claimant) and a Belgian reinsurance company established in Brussels (the defendant), following the latter's participation in a reinsurance transaction which had been offered to it by a French company established in France, in accordance with the instructions of the Canadian company in question. The Belgian company alleged that the French court seised of the dispute lacked jurisdiction, relying in particular on Article 2 of the Brussels Convention, and therefore the Cour d'appel de Versailles (France) asked the Court of Justice whether the jurisdictional rules in the Convention are applicable where the defendant is domiciled or has its seat in the territory of a Contracting State whereas the claimant is domiciled in a non-Contracting State. The Cour d'appel referred a question in those terms to the Court of Justice because it was uncertain whether the Convention rules may be relied on against a claimant domiciled in a non-Contracting State since, in its view, that would lead to an extension of Community law to non-member countries. [64]

112. In response to that question, the Court stated that, 'as a general rule, the place where the plaintiff is domiciled is not relevant for the purpose of applying the rules of jurisdiction laid down by the Convention, since that application is, in principle, dependent solely on the criterion of the defendant's domicile being in a Contracting State'. [65] The Court made clear that '[i]t would be otherwise only in exceptional cases where the Convention makes the application of the rules of jurisdiction *expressly* dependent on the plaintiff being domiciled in a Contracting State'. [66] The Court concluded that 'the Convention does not, in principle, preclude the rules of jurisdiction which it sets out from applying to a dispute between a defendant domiciled in a Contracting State

64 — See paragraph 30.
65 — Ibid., paragraph 57.
66 — Ibid., paragraph 58 (emphasis added).

and a plaintiff domiciled in a non-member country'. [67]

113. In my view, that case-law can be transposed to a situation where the claimant is domiciled in the same Contracting State as the defendant.

114. I consider that if the authors of the Convention had really intended to exclude Article 2 of the Convention in such circumstances, they would have taken care to say so *expressly* in the actual body of the Convention. However, that is not what was done. This fact cannot be overturned by the considerations in Mr Jenard's report, since they commit only the author thereof, and not the Contracting States. I take the view therefore that Article 2 of the Convention is applicable even where the claimant is domiciled in the same Contracting State as that of the domicile of the defendant.

115. That conclusion remains valid even where, as here, the substance of the case is connected not with any Contracting State, but only with a non-Contracting State.

116. It is clear from the wording of Article 2 that the jurisdictional rule in it applies 'subject to the provisions of this Convention'. Now, as we shall see when examining the general scheme of the Convention, although certain jurisdictional rules — other than those in Article 2 — fall to be applied only in the special case where the substance of the dispute or the situation of the parties displays a connection with more than one Contracting State, that does not mean that the same applies to Article 2. To assert the contrary would be to ignore the specificity of those other jurisdictional rules.

117. Moreover, to extend in that way the requirement as to the existence of a legal relationship involving more than one Contracting State would be tantamount to adding to the wording of Article 2 of the Convention a supplementary condition for which it does not provide. That addition would probably go against the wishes of the Convention's authors. As the German Government has rightly emphasised, if the authors had wished to limit the scope of Article 2 to cases where more than one Contracting State is concerned, they would have taken care to say so expressly as they did for the other jurisdictional rules in question.

118. From this I infer that the wording of Article 2 of the Convention does not prevent that article from applying to a legal relationship connected only to a Contracting State and a non-Contracting State. The general scheme of the Convention supports that interpretation.

67 — Ibid., paragraph 59.

3. The general scheme of the Convention

119. In my view, the general scheme of the Convention likewise does not prevent Article 2 thereof from applying to a legal relationship connected only with a Contracting State and a non-Contracting State.

120. Indeed, as will be shown in detail, the judicial area established by the Brussels Convention is of variable geometry and is capable — according to the circumstances and the relevant provisions of the Convention — of being reduced to legal relations involving more than one Contracting State or of being deployed on a worldwide scale in the context of disputes with factors connecting it to a Contracting State and one or more non-Contracting States.

121. My inference is that, whilst it is true that certain provisions of the Convention are in principle applicable only to legal relations involving two or more Contracting States, the general scheme of the Convention does not rule out a different application of the provisions of Article 2. In my view, it follows that that article is capable of applying, according to the circumstances, to legal relations involving two or more Contracting States or to disputes connected with one Contracting State and one or more non-Contracting States.

122. That is the view which I shall now develop when considering successively the various provisions of the Convention.

123. First of all, it must be borne in mind that *the first paragraph of Article 4 of the Convention* provides that '[i]f the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16 [of the Convention], be determined by the law of that State'. In other words, where the defendant is domiciled in a non-Contracting State, in principle the jurisdiction of the court seised is determined by the jurisdictional rules in force in the Contracting State in whose territory that court is located and not by the rules of direct jurisdiction laid down by the Convention.

124. The application of the rules on direct jurisdiction laid down by the Convention is not therefore excluded (subject to those in Article 16) save where the defendant is domiciled in a non-Contracting State. It follows that there are no grounds for thinking that the application of the jurisdictional rule in Article 2 of the Convention would be excluded in cases where the claimant and the defendant, or one of the defendants (as in the main proceedings) were domiciled in the same Contracting State and where the legal relationship at issue was, moreover, connected with a non-Contracting State and not with another Contracting State (by reason of the substance of the case or the domicile of the other defendants, or both, as the case may be).

125. I consider therefore that the first paragraph of Article 4 of the Convention tends to support the view that the jurisdictional rule in Article 2 is capable of being applied to a situation such as that at issue in the main proceedings.

126. Admittedly, as I have already indicated, certain jurisdictional rules — other than those of Article 2 — are applicable only if the substance of the dispute or the situation of the parties is connected with two or more Contracting States. That applies to the *special rules of jurisdiction* in Articles 5 and 6 of the Convention, and to the *specific rules of jurisdiction* set out in Sections 3 and 4 of Title II of the Convention regarding insurance and consumer contracts.

127. However, it is important to bear in mind that, according to settled case-law, [68] those jurisdictional rules, whether special or specific, derogate from the principle laid down in Article 2, in so far as they offer the claimant the possibility, *in cases which are listed exhaustively*, of choosing to bring his action and therefore to sue the defendant before the courts of a Contracting State other than the one in which the latter is domiciled.

128. Those derogating jurisdictional rules reflect both the requirements of sound administration of justice and proper organisation of proceedings, having regard to the existence of a direct or particularly close connection between the dispute and the court of a Contracting State other than that of the relevant defendant's domicile, [69] and a concern to protect certain claimants, whose special situation justifies recognising, on an exceptional basis, the jurisdiction of courts of the Contracting State of their domicile, which supposedly is situated in a Contracting State other than that of the defendant. [70]

129. It is only within that specific context that the Brussels Convention makes application of the jurisdictional rules conditional

68 — See, in particular, Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 14; Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, paragraphs 15 and 16; Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 13; Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 16; *Group Josi*, paragraphs 36 to 40; and, more recently, Case C-168/02 *Kronhofer* [2004] ECR I-6009, paragraphs 12 and 13.

69 — See, in particular, regarding Article 5(1), in matters of contract, Case 56/79 *Zelger* [1980] ECR 89, paragraph 3; regarding Article 5(3), in matters of tort, delict or quasi-delict, Case 21/76 *Bier (Mines de potasse d'Alsace)* [1976] ECR 1735, paragraph 11; regarding Article 6(1), relating to multiple defendants, Case 189/97 *Kalfelis* [1988] ECR 5565, paragraph 11; and, regarding Article 6(2), in relation to enforcement of a guarantee or intervention, *Hagen*, paragraph 11.

70 — That applies to maintenance creditors, deemed to be in need (Article 5(2)) and consumers (Articles 13 and 14) or insurance policy-holders (Articles 8, 9 and 10), parties to a contract who are deemed to be economically weaker and legally less experienced than the opposite party, who is a trader. Regarding the aim pursed by Articles 13 and 14 of the Convention, see, in particular, Case C-96/00 *Gabriel* [2002] ECR I-6367, paragraph 39.

upon the existence of a legal relationship connected with more than one Contracting State, by reason of the substance of the dispute or the respective domiciles of the parties involved.

130. Whilst it goes without saying that the application of jurisdictional rules that are concurrent with the rule based on the defendant's domicile presupposes the existence of a connection with a Contracting State other than that of the defendant's domicile, the position is different in the case of the Article 2 jurisdictional rule precisely because it is based solely on such domicile.

131. I therefore consider that the approach appropriate to the application of the special or specific jurisdictional rules of the Convention is not appropriate to the application of the general rule in Article 2.

132. Moreover, it is interesting to note that the application of the specific jurisdictional rules (set out in Sections 3 and 4 of Title II of the Convention) does not necessarily presuppose that the defendant should be actually or genuinely domiciled in a Contracting State (within the meaning of the internal law of that State, in the absence of any definition of the concept of domicile in the Convention). It is therefore possible for those jurisdictional rules to apply when the legal relationship at issue involves a Contracting State and a non-Contracting State rather than two Contracting States.

133. Article 8 (concerning insurance) and Article 13 of the Convention (consumer contracts) provide respectively that where the insurer or non-consumer party is not domiciled in a Contracting State but has a branch, agency or any other establishment in a Contracting State, that party is deemed, for disputes concerning the operations thereof, to be domiciled in that State.

134. It follows from those provisions that an insurer or trade party to a consumer contract, who is domiciled in a non-Contracting State, is deemed, for the purposes of applying the protective jurisdictional rules in that sphere, to be domiciled in a Contracting State. This legal fiction makes it possible to avoid application of Article 4 of the Convention, that is to say the effect of the jurisdictional rules in force in the Contracting State in which the court seised is located when the defendant is domiciled in a non-Contracting State. [71]

135. It would therefore be excessive to take the view that the application of the specific

71 — That is what the Court held in relation to the second paragraph of Article 13 in Case C-318/93 *Brenner and Noller* [1994] ECR I-4275, paragraph 18.

jurisdictional rules in Sections 3 and 4 of Title II of the Convention necessarily falls within the scope of a legal relationship genuinely or significantly involving two Contracting States.

136. As regards the *rules on exclusive jurisdiction* in Article 16 of the Convention, it is expressly stated that they apply 'regardless of domicile'. Those jurisdictional rules, which derogate from the general rule in Article 2 of the Convention, are based on the existence of particularly close links between the substance of the dispute and the territory of a Contracting State. [72] That is the case, for example, where a dispute is concerned with rights *in rem* in immovable property or leases of such property. In such cases, the substance of the dispute is strongly connected with the Contracting State in whose territory the property in question is situated, so that the courts of that Contracting State alone have jurisdiction to deal with such a dispute.

137. The Court has made it clear that those rules of exclusive jurisdiction apply 'irrespective of the domicile both of the defendant and of the plaintiff'. [73] That specific statement was intended to show that, in principle, it is not necessary for the claimant to be domiciled in a Contracting State for the jurisdictional rules laid down by the Convention to be applicable, with the result that, in general, those rules apply even where the claimant is domiciled in a non-Contracting State.

138. Following on from that case-law, it can be stated that the jurisdictional rules in Article 16 of the Convention also fall to be applied where the defendant is domiciled in a non-Contracting State or even where all the parties are established in such a State. [74]

139. Thus, regardless of the consequences which might follow from a possible 'reflex effect' of Article 16 of the Convention, in a case where one of the connecting factors envisaged in that article is located in a non-Contracting State, [75] it can be stated that the jurisdictional rules in that article are capable of applying to legal relations connected only with a Contracting State (by reason of one of the connecting factors envisaged by that article) and a non-Contracting State (by reason of the domicile of the claimant or of the defendant or of both). In that regard, the territorial or personal scope of Article 16 can be compared with that of Article 2.

72 — See to that effect, in particular, *Group Josi*, paragraph 46.

73 — Idem.

74 — See, in particular, H. Gaudemet-Tallon, cited in footnote 61, p. 71.

75 — This question remains open. As I have already stated in point 70, I shall not go into it since the circumstances of the main proceedings do not call for it to be examined.

140. The same applies to the *Convention rules concerning express attribution of jurisdiction*. It is expressly provided that those rules are capable of being applied where one of the parties to an agreement conferring jurisdiction or some of the parties (first paragraph of Article 17) or even all the parties (second paragraph of Article 17) are domiciled in a non-Contracting State. The rules in question may therefore operate exclusively in relations between one or more non-Contracting States (in which the parties are domiciled) and a Contracting State (where the designated court is located).

141. Thus, the Convention rules, relating both to exclusive jurisdiction and to express conferment of jurisdiction, are capable of applying to legal relations involving only one Contracting State and one or more non-Contracting States. This is clear proof that not all the jurisdictional rules laid down by the Convention limit their application to legal relations involving Contracting States.

142. As regards the other rules of the Brussels Convention, concerning *lis pendens* and *related actions*, and *recognition* and *enforcement*, it is true that they are capable of applying in the context of relations between different Contracting States. That is clear from the wording of Article 21 regarding *lis pendens*, Article 22 regarding related actions, and Articles 25, 26 and 31 regarding recognition and enforcement.

143. It is settled case-law that Articles 21 and 22 of the Convention seek, in the interests of sound administration of justice in the Community, to avoid parallel proceedings before courts of different Contracting States and the conflicting decisions which might result, so as to avoid as far as possible cases in which a decision given in one Contracting State is liable not to be recognised in another Contracting State. [76]

144. As regards the simplified mechanism for recognition and enforcement of judgments, it was established by the Brussels Convention in a specific context characterised by mutual trust between the Member States of the Community regarding their legal systems and their judicial institutions. [77] However, the same situation does not necessarily prevail in relations between Member States and non-Contracting States. That is why this mechanism of the Conven-

76 — See, in particular, Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317, paragraph 16, and Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 41.

77 — See *Gasser* and *Turner*, paragraph 24.

tion applies only to judgments given by courts of a Member State in the context of their recognition and enforcement in another Member State.

145. Thus, the Court held in *Owens Bank* [78] that the rules of the Convention on recognition and enforcement do not apply to proceedings for an order for the enforcement of judgments given in a non-member State. It inferred that those relating to *lis pendens* and related actions are not available for the resolution of problems encountered in the context of proceedings arising in parallel in different Contracting States regarding recognition and enforcement of judgments delivered in a non-Contracting State. [79]

146. It must therefore be concluded that the Brussels Convention rules on *lis pendens* and related actions, and those on recognition and enforcement, are in principle applicable only in the context of relations between different Contracting States.

147. However, there is nothing to prevent a different conclusion regarding the jurisdictional rule laid down in Article 2 of the Convention.

148. Moreover, it is important to make it clear that the rules in question are not always limited to relations between Contracting States since they can also operate in relation to disputes having connections with a Contracting State and a non-Contracting State.

149. In the case of rules on *lis pendens* and related actions, it is not necessary for either of the parties to the dispute to be domiciled in a Contracting State for Article 21 or Article 22 to apply. That was what the Court made clear in *Overseas Union Insurance and Others* regarding Article 21, when it held that '[that provision] must be applied both where the jurisdiction of the Court is determined by the Convention itself and where it is derived from the legislation of a Contracting State in accordance with Article 4 of the Convention', that is to say when the defendant is domiciled in a non-Contracting State. [80] That also applies to Article 22, in the absence of provisions imposing any requirement in that regard.

78 — Case C-129/92 [1994] ECR I-117, paragraph 25.

79 — Ibid., paragraph 37.

80 — See paragraph 14.

150. Similarly, as the German Government and the Commission have emphasised, the Convention rules on recognition and enforcement of judgments can be applied regardless of the head of jurisdiction relied on by the courts which delivered the judgments in question. That jurisdiction can be derived from the Convention or from the legislation of the Contracting State in which the courts concerned are located.

151. It follows that, for the application of the rules of the Convention, it is of little importance whether the dispute is connected to just one Contracting State, [81] to more than one Contracting State or to a Contracting State and a non-Contracting State.

152. In other words, whilst it is clear from their wording that the Convention rules on *lis pendens* and related actions or recognition and enforcement of judgments apply in relations between different Contracting States, provided that they concern proceedings pending before courts of different Contracting States or judgments delivered by courts of a Contracting State with a view to recognition and enforcement thereof in another Contracting State, the fact nevertheless remains that the disputes with which the proceedings or decisions in question are concerned may be purely internal or be international, involving a Contracting State and a non-Contracting State, and not always two Contracting States.

153. Moreover, it is precisely because the disputes in question may be connected with non-Contracting States that the authors of the Convention considered it necessary to lay down certain specific rules concerning recognition.

154. Thus, Article 27(5) of the Convention provides that a judgment delivered in a Contracting State will not be recognised in another Contracting State (the State where recognition is sought) where that judgment is irreconcilable with an earlier judgment given in a non-Contracting State, between the same parties, in a dispute involving the same cause of action, where the judgment of the non-Contracting State in question fulfils the conditions necessary for its recognition in the State where enforcement was sought (either under the ordinary international law of the State where recognition is sought or under international agreements to which that State is a party).

81 — See, to that effect, Case 49/84 *Debaecker and Plouvier* [1985] ECR 1779, concerning the application of Article 27(2) of the Convention in connection with the recognition in the Netherlands of a judgment of a Belgian court delivered in proceedings between parties domiciled in Belgium concerning the letting of property also situated in Belgium.

155. Moreover, it is apparent from a reading of the first paragraph of Article 28 in conjunction with the first paragraph of Article 59 of the Convention that a Contracting State is entitled not to recognise a judgment delivered by the courts of another Contracting State by virtue of a rule of exorbitant jurisdiction in force in that State (under Article 4 of the Convention) against a defendant whose domicile or habitual residence was in the territory of a non-Contracting State, where the State where enforcement is sought has concluded with that non-Contracting State an agreement whereby it gave a commitment to the latter not to recognise such a judgment in those circumstances.

156. That blocking mechanism was included in the Convention in order to meet the concerns of certain non-Contracting States regarding the prospect of giving effect to the Brussels Convention rules designed to ensure the free movement of judgments within the Community vis-à-vis defendants established in the non-Contracting States in question. [82]

157. All those considerations show that the judicial area created by the Brussels Convention does not stop at the external Community frontiers of the Contracting States. Thus, like Professor Gaudemet-Tallon, one can say 'that it would be mistaken and simplistic to believe that the European systems and those of the non-Contracting States exist side by side without ever meeting, are unaware of each other ...; on the contrary, instances of clashes and reciprocal interference are numerous and often raise difficult questions'. [83]

158. I conclude therefore that the general scheme of the Convention does not prevent Article 2 from applying to disputes which are connected only with a Contracting State and a non-Contracting State. This conclusion concerning the territorial or personal scope of Article 2 is further supported by the aims of the Convention.

4. The aims of the Convention

159. In the terms of its preamble, the Convention aims 'to strengthen in the Community the legal protection of persons therein established'. Again according to the preamble, it is for that purpose that the Convention lays down, first, rules concerning the jurisdiction of courts common to the

82 — In that connection, see F. Juenger, *La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale — Réflexions d'un Américain*, RC, 1983, p. 37.

83 — 'Les frontières extérieures de l'espace judiciaire européen: quelques repères', *E Pluribus Unum — Liber Amicorum Georges A.L. Droz*, Martinus Nijhoff Publishers, 1996, p. 85, in particular pp. 103 and 104.

Contracting States and, second, rules to facilitate recognition of judgments and to establish an expeditious procedure for their enforcement.

160. The Court has clarified the meaning of that aim of the Convention, in particular with regard to the common jurisdictional rules which it contains. It has taken the view that the strengthening of the legal protection of persons established in the Community involves 'enabling the claimant to identify *easily* the court in which he may sue and the defendant *reasonably* to foresee in which court he may be sued'. [84] The Court has also characterised those rules as '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'. [85]

161. Only jurisdictional rules meeting those requirements are capable of guaranteeing observance of the principle of legal certainty, which is also, according to settled case-law, [86] one of the objectives of the Brussels Convention.

162. In my view, those two aims of the Convention, both that of strengthening legal protection for people established in the Community and that of ensuring legal certainty, mean that the application of Article 2 of the Convention cannot be made conditional on the existence of a dispute displaying connections with different Contracting States.

163. Indeed, to impose such a condition would inevitably make it more difficult to implement the jurisdictional rule laid down in Article 2, and that rule constitutes what may be called the keystone of the system established by the Convention.

164. Determining whether a dispute is of an intra-Community nature is an exercise which may prove particularly difficult. Numerous questions may arise: what criteria should be applied? In what cases may it be considered

84 — See, in particular, Case 38/81 *Effer* [1982] ECR 825, paragraph 6; Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 11; *Benincasa*, paragraph 26; Case C-334/00 *Tacconi* [2002] I-7357, paragraph 20; Case C-18/02 *DFDS Torline* [2004] ECR I-1417, paragraph 36; and *Kronhofer*, paragraph 20.

85 — See, in particular, Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913, paragraph 15, and Case C-256/00 *Besix* [2002] ECR I-1699, paragraph 25 (emphasis added).

86 — See, in particular, *Effer*, paragraph 6, *Owens Bank*, paragraph 32, *Custom Made Commercial*, paragraph 18, *Besix*, paragraphs 24 to 26, and Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-6307, paragraph 23, and Case C-80/00 *Italian Leather* [2002] ECR I-4995, paragraph 51.

that a dispute is actually or sufficiently connected with a number of Contracting States? Is it important to set an order of importance for the various criteria to be taken into account? Are certain criteria more relevant or more attractive than others? At what moment should the situation be assessed: on the day when it arises, the day on which the writ is served or the day on which the court seised is to give judgment? In a case where the substance of the dispute is not itself connected with two or more Contracting States, would it be sufficient for a claimant (domiciled in a Contracting State other than that in which the defendant is domiciled and in which all or part of the substance of the case is located) to change domicile, in the course of the relevant period, by establishing himself in that same Contracting State in order for the application of Article 2 of the Convention to then be excluded? Conversely, would it be necessary, for that article ultimately to be applicable, for a claimant who was domiciled in that same Contracting State to establish himself during the period in question in another Contracting State?

165. They are delicate questions which are very likely to arise both for the parties to the dispute and for the court seised in the event of the application of Article 2 of the Convention being conditional upon the existence of a legal relationship involving two or more Contracting States.

166. In such circumstances, I find it hard to see how one could continue to take the view that the general jurisdictional rule in Article 2 simultaneously enabled the claimant *easily* to identify the court in which he may commence proceedings and the defendant to foresee *reasonably* before which court he might be sued. Contrary to the requirements laid down by the Court, the situation would fall far short of any *certainty* as to the allocation of jurisdiction between the various national courts before which a particular dispute might be brought. Such a situation would run counter to the Convention's aim of strengthening the legal protection of people established in the Community, and the observance of the principle of legal certainty.

167. That conclusion is made all the more inevitable by the fact that the question of the intra-Community nature of the dispute concerned is very likely to be a bone of contention, giving rise to numerous differences between the parties and therefore leading to recourse to applications to the courts relating to that preliminary issue alone, rather than the actual substance of the case. Clearly, such a prospect of proliferation of proceedings is far from satisfactory in terms of legal certainty. Moreover, the possibility cannot be ruled out that the problem might be exploited by certain defendants for the purposes of purely dilatory manoeuvres, which would run counter to the strengthening of the legal protection of claimants.

168. Quite apart from those considerations, in more general terms it is important to bear in mind that private international law is a discipline which it is far from easy to handle. The Brussels Convention is a specific

response to a concern for simplification of the rules in force in the various Contracting States regarding jurisdiction of the courts, as well as recognition and enforcement. That simplification contributes, in the interest of everybody, to promoting legal certainty. It is also intended to facilitate the work of national courts in dealing with proceedings. It is therefore preferable not to introduce into the system created by the Convention elements which are liable seriously to complicate its operation.

169. Moreover, quite apart from the complexity of the issue of the intra-Community nature of a dispute, I consider that to make the application of Article 2 of the Convention conditional upon establishing that character would inevitably result in a reduction of the cases in which that article would apply.

170. As the Court has made clear, that general rule is accounted for by the fact that it enables a defendant in principle to defend himself more easily. [87] It thereby contributes to strengthening the latter's legal protection. It is precisely because of the guarantees granted to the defendant in the original procedure, regarding observance of the rights of the defence, that the Convention takes a very liberal approach regarding the recognition and enforcement of judgments. [88] The general jurisdictional rule in Article 2 therefore constitutes one of the foundations on which the Convention largely stands.

171. In settled case-law, the Court has inferred from this that jurisdictional rules derogating from that general rule cannot give rise to an interpretation going beyond the limits of the cases *expressly* envisaged by the Convention. [89] However, a comparable result would be arrived at, *mutatis mutandis*, if the application of Article 2 of the Convention was excluded when the legal relationship at issue was not connected to two or more Contracting States.

172. In such circumstances, although domiciled in a Contracting State, a defendant would be exposed to the operation of exorbitant jurisdictional rules in force in another Contracting State, so that he would be liable to be sued before the courts of that State simply by reason, for example, of his temporary presence within the latter's territory (as under English law), the existence within that territory of property belonging to him (as under German law), or the fact that the claimant has the nationality of that State (as under French law). A defendant domiciled in a Contracting State would therefore

87 — See, in particular, *Handte*, paragraph 14, and *Group Josi*, paragraph 35.

88 — See, in particular, Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 13.

89 — See, in particular, *Handte*, paragraph 14, and *Group Josi*, paragraph 36.

be subject to the same regime as that reserved exclusively, under Article 4 of the Convention, for a defendant domiciled in a non-Contracting State.

173. Thus, the general rule in Article 2 would be derogated from in a case which not only was not *expressly* envisaged by the Convention but also was implicitly but necessarily excluded by the Convention in the light of one of the aims pursued by it.

174. It follows that to limit the application of Article 2 to intra-Community disputes would ultimately unduly curtail the scope of that article, contrary to the Convention's aim of strengthening the legal protection of people established in the Community, in particular defendants.

175. In short, I consider not only that the wording of Article 2 and the general scheme of the Convention do not prevent that article from applying to a dispute connected with only one Contracting State and a non-Contracting State but, in addition, that the aims of the Convention require that Article 2 be applied in that way.

176. Since some parties have contended that there are several obstacles to the acceptance of that view, it is appropriate to consider them now.

5. The alleged obstacles to the application of Article 2 of the Convention to a legal relationship connected only with a Contracting State and a non-Contracting State

177. The obstacles on the basis of which the defendants in the main proceedings and the United Kingdom Government argue against recognition of the view just expressed are based essentially on Community law. Considerations linked with international law have also been mentioned to that effect. I shall examine the latter briefly before considering those based on Community law.

(a) The alleged obstacles based on international law

178. According to the defendants in the main proceedings,[90] the Brussels Convention is not universally applicable. It constitutes a simple agreement between the Contracting States for their mutual relations only. Apart from the special case of the

90 — Paragraph 48 of the order for reference.

Brussels Convention, that argument relates to a wider problem concerning the law of treaties and international agreements. The United Kingdom Government has also suggested the advantages of such an approach. [91]

179. In that connection, I should point out that it is commonly accepted that a State cannot be bound by an international agreement unless it expresses its consent thereto. In other words, in accordance with the principle of the relative effect of treaties, an international agreement creates neither obligations nor rights for a State which has not consented thereto. [92]

180. It is common ground that the Brussels Convention does not impose any obligation on States which have not consented to be bound by it. The obligations laid down by that Convention, whether regarding the conferment of jurisdiction or regarding the recognition and enforcement of judgments, apply only to the Contracting States and their courts.

181. In that connection, neither the object of the Brussels Convention in general nor the interpretation of Article 2 which I advocate is contrary to the principle of the relative effect of treaties.

182. Admittedly, as we have seen, the Convention is liable to deploy some of its effect vis-à-vis non-Contracting States, in particular with regard to the allocation of jurisdiction. The rules laid down by the Convention in that regard, such as the rule in Article 2, are thus susceptible of application to disputes in which certain matters are connected with non-Contracting States.

183. However, this situation is not entirely novel. It does happen that States which are parties to an international Convention authorise each other to exercise certain competences vis-à-vis nationals of third States in situations in which, hitherto, the latter had exclusive competence. That applies, for example, to a number of conventions on protection of the maritime environment. [93]

184. In the area of private international law, that also applies for example to the Rome Convention of 19 June 1980 on the law applicable to contractual obligations. [94] Article 1(1) thereof provides that the uniform

91 — Paragraph 21 of its written observations.

92 — See N. Quoc Dinh, P. Daillier and A. Pellet, *Droit international public*, 6th edition, entirely recast, 1999, LGDJ, p. 239 et seq.

93 — See N. Quoc Dinh, P. Daillier and A. Pellet, op cit., p. 249. Reference is made, in particular, to the Brussels Convention of 29 November 1969 on intervention on the high seas in the event of an accident leading to or capable of leading to oil pollution. The States parties to that Convention reserve the right to intervene on the high sea off their coasts even with respect to vessels flying the flag of third countries.

94 — OJ 1980 L 266, p. 1.

rules of that Convention are applicable (to contractual obligations) in situations involving a conflict of laws. Thus, it is sufficient for the situation at issue to give rise to a conflict between legal systems for the uniform rules of the Convention to become applicable. It is of little importance whether that situation is connected with a number of Contracting States or a Contracting State and a non-Contracting State. [95]

185. Moreover, the universal applicability of the uniform rules of the Rome Convention is particularly clear since, under Article 2 thereof, the conflict rules which it lays down may result in the application of the law of a non-Contracting State. [96] In that connection, the effects of that Convention vis-à-vis third countries go much further than those deriving from the Brussels Convention since, as we have seen, the conflict rules laid down by the latter seek only to designate the courts of Contracting States as having jurisdiction, to the exclusion of those of non-Contracting States.

186. I conclude from this that, in international law, there is nothing to prevent the jurisdictional rules laid down by the Brussels Convention, such as those appearing in Article 2, from qualifying to be applied to disputes displaying certain links with non-Contracting States. In my view, the position is the same under Community law

(b) The alleged obstacles under Community law

187. The first defendant and the United Kingdom Government submit that the fundamental freedoms upheld by the EC Treaty are not applicable to situations that are purely internal to a Member State, that is to say situations which do not involve a cross-frontier element as between two or more Member States. It follows, by analogy, that the jurisdictional rule in Article 2 of the Brussels Convention, which is reproduced in identical terms in Regulation No 44/2001, is not capable of applying to the dispute in the main proceedings since that dispute is not connected with more than one Contracting State. In fact, a jurisdictional rule of that kind is merely incidental to the aim of free movement of judgments between the Contracting States pursued by the Convention, and then by the regulation, in relation to the Member States, so that the application of Article 2 of the Convention is correspondingly subject to the existence of a cross-frontier dispute displaying connections with more than one Contracting State.

188. I am not convinced by those arguments.

95 — In that connection, see the report drawn up jointly by Mr Giuliano and Mr Lagarde on the Rome Convention, OJ 1980 C 282, p. 1. See, in particular, paragraph 8 of the introductory part, and the commentary on Articles 1(1) and 2 of that Convention.

96 — In that connection, see the comments on Article 2 of the Rome Convention in the report cited above, and also J.-M. Jacquet, 'Aperçu de la convention de Rome', *L'européanisation du droit international privé*, Academy of European law, Trier, 1996, p. 21.

189. Admittedly, in its judgment in *Mundt & Fester*, [97] the Court held that the fourth indent of Article 220 of the Treaty, on the basis of which the Brussels Convention was adopted, aims 'to *facilitate the working of the common market* through the adoption of rules of jurisdiction for disputes relating thereto and through the elimination, as far as possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the Contracting States'. The Court of Justice concluded from this that the Convention provisions are linked to the Treaty. [98]

190. One can but agree with that conclusion since, as Advocate General Tesauro emphasised in his Opinion in *Mund and Fester*, 'the free movement of judgments is of fundamental importance to the avoidance of the difficulties which can arise for the functioning of the common market when it proves impossible to secure the acceptance of, and easily enforce even by judicial means, the individual rights that derive from the multiplicity of legal relationships which come into being in that market'. [99]

191. However, it cannot be deduced therefrom, as the United Kingdom Government contends, [100] that the uniform rules of jurisdiction laid down by the Convention are designed only to settle positive conflicts of jurisdiction (real or potential) as between the courts of different Contracting States, for the sole purpose of ensuring that the courts of a Contracting State are required to recognise and declare enforceable judgments delivered by courts of another Contracting State in circumstances where the courts of the State where recognition is sought consider themselves also to have jurisdiction, under the laws of that State, to settle the disputes which gave rise to the judgments in question.

192. To reduce the uniform rules of jurisdiction of the Convention to that simple purpose would be tantamount to disregarding, as we have seen, the general scheme of the Convention and the aims that it pursues, which relate both to the strengthening of the protection of persons established in the Community and to observance of the principle of legal certainty.

193. In my view, this analysis is not open to challenge on the basis that the Brussels Convention has been replaced by Regulation No 44/2001, that is to say by a Community legislative act, adopted in implementation of, and for the implementation of, certain provisions of the Treaty. Several factors point in that direction.

194. In the first place, as emphasised in the 19th recital in the preamble to that regula-

97 — Case C-398/92 [1994] ECR I-467, paragraph 11 (emphasis added).

98 — See paragraph 12. See also, to that effect, *Tessili* v *Dunlop*, paragraph 9.

99 — See point 8.

100 — See paragraph 24 of its written observations.

tion, it is necessary to ensure continuity between the Convention and that regulation, particularly as regards the interpretation of the Convention by the Court of Justice. However, if the uniform rules of jurisdiction laid down by the regulation were interpreted by the Court as being intended solely to settle conflicts of jurisdiction as between the courts of different Contracting States, such an interpretation would mark a departure from the copious case-law of the Court concerning the Convention, in particular its objectives (which relate to strengthening of the legal protection of persons established in the Community and observance of the principle of legal certainty). It would thus constitute a change of direction in the case-law which would manifestly not be in harmony with the Community legislature's concern to ensure continuity in the interpretation of the two instruments. Without wishing to prejudge such rulings as the Court may give regarding the territorial or personal scope of Article 2 of the Regulation, I will simply say that I experience some difficulties in imagining that the Court might venture along the road towards such a change in its case-law.

195. Moreover, whilst it is true that Article 65 EC, to which Article 61(c) EC (which constitutes the substantive legal basis of the regulation) refers, mentions expressly, in the area concerned, *measures having cross-border implications*, to be taken in so far as necessary for the *proper functioning of the internal market*, I am not convinced that the necessary inference is that situations covered by the jurisdictional rules of that regulation, which substantially reproduce those of the Convention, must necessarily be linked with two or more Member States.

196. Indeed, as emphasised in the second and eighth recitals in the preamble to the regulation, the jurisdictional rules contained in it — in view of the diversity of the existing national rules in this area and the resulting difficulties for the proper functioning of the internal market — seek to 'unify the rules of conflict of jurisdiction in civil and commercial matters', so as to arrive at 'common rules' in the Member States. This exercise of unifying jurisdictional rules forms part of an approach comparable to that provided for in Article 94 EC for the adoption of directives, since the aim of that substantive legal basis is 'the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market'.

197. The Court recently held, in *Österreichischer Rundfunk and Others*,[101] that 'recourse to Article 100a of the Treaty as the legal basis [that is to say the procedural legal basis now appearing in Article 95 EC]

101 — Joined Cases C-465/00, C-138/01 and C-139/01 [2003] ECR I-4989, paragraph 41. See also to that effect, in particular, Case 98/86 *Mathot* [1987] ECR 809, paragraph 11; Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 16, in relation to Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1), and Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraphs 30 to 33, concerning Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1). On that subject, see M. Fallon, 'Les conflits de lois et de juridictions dans un espace économique intégré — L'expérience de la Communauté européenne', *Recueil des cours*, Académie de droit international, Martinus Nijhoff Publishers, 1996, pp. 49, 182 and 183.

does not presuppose the existence of an actual link with free movement between Member States *in every situation* referred to by the measure founded on that basis'. It stated that 'to justify recourse to Article 100a of the Treaty as the legal basis, what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market'. [102]

198. The Court concluded that 'the applicability of Directive 95/46 [[103]] cannot depend on whether the specific situations at issue in the main proceedings have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty, in particular, in those cases, the freedom of movement of workers'. [104]

199. That conclusion is based on the view that '[a] contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations'. [105]

200. That reasoning was confirmed by the judgment in *Lindqvist* [106] concerning the same directive, Directive 95/46.

201. It may be considered that what is valid for that directive, regarding the protection of individuals with regard to the processing of personal data and the free movement of such data, applies also to Regulation No 44/2001 concerning jurisdiction and the free movement of judgments, even though those two Community measures of secondary law are different in nature.

202. To make the applicability of the jurisdictional rule in Article 2 of that regulation conditional upon the existence, in every dispute, of an actual and sufficient link with two or more Member states would be liable (as I have already explained in connection with the aims of the Convention) to make the boundaries of the field of application of that article particularly uncertain and subject to chance. Such an interpretation of the territorial or personal scope of Article 2 would be contrary to the objective of the

102 — See *Österreichischer Rundfunk and Others*, paragraph 41.

103 — Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

104 — See *Österreichischer Rundfunk and Others*, paragraph 42.

105 — Idem.

106 — Case C-101/01 [2003] ECR I-12921. paragraphs 40 and 41.

regulation, which is to unify the conflict of jurisdiction rules and simplify the recognition and enforcement of judgments in order to eliminate obstacles to the functioning of the internal market which specifically derive from differences between the national legislations in that area.

203. In that connection, it may even be considered that what is valid for Directive 95/46 is valid with greater reason for Regulation No 44/2001 since the choice of a regulation, rather than a directive, to replace the Convention reflects to a considerable extent the concern to guarantee unification of the rules concerned and not to undertake mere approximation of national rules by means of transposition of a directive into domestic law, with the divergences which that might entail in terms of uniform application of Community law.

204. In addition to these considerations concerning the impact of recourse to Article 95 EC as a legal basis on the geographical scope of a directive, I would add that the application of a regulation, like that of a directive, [107] does not necessarily presuppose that the situations covered thereby are connected solely with the territory of the Member States, and not also that of non-member countries.

205. That clearly applies to regulations which contain provisions expressly governing trade between the Community and non-member countries. That is so, for example, in the case of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) and Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1).

206. That applies also, for example, to Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to workers and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

207. That regulation, which is designed to ensure, in the field of social security, free movement for workers, does not expressly define its territorial scope, even though it is commonly described as being 'substantively territorial', in the sense that its application is determined by a 'factor which relates to a place'. [108]

107 — To that effect, see, in particular, Case C-70/03 *Commission* v *Spain* [2004] ECR I-7999, paragraph 30, concerning Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

108 — In that connection, see J. Aussant, R. Fornasier, J.-V. Louis, J.-C. Seche and S. Van Raepenbusch, *Commentaire J. Megret — Le droit de la CEE*, vol. 3, University of Brussels, 2nd Edition, p. 113 et seq., and M. Fallon, op. cit., p. 43 et seq. (in particular pp. 45 and 46).

208. It can be said that whilst the spatial domain of that regulation, that is to say the space within which that *characteristic link* must be situated, necessarily corresponds to that of the Treaty provisions concerning the free movement of persons, so that the application of those provisions requires *localisation* within the 'territory of the Community', there is absolutely no requirement, in order for those provisions (in particular those guaranteeing equal treatment) to retain their effects, that the profession or occupation concerned must be carried on within that territory. [109]

209. Thus, the fact that certain social security benefits may derive, *even exclusively*, from periods of insurance completed outside the territory covered by the EC Treaty cannot, in itself, lead to non-application of Regulation No 1408/71, provided that a close link exists between the entitlement to the social benefits and the Member State responsible for paying them. [110]

210. In my view, that case-law concerning Regulation No 1408/71 could be transposed to Regulation No 44/2001. It is important to bear in mind that the latter was adopted on the basis of provisions in Title IV of the Treaty concerning policies relating to the free movement of persons. Moreover, as in the case of Regulation No 1408/71, the application of Regulation No 44/2001 presupposes the existence of some connection with the territory of the Member States that are covered by that regulation. Thus, in the case of Article 2 of the regulation in question (which is identical to Article 2 of the Convention), its application implies the requirement that the defendant be domiciled in the territory of a Member State. In harmony with the case-law just referred to, it must be considered that, for Article 2 of the regulation in question (or the Convention) to apply, there is absolutely no requirement that the dispute in question should be connected exclusively with the territory covered by that regulation (or by the Convention), and not also that of non-member countries.

211. In the same way, it is important to emphasise that the eighth recital in the preamble to Regulation No 44/2001 states that '[t]here must be *a link* between proceedings to which this regulation applies and the territory of the Member States bound by this regulation'. [111] Thus, 'common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States'.

109 — Idem. See, to that effect, Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 26 to 28, and Case 237/83 *Prodest* [1984] ECR 3153, paragraph 6, in relation, generally, to Community provisions on the free movement of workers within the Community and, in particular, Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition Series I, 1968 (II), p. 475).

110 — See, to that effect, in particular, Case 300/84 *Van Roosmalen* [1986] ECR 3097, paragraphs 30 and 31, and Joined Cases 82/86 and 103/86 *Laborero and Sabato* [1987] ECR 3401, paragraphs 25 to 28.

111 — Emphasis added.

212. In my view, that recital clearly confirms that it is sufficient, for Article 2 of the regulation (which is identical to that of the Convention) to be applicable, for the defendant to be domiciled in a Member State bound by that regulation, so that the dispute concerned displays a link with one of the Member States of the Community. It is therefore of scant importance that the dispute in question may not display an additional link with another Member State, or displays such a link with a non-member State.

213. I conclude from this that Regulation No 44/2001 provides no basis for challenging the view that the scope of Article 2 of the Convention is in no way limited to disputes connected with two or more Contracting States.

214. It follows from all the foregoing that the arguments put forward by certain parties to these preliminary-ruling proceedings to oppose that view, whether they be based on international law or on Community law, must be regarded as irrelevant.

215. Consequently, the answer to the first part of the first preliminary question must be that Article 2 of the Brussels Convention must be interpreted as being applicable even where the claimant and the defendant are domiciled in the same Contracting State and the dispute between them, before the courts of that Contracting State, displays certain links with a non-Contracting State, and not with another Contracting State, so that the only question of allocation of jurisdiction likely to be encountered in such a dispute arises solely regarding the relationship between the courts of a Contracting State and those of a non-Contracting State, and not regarding relationships between the courts of different Contracting States.

216. Since Article 2 of the Brussels Convention falls to be applied in the present circumstances, it is important to consider whether, in a situation such as that at issue in the main proceedings, the Convention prevents a court of a Contracting State — whose jurisdiction is based on Article 2 — from exercising a discretion to decline that jurisdiction, on the ground that a court of a non-Contracting State is a more appropriate forum to try the substantive action. In other words, it is a question of determining whether, in a situation such as that in the main proceedings, the *forum non conveniens* doctrine is compatible with the Convention.

B — *Compatibility of the* forum non conveniens *doctrine with the Brussels Convention*

217. In order to confine the subject-matter of my examination to a situation such as that at issue in the main proceedings, I should

point out that, by the second part of its first question, the national court wishes to ascertain, essentially, whether the Brussels Convention precludes a court of a Contracting State — whose jurisdiction is based on Article 2 of the Convention — from exercising a discretion to waive its jurisdiction on the ground that the court of a non-Contracting State is a more appropriate forum to deal with the substance of the case, where the latter court has not been designated by any jurisdiction clause, has not previously been seised of any claim liable to give rise to *lis alibi pendens* or related actions and the factors connecting the dispute with that non-Contracting State are of a kind other than those mentioned in Article 16 of the Brussels Convention.

218. To answer this question, I shall first consider the intention of the authors of the Convention and will then examine successively the wording of the first paragraph of Article 2 thereof, the general scheme of the Convention and the objectives pursued by the Convention.

1. The intention of the authors of the Convention

219. When the Brussels Convention was drawn up, the United Kingdom and Ireland were not yet Member States of the Community. They did not therefore take part in the negotiations undertaken between the Member States under what is now Article 293 EC which resulted in the adoption of that Convention on 27 September 1968. Those two States did not accede to the Community until 1 January 1973, that is to say just one month before the entry into force of the Convention on 1 February 1973.

220. It is essentially in those two Member States alone that the *forum non conveniens* doctrine has developed. [112] That doctrine is for the most part alien to the Member States of the civil law tradition, that is to say those which negotiated the Brussels Convention. It follows that the Convention contains no provision relating to that doctrine.

221. It was only during the preparation of the Convention of the Accession of the United Kingdom, Ireland and the Kingdom of Denmark to the Brussels Convention, which was adopted on 9 October 1978, that the question of the compatibility of the *forum non conveniens* doctrine was raised. [113]

112 — It would appear that this doctrine is also applied in the Netherlands, but to a much lesser extent.

113 — Thus, as early as 1972, Mr Droz stated forcefully that the doctrine had no place in the Brussels Convention, taking the view that 'it would be better to throttle this source of chicanery at birth' (free translation), G. Droz, *Droits de la demande dans les relations privées internationales*, TCFDIP, 1993-1995, p. 97.

222. The report run up by Mr Schlosser concerning that accession convention reflects the breadth of the discussions raised by that issue. [114]

223. Paragraph 78 of that report indicates that '[a]ccording to the views of the delegations from the Continental Member States of the Community such possibilities [in particular, that of staying proceedings in accordance with the *forum non conveniens* doctrine] are not open to the courts of those States when, under the 1968 Convention, they have jurisdiction and are asked to adjudicate'.

224. It was stated that, in that connection, 'the view was expressed that under the 1968 Convention the Contracting States are not only entitled to exercise jurisdiction in accordance with the provisions laid down in Title 2; they are also obliged to do so'. In that regard, it was considered that 'a plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another'.

225. Furthermore, the report in question states, still in paragraph 78, that 'where the courts of several States have jurisdiction, the plaintiff has deliberately been given a right of choice, which should not be weakened by application of the doctrine of *forum conveniens*'. In that connection, it emphasises that '[t]he plaintiff may have chosen another apparently "inappropriate" court from among the competent courts in order to obtain a judgment in the State in which he also wishes to enforce it'.

226. The same paragraph of the report adds that 'the risk of a negative conflict of jurisdiction should not be disregarded: despite the United Kingdom court's decision, the judge on the Continent could likewise decline jurisdiction'.

227. Finally, it indicates that '[t]he practical reasons in favour [to date] of the doctrine of *forum conveniens* [and its corollary, the doctrine of *forum non conveniens*] will lose considerably in significance, as soon as the 1968 Convention becomes applicable in the United Kingdom and Ireland'. In that connection, the report makes clear, still in paragraph 78, that the national legislation intended to give effect to the Convention in those two Member States would necessitate, first, a narrower conception of the idea of domicile than that previously existing and, second, abandonment of their national rule of exorbitant jurisdiction based on mere notification or service of a writ on a defendant temporarily present in the territory of the States in question, in accordance with the second paragraph of Article 3 of the Convention.

114 — OJ 1979 C 59, p. 71, paragraphs 77 and 78.

228. It was because of those arguments that, according to the said paragraph 78, 'the United Kingdom and Irish delegations did not press for a formal adjustment of the 1968 Convention on this point'.

229. I infer from all the foregoing that the Member States which negotiated and concluded the Brussels Convention or the Accession Convention of 1978 either had no intention of agreeing to include the *forum non conveniens* principle in the scheme of the Convention which was established or that a majority of them were firmly opposed to its inclusion.

230. To accept the opposite view would therefore be tantamount to disregarding the intentions of the States which are parties to the Convention, as amended by the Accession Convention of 1978, and it is clear that those intentions were not subsequently departed from when the later accession conventions or Regulation No 44/2001 were adopted. An examination of the wording of the first paragraph of Article 2 of the Convention, of the general scheme of the Convention and of its useful effect, in the light of the objectives which it pursues, also militates against acceptance of the doctrine of *forum non conveniens*.

2. The wording of the first paragraph of Article 2 of the Convention

231. The first paragraph of Article 2 of the Convention provides '[s]ubject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State'.

232. It should also be noted that, according to settled case-law, Community provisions must be interpreted and applied uniformly in the light of the versions existing in all the Community languages. [115] In my view, the same necessarily applies to the interpretation and application of the Brussels Convention, in view of the concern, frequently expressed by the Court, to ensure observance of the principle of legal certainty and equality and uniformity of rights and obligations deriving from that convention, vis-à-vis both the Contracting States and the persons concerned. [116]

233. It is undisputed that an examination of the various language versions of the first paragraph of Article 2 of the Convention

115 — See, in particular, Case 19/67 *Van der Vecht* [1967] ECR 345; Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 18; Case C-219/95 P *Ferrière Nord* v *Commission* [1997] ECR I-4411, paragraph 15; and Case C-371/02 *Björnekulla Fruktindustrier* [2004] ECR I-5791, paragraph 16.

116 — See, in particular, Joined Cases 9/77 and 10/77 *Bavaria Fluggesellschaft and Germanair* v *Eurocontrol* [1977] ECR 1517, paragraph 4; Case 33/78 *Somafer* [1978] ECR 2183, paragraph 8, and Case 288/82 *Duijnstee* [1983] ECR 3663, paragraph 13.

shows that the rule on jurisdiction laid down in it is mandatory and not optional and that no derogation from that rule is allowed otherwise than in cases expressly provided for by the Convention. It is also undisputed that a situation such as the one in the main proceedings does not fall within any of those cases, which are exhaustively enumerated in the Convention, and which I shall examine in greater detail in connection with the general scheme of the Convention.

234. From this I infer that the effect of the wording of the first paragraph of Article 2 of the Convention is that, in circumstances such as those of the main proceedings, a court of a Contracting State seised of litigation on the basis of that article has no discretion to decline to give judgment on the substance on the ground that a court of a non-Contracting State would be a more appropriate court to do so. That conclusion is also supported by the general scheme of the Convention.

3. The general scheme of the Convention

235. Where the jurisdiction of the court of a Contracting State such as the United Kingdom is established, pursuant to Article 4 of the Convention, on the basis of the rules of exorbitant jurisdiction in force in that State (in a case where the defendant is domiciled in a non-member country), I concede that a priori the Convention does not prevent the court in question from declining to exercise its jurisdiction, in accordance with the doctrine of *forum non conveniens* (applicable in the Contracting State in question) on the ground that a court of a non-member country would be more appropriate or better placed to deal with the substance of the case.

236. However, that possibility can be envisaged only in a case (and Mr Owusu's case is not such a case) in which the defendant is domiciled in a non-Contracting State, since Article 4 of the Convention refers to that case alone.

237. Conversely, where the defendant is domiciled in a Contracting State and the jurisdiction of a court of a Contracting State is thus based on the first paragraph of Article 2 of the Convention, the general scheme of the Convention prevents the court in question, in circumstances like those of the main proceedings, from declining, in its discretion, to exercise its jurisdiction on the ground that a court of a non-Contracting State would be a more appropriate forum to deal with the substance of the dispute.

238. Indeed, although certain provisions of the Convention tend to attenuate the binding force of the rule on jurisdiction laid down in Article 2, this occurs only in very special circumstances, not coinciding with those of the main proceedings, with the result that

the general scheme of the Convention prevents a court of a Contracting State from declining to exercise that mandatory jurisdiction in the circumstances of this case, that is to say in circumstances other than those expressly and exhaustively set out in the Convention.

239. Furthermore, it is important to emphasise that some of those convention provisions are inspired by considerations which differ considerably from those associated with the *forum non conveniens* doctrine. That fact supports my view that the general scheme of the Convention precludes implementation of the doctrine in question as regards exercise of jurisdiction based on Article 2.

240. I shall now go into further detail.

241. First, I would point out that, although the special or particular Convention rules (in Articles 5 and 6 and Sections 3 and 4 of Title II) allow derogations from the mandatory jurisdiction rule in Article 2, in view in particular of the existence of a direct or particularly close connecting factor between the dispute and the courts of a State other than that of the defendant's domicile, that option regarding jurisdiction is available only in the context of relations between Contracting States, and not in the context of relations between a Contracting State and a non-Contracting State, as is the case in the main proceedings.

242. Also, it is important, above all, to emphasise that that option concerning jurisdiction is available only to a claimant, for the purpose of bringing his action. Consequently, once a court of a Contracting State is seised of proceedings pursuant to the jurisdiction rule in Article 2, it is not entitled, on the basis of the special or particular rules on jurisdiction in the Convention, to decline to adjudicate, even if the dispute displays a significant connection with the courts of a State (Contracting State or otherwise) other than that of the defendant's domicile.

243. Also, although under the first paragraph of Article 17 of the Convention and under Articles 19, 21 and 22, a court of a Contracting State is required to decline jurisdiction, or is entitled to decline to give judgment, when it has been seised on the basis of the general and binding jurisdictional rule in Article 2, it is clear that the dispute in the main proceedings does not fall within any of those cases, so that the binding force of the jurisdictional rule in Article 2 remains intact. This will be illustrated in greater detail when each of the provisions in question is considered.

244. First, in the case of the first paragraph of Article 17 of the Convention, regarding cases where jurisdiction is expressly attributed, it provides that, where at least one of the parties is domiciled in a Contracting State, the court or courts of such a State which are designated by the parties (in accordance with the conditions laid down in that article) are alone to have jurisdiction. Thus, any other court seised by a party, in particular on the basis of Article 2 of the Convention, in principle lacks jurisdiction unless, under Article 18 of the Convention, the defendant agrees to appear before the court seised without alleging that it lacks jurisdiction on the basis of the clause choosing a forum. Subject to the case envisaged in Article 18, a court seised by a party in disregard of a jurisdiction clause must therefore declare that it lacks jurisdiction.

245. The same applies where a court of a Contracting State, in particular of the Contracting State of the defendant's domicile, has been seised in disregard of the exclusive jurisdiction rules laid down in Article 16 of the Convention, in view of the existence of particularly close links between the substance of the dispute and the territory of a Contracting State. Moreover, the binding force of those jurisdictional rules is particularly significant, since Article 19 of the Convention provides that where a court is seised of a claim which is principally concerned with a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16, it must declare of its own motion that it has no jurisdiction.

246. Only those rules on exclusive jurisdiction are capable of precluding application of the general and binding jurisdiction rule in Article 2 of the Convention; and it will be remembered that those exclusive jurisdiction rules do not apply to a situation of the kind with which the main proceedings are concerned.

247. The same applies to the mechanisms provided for in Articles 21 and 22 of the Convention with regard to application of the jurisdiction rules.

248. It should be remembered that Article 21 of the Convention, concerning *lis pendens*, provides that, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, the court second seised is required to stay its proceedings until such time as the jurisdiction of the court first seised is established and then, if so established, decline jurisdiction in favour of that court.

249. As indicated earlier, the circumstances of the main proceedings do not fall within that case, since no court of a Contracting State other than that of the first defendant's domicile has had parallel proceedings brought before it.

250. Furthermore, as the Court recently held in paragraph 47 of *Gasser*, that procedural rule 'is based clearly and solely on the chronological order in which the courts in question are seised'. It does not therefore leave room for any discretion as to whether one of the courts seised is better placed than the other to deal with the substance of the case. It follows that, contrary to the view sometimes put forward, the mechanism provided for by the Convention in relation to *lis pendens* reflects a logic profoundly different from that associated with the doctrine of *forum non conveniens* since, as we have seen, the latter implies a discretion enjoyed by the court seised as to whether a foreign court would be a clearly more appropriate forum for dealing with the substance of the case.

251. As regards Article 22 of the Convention, it provides that, where related actions are brought before courts of different Contracting States and are pending at first instance, the court second seised may either stay its proceedings or decline jurisdiction on the application of either of the parties, provided that the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

252. In contrast to Article 21 regarding *lis pendens*, Article 22 is not based solely on the chronological order in which the courts involved have been seised. It leaves some room for discretion on the part of the court second seised, since an option is made available to it either to stay its proceedings or to decline jurisdiction. It may be considered that that choice may depend in particular on the question whether the court first seised is better placed to deal with the case which the court second seised is called on to examine. In that connection, that mechanism might be compared (but only to that extent) to that of the doctrine of *forum non conveniens*.

253. However, it is important to emphasise that the possibility offered to the court of staying its proceedings or declining jurisdiction under Article 22 of the Convention applies only in the special circumstances where parallel proceedings have been commenced before the courts of different Contracting States, in order to avoid the possibility of conflicting decisions and consequently to obviate, as far as possible, cases in which a decision given in one Contracting State is exposed to the risk of not being recognised in another Contracting State.

254. Now, if it were assumed that the proceedings for compensation brought by the English holiday-maker who suffered an accident similar to that suffered by Mr Owusu were still pending and could be regarded as related to the main proceedings in this case, those parallel proceedings were commenced in Jamaica, that is to say before the courts of a non-Contracting State, so that Article 22 does not in principle fall to be applied.

255. Moreover, regardless of those considerations specific to this case, the logic of that mechanism for coordination of judicial functions as between the courts of the various Contracting States is clearly very different from that of the *forum non conveniens* doctrine since the application of that doctrine is not in principle subject to the existence of parallel proceedings in another Contracting State. Indeed, as was made clear in the *Spiliada* judgment, [117] it is important for the court seised to determine the 'natural forum' of the dispute, that is to say 'the one with which the dispute displays the closest connections', in accordance with criteria of a practical or pecuniary nature, such as the availability of witnesses, or criteria such as the law applicable to the transaction in question. The appropriateness or otherwise of the court seised does not therefore depend necessarily and solely on the existence of parallel proceedings before a court of another Contracting State.

256. It follows that, where the jurisdiction of a court of a Contracting State is based on Article 2 of the Convention (provided that it does not come up against the exclusive jurisdiction rules in Articles 16 and 17), that court is not entitled to decline to exercise its jurisdiction, save in the special cases provided for in Articles 21 and 22 of the Convention, which do not arise in the main proceedings.

117 — See point 27 of this Opinion.

257. This examination of the general scheme of the Convention thus supports the view that, in circumstances like those of the main proceedings, a court in a Contracting State, whose jurisdiction is based on Article 2 of the Convention, is precluded from declining, as a matter of discretion, to exercise its jurisdiction on the ground that a court of a non-Contracting State would be a more appropriate forum to determine the action.

258. In my opinion, that view cannot be undermined by the fact that, as in this case, the action brought before the court of a Contracting State, on the basis of Article 2 of the Convention, concerns not only a defendant domiciled in the Contracting State of that court but also several defendants domiciled in a non-Contracting State.

259. If the application of Article 4 of the Convention, in circumstances where several defendants are domiciled in a non-Contracting State, is likely to prompt the court seised to raise questions about the appropriateness of recourse to it, having regard to the criteria associated with the doctrine of *forum non conveniens*, the fact nevertheless remains that Article 4 does not impose on that court any obligation to decline to exercise the jurisdiction which it derives from Article 2 with regard to a defendant domiciled in the territory of the Contracting State in which it operates. It is simply incumbent on the court seised, having regard to the situation of the parties and the various interests involved, to consider whether it is appropriate to give judgment on the dispute in its entirety or only on that part of the dispute that relates to

the defendant domiciled in the Contracting State in question.

4. The objectives and the useful effect of the Convention

260. If it is assumed that the doctrine of *forum non conveniens* constitutes a rule which is procedural and thus is a matter of national law alone, the application of such a rule may not impair the effectiveness of the Convention. That is what the Court recently pointed out in *Turner*, cited above, in connection with the mechanism of 'anti-suit injunctions'. [118]

261. I consider that the application of that possible procedural rule is liable to undermine the objectives of the Convention and, at the same time, its effectiveness, so that those two factors preclude application of the *forum non conveniens* doctrine.

262. Several arguments militate in favour of that view.

263. First, by allowing the court seised the opportunity to decline — *in a purely discretionary manner* — to exercise the jurisdiction which it derives from a provision of the Convention, such as Article 2, the doctrine of *forum non conveniens* seriously affects the predictability of the effects of the jurisdiction rules laid down by the Convention, in particular the rule in Article 2. As already pointed out, that predictability of the jurisdiction rules constitutes the only way of ensuring observance of the principle of legal certainty and ensuring greater legal protection for people established in the Community, in accordance with the objectives pursued by the Convention. Any impact of that kind on the predictability of the jurisdiction rules laid down by the Convention, in particular in Article 2 (which is a general jurisdiction rule) thus ultimately detracts from the effectiveness of the Convention.

264. In that connection, it is important to bear in mind that the Convention is largely inspired within the civil law system, which attaches particular importance to the predictability and inviolability of rules on jurisdiction. That dimension has a lower profile in the common law system, since the application of the rules in force is approached in a somewhat more flexible manner and on a case-by-case basis. In that way, the *forum non conveniens* doctrine fits easily within the common law system, since it grants the court seised the power to exercise a discretion in considering whether or not it is appropriate to exercise the jurisdiction vested in it. It is therefore clear that that doctrine is hardly compatible with the spirit of the Convention.

118 — See paragraph 29, following the dicta in *Hagen* (paragraph 20).

265. Quite apart from the foregoing general considerations, it is important to consider in greater detail the procedural consequences of implementing the *forum non conveniens* doctrine. In my view, such consequences would be difficult to reconcile with the objectives of the Convention which, let it be remembered, relate both to observance of the principle of legal certainty and to greater legal protection for people established in the Community.

266. As we have seen, as English law stands at present, the application of that doctrine entails a stay of proceedings, that is to say suspension of an action, which may operate *sine die*. That situation is inherently unsatisfactory in terms of legal certainty.

267. Moreover, in my view, instead of providing greater legal protection for people established in the Community, the *forum non conveniens* doctrine is more liable to undermine it. That is particularly true for claimants.

268. It bears repeating that it is upon a claimant seeking to escape the effect of the procedural objection in question that it is incumbent to establish his inability to secure a just outcome in the foreign forum in question. Here too, that situation is not satisfactory, in view of the real fear that that procedural objection may be invoked by certain defendants for the sole purpose of delaying the progress of proceedings against them.

269. Furthermore, where the court seised has finally decided to allow the plea of *forum non conveniens*, it is once again incumbent upon a claimant wishing to re-initiate proceedings to produce the evidence necessary for that purpose. Thus, it is for the claimant to establish that the foreign court does not ultimately have jurisdiction to hear the case or that he himself is not likely to secure a just outcome in that court or has not been able to do so. That burden of proof on the claimant may prove particularly heavy. In that respect, application of the *forum non conveniens* doctrine is therefore liable to have a considerable impact on the defence of his interests, so that it tends to detract from rather than reinforce the legal protection enjoyed by the claimant, contrary to the objective of the Convention.

270. Finally, in the event of the claimant not succeeding in producing the evidence in question to oppose a stay of proceedings (which could be pronounced *sine die*) or to recommence proceedings already suspended, the only possibility that would remain if he sought to pursue his claims would be to take all the steps needed to commence a new suit before the foreign court. It goes without saying that those steps have a cost and are likely considerably to prolong the time spent in the conduct of proceedings before the claimant finally has his case heard. Moreover, in that respect, the mechanism associated with the *forum non conveniens* doctrine could be regarded as incompatible with the requirements of Article 6 of the European Convention on the protection of human rights and fundamental freedoms.

271. I conclude that that doctrine detracts from the effectiveness of the Convention, in that it has an impact on the objectives of legal certainty and the strengthening of legal protection for people established in the Community, which are pursued by the Convention by virtue of the binding rules on jurisdiction of the kind appearing in Article 2.

272. In my view, that conclusion also applies to the rules laid down by the Convention to facilitate, between Contracting States, the recognition and enforcement of judgments. By declining to exercise the jurisdiction which it derives from the Convention rules, in particular Article 2, on the ground that a court of a non-Contracting State would be more appropriate for trial of the dispute brought before it, the court of a Contracting State deprives a claimant of the opportunity to benefit from the simplified mechanism of recognition and enforcement provided by the Convention. That situation also runs counter to the objectives of the Convention relating to observance of legal certainty and enhanced legal protection for people established in the Community. In that way, the mechanism associated with the *forum non conveniens* doctrine detracts, once again, from the effectiveness of the Convention.

273. In addition, it must be emphasised that that doctrine is liable to undermine the uniform application of the rules laid down by the Convention and thus to run counter to the settled case-law of the Court of Justice.

274. As we have seen, the Court has frequently expressed a concern to ensure equality and uniformity of the rights and obligations deriving from the Convention, whether in relation to Contracting States or in favour of the individuals concerned.

275. As stated earlier, the *forum non conveniens* doctrine developed significantly only in the United Kingdom and in Ireland, and not in the other Contracting States.

276. To agree to the implementation of that doctrine in only those two Contracting States where it is known would thus have the effect of creating discrimination between people established in the Community depending on whether the Contracting State in whose territory the defendant was domiciled did or did not recognise that doctrine. Such discrimination would beyond all doubt be contrary to the principle laid down in the case-law of equality and uniformity of the rights deriving from the Convention.

277. It follows from all the foregoing that both the wording of the first paragraph of

Article 2 of the Convention and the general scheme of the Convention, and its objectives and its effectiveness, preclude a court of a Contracting State — whose jurisdiction is based on Article 2 of that Convention — from exercising a discretion to decline to exercise that jurisdiction on the ground that a court of a non-Contracting State would be a more appropriate forum for dealing with the substance of the case, where the latter has not been designated by any jurisdiction clause, has not previously had brought before it any claim liable to give rise to *lis alibi pendens* or related actions and the factors connecting the dispute with that non Contracting State are of a kind other than those referred to in Article 16 of the Brussels Convention.

278. I would add that Regulation No 44/2001 clearly confirms this view. According to the 11th recital in its preamble (emphasis added) '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' (emphasis added).

279. Those considerations implicitly but necessarily exclude the possibility of the court seised in accordance with Article 2 of the Convention declining to exercise its jurisdiction on the ground that, under the *forum non conveniens* doctrine, a court of another State would be better placed to deal with the dispute.[119] In my view, that conclusion is correct not only where the competing court is located in a Member State other than that of the defendant's domicile. It is also correct where the competing court is located in a non-Contracting country.

280. Consequently, the answer to the second part of the first preliminary question must be that the Brussels Convention prevents a court of a Contracting State — whose jurisdiction is established on the basis of Article 2 of that Convention — from exercising a discretion to decline to exercise that jurisdiction on the ground that a court of a non-Contracting State would be more appropriate to deal with the substance of the dispute, where the latter court has not been designated by any agreement conferring jurisdiction, has not previously been seised of any claim liable to give rise to *lis pendens* or related actions and the links connecting the dispute with that non-Contracting State are of a kind other than those referred to in Article 16 of the Brussels Convention.

119 — See, to that effect H. Gaudemet-Tallon, op. cit. in footnote 61, p. 57 et seq.

V — Conclusion

281. In view of all the foregoing considerations, I propose that the Court of Justice reply as follows to the question referred to it by the Court of Appeal (England and Wales) (Civil Division):

(1) Article 2 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention on 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden ('the Brussels Convention') must be interpreted as being applicable even where the claimant and the defendant are domiciled in the same Contracting State and the dispute between them, before the courts of that Contracting State, displays certain links with a non-Contracting State, and not with another Contracting State, so that the only question of allocation of jurisdiction which is capable of arising in such a dispute is concerned solely with the relationship between the courts of a Contracting State and those of a non-Contracting State, and not with relations between the courts of different Contracting States.

(2) The Brussels Convention precludes a court of a Contracting State — whose jurisdiction is established on the basis of Article 2 of that Convention — from exercising a discretionary power to decline to exercise that jurisdiction on the ground that a court of a non-Contracting State would be more appropriate for the trial of the action, where the latter court has not been designated by any agreement conferring jurisdiction, has not previously been seised of any claim liable to give rise to *lis pendens* or related actions and the links connecting the dispute with that non-Contracting State are of a kind other than those referred to in Article 16 of the Brussels Convention.