Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 24 January 2019[1]

Case C-603/17

Peter Bosworth,
Colin Hurley
v
Arcadia Petroleum Limited and Others

(Request for a preliminary ruling from the Supreme Court of the United Kingdom)

(Reference for a preliminary ruling — Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters — Lugano II Convention — Title II, Section 5 — Jurisdiction in matters relating to individual contracts of employment — Claims for compensation made by several companies within the same group against former directors — Concepts of 'individual contract of employment' and of 'employer' — Claims resting on legal bases regarded as tortious in substantive law — Conditions under which such claims are 'matters' relating to a contract and/or individual contracts of employment for the purposes of the Lugano II Convention)

I. Introduction

1. By its request for a preliminary ruling, the Supreme Court of the United Kingdom has referred to the Court of Justice four questions on the interpretation of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007[2] ('the Lugano II Convention').

2. Those questions were raised in the context of an action brought by the sole shareholder and several companies of a multinational group against certain former company directors concerning claims for compensation for the harm caused by fraud allegedly committed at the expense of those companies of which those directors were allegedly the principal architects and beneficiaries.

3. At the present stage of the dispute in the main proceedings, the referring court must determine whether the courts of England and Wales have jurisdiction to rule on those claims or whether it is the courts of Switzerland, as courts of the domicile of the former directors implicated, that must hear all or part of the claims. The answer to that depends on whether or not the claims are 'matters relating to individual contracts of employment', within the meaning of the provisions of Title II, Section 5 of the Lugano II Convention ('Section 5').

1 Original language: French.

2 OJ 2007 L 339, p. 1. The conclusion of the Convention was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1).

4. In this context, the questions of that court raise complex points of law concerning the interpretation of key concepts of that Section 5, namely those of 'individual contract of employment', 'employee' and 'employer'. They also raise the issue of whether, and if so under what circumstances, a claim made between parties to such a 'contract' which rests on a legal basis that is tortious in substantive law falls within the scope of that section.

5. In this Opinion I shall set out the reasons for which company directors who carry out their duties in full autonomy are not bound to the company for which they perform those duties by an 'individual contract of employment' within the meaning of the provisions of Section 5. In the alternative, I shall then explain, first, why a claim made between parties to that 'contract' and legally based in tort does fall within the scope of that section where the dispute arose in connection with the employment relationship and, secondly, why an 'employer' within the meaning of the provisions of that section is not necessarily solely the person with whom the employee formally concluded a contract of employment.

II. The Lugano II Convention

6. Section 5, which is headed 'Jurisdiction over individual contracts of employment', notably contains Articles 18 and 20 of the Lugano II Convention.

7. Article 18(1) of that convention provides that, 'in matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Articles 4 and 5(5)'.

8. Article 20(1) of that convention provides that 'an employer may bring proceedings only in the courts of the State bound by this Convention in which the employee is domiciled'.

III. The dispute in the main proceedings, the questions referred and the procedure before the Court

9. The Arcadia group comprises the companies Arcadia London, Arcadia Switzerland and Arcadia Singapore. The group is wholly owned by the company Farahead Holdings Ltd ('Farahead'). At the time of the relevant facts, Mr Peter Bosworth and Mr Colin Hurley ('the defendants in the main proceedings'), who are currently domiciled in Switzerland, were Chief Executive Officer (CEO) and Chief Financial Officer (CFO) of the group respectively. They were also directors of the three Arcadia companies in question. Each of them had a contract of employment with one or other of those companies, one that had been drawn up by themselves or under their direction.

10. On 12 February 2015, the three Arcadia companies and Farahead (together, 'Arcadia') issued proceedings before the High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court) claiming compensation from a number of individuals, including the defendants in the main proceedings. Those claims seek compensation for the damage which the group had sustained as a result of a series of fraudulent transactions involving the Arcadia companies and carried out between April 2007 and May 2013.

11. According to Arcadia, the defendants in the main proceedings were the principal architects and beneficiaries of that fraud. As CEO and CFO of the group, they were associated with the other persons implicated to divert most of the profits resulting from the transactions in question and concealed those transactions from Farahead. For their part, the defendants in the main proceedings firmly deny these accusations.

12. In its original particulars of claim, Arcadia alleged that the wrongdoings of the defendants in the main proceedings consisted in (1) the tort of unlawful means conspiracy, (2) the tort of breach of fiduciary duty and (3) breach of express and/or implied contractual duties.

13. On 9 March 2015, the defendants in the main proceedings made an application arguing that, in accordance with the Lugano II Convention, the courts of England and Wales did not have jurisdiction to hear the claims made by Arcadia against them: the claims were 'matters relating to individual contracts of employment' and thus fell within the scope of Section 5. Consequently, only the courts of their country of domicile, that is, the Swiss courts, had jurisdiction to hear the claims.

14. Subsequently, the applicants in the main proceedings amended their application. They abandoned their claim that the defendants in the main proceedings had breached duties under their contracts of employment and removed all reference to breach of those duties as an unlawful means employed in the context of the tort of conspiracy.

15. By judgment of 1 April 2015, the High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court) held that the courts of England and Wales had jurisdiction to hear Arcadia's claims to the extent that they were based on the tort of unlawful means conspiracy. It also held that they also had jurisdiction to hear the claims to the extent that they were based on the tort of breach of fiduciary duty, albeit they did not have jurisdiction to hear any such claims made on that basis by Arcadia London and Arcadia Singapore in relation to facts occurring at the time when either of those companies was bound by a contract of employment with Mr Bosworth or Mr Hurley. To that extent, and to that extent only, Arcadia's claims were 'matters relating to individual contracts of employment' within the meaning of the provisions of Section 5.

16. The defendants in the main proceedings brought an appeal against that judgment before the Court of Appeal (England & Wales) (Civil Division). That appeal was dismissed by judgment of 19 August 2016. Nevertheless, the Supreme Court of the United Kingdom granted the interested parties permission to appeal.

17. It was in those circumstances that the referring court decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) What is the correct test for determining whether a claim advanced by an employer against an employee or former employee ("an employee") constitutes a "matter relating to" an individual contract of employment within the meaning of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention?

(a) Is it sufficient for a claim advanced by an employer against an employee to fall within Articles 18 to 21 [of the Lugano II Convention] that the conduct complained of *could* also have been pleaded by the employer as a breach of the employee's individual contract of employment — even if the claim actually advanced by the employer does not rely on, complain of, or plead any breach of that contract, but is (for example) advanced on one or more of the different bases [in question in the main proceedings]?

(b) Alternatively, is the correct test that a claim advanced by an employer against an employee falls within Articles 18 to 21 only if the obligation on which the claim is actually based is an obligation in the contract of employment? If this is the correct test, does it follow that a claim which is based only on breach of an obligation which arose independently of the contract of employment (and, if relevant, is not an obligation which was "*freely consented to*" by the employee) does not fall within Section 5?

(c) If neither of the above is the correct test, what is the correct test?

(2) If a company and an individual enter into a "*contract*" (within the meaning of Article 5(1) of the [Lugano II] Convention), to what extent is it necessary for there to be a relationship of subordination between the company and the individual for that contract to constitute an "*individual contract of employment*" for the purposes of Section 5 [of Title II of the Convention]? Can such a relationship exist where the individual is able to determine (and does determine) the terms of his contract with the company and has control and autonomy over the day-to-day operation of the company's business and the performance of his own duties, but the shareholder(s) of the company have the power to procure the termination of the relationship?

(3) If Section 5 of Title II of the Lugano [II] Convention only applies to claims which, but for Section 5, would fall within Article 5(1) of the Lugano [II] Convention, what is the correct test to determine whether a claim falls within Article 5(1)?

(a) Is the correct test that a claim falls within Article 5(1) if the conduct complained of could be pleaded as a breach of contract, even if the claim actually pleaded by the employer does not rely on, complain of, or plead any breach of that contract?

(b) Alternatively, is the correct test that a claim falls within Article 5(1) only if the obligation on which it is actually based is a contractual obligation? If that is the correct test, does it follow that a claim which is based only on breach of an obligation which arose independently of the contract (and, if relevant, is not an obligation which was "*freely consented to*" by the defendant) does not fall within Article 5(1)?

(c) If neither of the above is the correct test, what is the correct test?

(4) In circumstances in which:

(a) companies A and B both form part of a group of companies;

(b) defendant X performs, de facto, the role of CEO of that group of companies (as Mr Bosworth did for the Arcadia Group of companies …), X is employed by one group company, company A (and so is an employee of company A) (as Mr Bosworth was from time to time …), and is not, as a matter of domestic law, employed by company B;

(c) company A brings claims against X, and those claims fall within Articles 18 to 21 [of the Lugano II Convention]; and

(d) the other group company, company B, also bring claims against X in respect of like conduct to that which forms the basis of company A's claims against X;

what is the correct test for determining whether company B's claim falls within Section 5 [of Title II of the Lugano II Convention]? In particular:

– does the answer depend on whether there was, as between X and company B, an "*individual contract of employment*" within the meaning of Section 5 [of Title II of the Lugano II Convention] and, if so, what is the correct test for determining whether there was such a contract?

– is company B to be treated as the "employer" of X for the purposes of Section 5 of Title II of the [Lugano II] Convention, and/or do company B's claims against X (see question 4(d) above) fall within Articles 18 to 21 [of the Lugano II Convention] in the same way that company A's claims against X fall within Articles 18 to 21? In particular:

  (a) does company B's claim fall within Article 18 [of the Lugano II Convention] only if the obligation on which it is actually based is an obligation in the contract of employment between company B and X?

  (b) alternatively, does the claim fall within Article 18 if the conduct complained of in the claim would have constituted a breach of an obligation in the contract of employment between company A and X?

– If neither of the foregoing is the correct test, what is the correct test?'

18. The order for reference was received at the Registry of the Court of Justice on 20 October 2017. The defendants in the main proceedings, along with Arcadia, the Swiss Confederation and the European Commission, submitted written observations to the Court. The same parties, with the exception of the Swiss Confederation, attended the hearing on 13 September 2018.

IV. Analysis

A. Preliminary remarks

19. The Lugano II Convention is an international convention binding the European Union, the European Free Trade Association (EFTA) States and the Swiss Confederation. Only rarely have questions been referred to the Court of Justice concerning its interpretation. It is a parallel instrument to Regulation (EC) No 44/2001,[3] having the same purpose and laying down the same rules on jurisdiction as the regulation. Accordingly, the broad case-law of the Court on the regulation can be applied to the equivalent provisions of that convention.[4]

20. The questions asked by the referring court fall within the following legal context. Arcadia considers that the courts of England and Wales have jurisdiction to hear its claims against the defendants in the main proceedings on the basis of Article 6(1) of the Lugano II Convention: these claims are closely connected with similar claims made against three other defendants domiciled in England and Wales.[5]

21. Nevertheless, the defendants in the main proceedings dispute that those courts have jurisdiction. They argue that those claims are 'in matters relating to individual contracts of employment' and therefore fall under Section 5.

3 Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1; 'the Brussels I Regulation'). Regulation No 44/2001 replaced the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Brussels on 27 September 1968 (OJ 1978 L 304, p. 36; 'the Brussels Convention'). Regulation No 44/2001 was recently replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

4 In addition, in interpreting the convention, national decisions concerning those instruments should be taken into account. See Article 1 of Protocol No 2 on the uniform interpretation of the [Lugano II Convention] and on the Standing Committee (OJ 2007 L 339, p. 27) and judgments of 2 April 2009, *Gambazzi* (C-394/07, EU:C:2009:219, paragraph 36), and of 20 December 2017, *Schlömp* (C-467/16, EU:C:2017:993, paragraphs 46 to 51).

5 Article 6(1) of the Lugano II Convention provides that a person may, where he is one of a number of defendants, be sued 'in the courts for the place where any of the defendants is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

22. In this connection, I would point out that, pursuant to Article 18(1) of the Lugano II Convention, jurisdiction for claims in this area is governed by the provisions of Section 5. In accordance with Article 20(1) of that convention, a claim made by an 'employer' against an 'employee' must be brought before the courts of the State in which the employee is domiciled. In addition, according to the Court, the provisions of that section are exhaustive.[6] If Section 5 does apply, Arcadia will therefore not be able to rely on Article 6(1) of the Convention.

23. One of the particular objectives of Section 5[7] is to *protect employees*, who are regarded as the weaker party to the contract, by rules of jurisdiction that are more favourable to their interests.[8] To that end, that section deprives the employer of any jurisdictional option to bring his claim and gives the employee the advantage of being able to be sued, in principle, only in the courts which are deemed to be the most familiar to him.

24. The outcome of the plea of lack of competence raised by the defendants in the main proceedings depends on the extent of the scope of Section 5. In that regard, Article 18(1) of the Lugano II Convention applies, I would reiterate, to claims 'in matters relating to individual contracts of employment'. Two conditions flow from that wording: first, there must be a 'contract' between the parties and, secondly, the claim must relate, in some way or other, to that 'contract'.

25. The second and fourth questions referred by the national court essentially concern the first of those conditions, while the first and third questions relate to the second condition. I shall thus consider the interpretation of the concept of 'individual contract of employment' (B) and then the issue of the relationship that must exist between the claim and the 'contract' (C), before coming back to the concept of 'employer' within the meaning of Section 5 (D).

B. The concept of 'individual contract of employment' (the second question)

26. By its second question, the referring court asks, in substance, whether contracts such as those which had been concluded between the defendants in the main proceedings and certain companies in the Arcadia Group can be classified as 'individual contracts of employment' within the meaning of the provisions of Section 5. That court seeks to ascertain to what extent, for the purposes of such classification, it is necessary for there to be a relationship of subordination between an individual and the company that uses his services. It raises the question of whether such a relationship can exist when the individual decides on the terms of his contract and has full control and autonomy over the day-to-day operation of the company's business and the performance of his own duties, while the shareholders of the company have the power to terminate the contract. In addition, the referring court wishes to know the conditions which allow the inference, for the purposes of Section 5, of the existence of such 'contracts' between the defendants in the main proceedings and the Arcadia companies with which they had not formally concluded a contract.[9]

6 See judgments of 22 May 2008, *Glaxosmithkline and Laboratoires Glaxosmithkline* (C-462/06, EU:C:2008:299, paragraphs 19 and 20); of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688, paragraph 51); and of 21 June 2018, *Petronas Lubricants Italy* (C-1/17, EU:C:2018:478, paragraph 25).

7 The rules on jurisdiction laid down in the Lugano II Convention and the Brussels I Regulation pursue generally the objective of ensuring legal certainty. They must, therefore, be highly predictable: claimants must be able to determine before which courts they may bring an action and defendants must be able reasonably to predict in which courts they might be sued. In addition, these rules help ensure the sound administration of justice. See judgments of 19 February 2002, *Besix* (C-256/00, EU:C:2002:99, paragraph 26), and of 10 April 2003, *Pugliese* (C-437/00, EU:C:2003:219, paragraph 16).

8 See recital 13 of the Brussels I Regulation and judgments of 19 July *Mahamdia* (C-154/11, EU:C:2012:491, paragraph 44), and of 21 June 2018, *Petronas Lubricants Italy* (C-1/17, EU:C:2018:478, paragraph 23).

9 The second part is addressed by the referring court in the context of its fourth question. Nevertheless, I think it useful to examine it now.

1. Admissibility

27. As the referring court indicates, Arcadia did not dispute before the lower national courts the fact that, vis-à-vis the companies with which they had formally concluded a contract of employment, the defendants in the main proceedings had the status of employee. According to the defendants in the main proceedings, a reply from the Court on this issue is therefore not necessary for the resolution of the dispute in the main proceedings.

28. I do not share that view. In the context of the cooperation between the Court of Justice and the national courts established by Article 267 TFEU it is for the national courts alone to assess, in the light of the particular features of the case, both the need for a preliminary ruling in order for them to give judgment and the relevance of the questions which they put to the Court.[10]

29. Moreover, it seems to me that Arcadia's not disputing the point may be explained by the fact that it had initially taken the view that the existence of a contract of employment within the meaning of substantive law automatically led to classification as an 'individual contract of employment' within the meaning of the provisions of Section 5. However, the group has since changed its view and now strenuously disputes that classification. In addition, at every stage in the national procedure the parties have disagreed as to whether such 'contracts' existed between the defendants in the main proceedings and the companies in the group with which they had not formally concluded a contract.[11] An answer from the Court of Justice is therefore clearly necessary.

2. Substance

30. It is worth repeating that, at the time of the disputed facts, the defendants in the main proceedings acted as *company directors* for the Arcadia Group, within the meaning of company law. More specifically, Mr Bosworth was the de facto Chief Executive Officer[12] of the group and Mr Hurley was the group's de facto Chief Financial Officer. In addition, they were *de jure* or de facto directors[13] of Arcadia London, Arcadia Switzerland and Arcadia Singapore.

31. Also, both of the defendants in the main proceedings had concluded a contract of employment, within the meaning of substantive law,[14] with a particular company in the Arcadia Group. The identity of the company changed over time, inasmuch as the two were variously employed by Arcadia London and Arcadia Singapore — but not by Arcadia Switzerland. The various contracts stipulated that the defendants in the main proceedings were to carry out specific managerial duties solely for the company that employed them. The only remuneration they received from the group was that stipulated in those contracts, paid by the employer-company, for those specific functions.

32. In that context, the question arises, first of all, of whether, for the purposes of the application of the rules on jurisdiction laid down in the Lugano II Convention, it is at the outset necessary to distinguish the relationships that existed between the defendants in the main proceedings and the companies of the Arcadia group with which they had formally concluded a contract, within the meaning of substantive law, from those that existed between them and the other companies of that group. I am not convinced they should, and there are two reasons for that.

10 See, inter alia, judgment of 14 March 2013, *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 19 and the case-law cited).

11 See Court of Appeal (England & Wales) (Civil Division), 19 August 2016, *Peter Miles Bosworth and Colin Hurley* v *Arcadia Petroleum Ltd and others*, [2016] EWCA Civ 818, paragraphs 90 and 91.

12 A de facto director is a person who, without being formally appointed as a director of a company, actually carries out a director's duties.

13 Mr Bosworth was appointed a director of Arcadia Singapore for a certain time and Mr Hurley was appointed an administrator of Arcadia London and then of Arcadia Singapore. Independently of those appointments, they, as a matter of fact, carried out those duties for all the Arcadia companies concerned throughout the period to which the facts in the main proceedings relate.

14 It is not absolutely clear from the order for reference whether that classification is in accordance with the *lex causae* or the *lex fori*.

33. In the first place, the concept of 'individual contract of employment', within the meaning of Article 18(1) of the Lugano II Convention, must be interpreted not by reference to the *lex causae* or the *lex fori*, but *independently*, in order to ensure the uniform application of the jurisdictional rules laid down by the Convention in all the States bound by it.[15]

34. As regards that independent definition, it is clear from the judgment in *Holterman* that an 'individual contract of employment' exists where, for a certain period of time, a person performs services for and under the direction of another in return for which he receives remuneration.[16] Such a 'contract' exists therefore once the features of an *employment relationship* — the performance of services, remuneration and subordination — are factually present. As the defendants in the main proceedings, the Swiss Confederation and the Commission point out, such a 'contract' can therefore exist between two persons even if, within the meaning of the applicable substantive law, no contract has been concluded and the employment relationship is a purely de facto one.[17]

35. I would clarify that that interpretation respects the wording of Section 5, in that the expression 'individual contract of employment' does not imply the formal conclusion of a contract within the meaning of substantive law. Moreover, the use of that expression in the instruments which bind the Member States and/or the European Union in matters of private international law dates back to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980.[18] When that Convention was adopted, the expression 'individual employment contracts' was preferred over 'employment relationship', proposed in an early draft of the Convention, essentially because the latter expression was unfamiliar in certain national legal systems.[19] It would therefore be a mistake to contrast 'contract' with 'relationship' within the context of Section 5.[20]

36. Consequently, the absence of any formal contract within the meaning of substantive law between the defendants in the main proceedings and one or other Arcadia company does not rule out the possibility of inferring from the facts a 'contract' for the purposes of the provisions of Section 5. Conversely, the contracts concluded between the parties concerned and other companies of the group will not necessarily be regarded as 'individual contracts of employment' within the meaning of Section 5.

37. In the second place, it is clear from the order for reference that, irrespective of the stipulations of the contracts in question, the various postings of the defendants in the main proceedings as employees of this or that Arcadia company and their movements within the group did not, as a matter of fact, alter the nature of the duties they carried out or have any effect on their respective roles as CEO and

15 See judgment of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraphs 35 to 37) ('the judgment in *Holterman*').

16 See the judgment in *Holterman*, paragraphs 39 to 45 and 49. The Court also referred, in the first two paragraphs, to the fact that both the employee and the employer are bound by a lasting relationship which puts the former in the context of a certain organisation of the latter's affairs. Nevertheless, the fact that the Court did not refer to that element in its answer in paragraph 49 of that judgment and in its operative part indicates, in my view, that it does not consider it to be a *condition* for the classification as an 'individual contract of employment' within the meaning of Section 5, but as a mere *description* of that type of contract.

17 See, by analogy, the Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I (OJ 1980 C 282, p. 1), especially p. 25. See also Baker Chiss, C., 'Compétence judiciaire, reconnaissance et exécution des décisions en matière civile et commerciale — Compétence — Règles de compétences spéciales — Règles de compétence protectrices des parties faibles — Contrat de travail — Articles 20 à 23 du règlement (UE) No 1215/2012', *JurisClasseur Droit international*, fasc. 584-155, 15 September 2014, paragraphs 29 to 38 and 46; Merrett, L., *Employment Contracts in Private International Law*, Oxford University Press, 2011, pp. 62-77, and Grušić, U., *The European Private International Law of Employment*, Cambridge University Press, 2015, pp. 78-83.

18 OJ 1980, L 266, p. 1.

19 See Grušić, U., op. cit., pp. 61-62.

20 Moreover, such an interpretation remains essential if the objective of protection pursued by Section 5 is to be met. The interpretation of the concept of 'individual contract of employment', within the meaning of Section 5, must be sufficiently broad as to capture all workers who need protection, including those who are in atypical employment relationships and have no real contract, yet are equally dependent on their employer.

CFO *of all the Arcadia companies and of the group itself*. In short, the postings were purely formal. The contracts were drawn up by, or under the direction of the defendants in the main proceedings, who *chose* not only the terms of those contracts, but also *the company with which the contract was to be concluded*.[21]

38. Therefore, it is necessary next to determine whether the relationships that existed between the defendants in the main proceedings, in their capacity as company directors, and *each of the Arcadia companies* (whether or not a formal contract existed at a given moment) may be regarded as 'individual contracts of employment' within the meaning of the provisions of Section 5.

39. By accepting the duties of director of a company, a person freely accepts the obligations associated with that activity. Likewise, by entrusting a social mandate to that person, the company voluntarily assumes certain obligations towards him. In particular, the duties of a company director are, as a general rule, exercised in return for remuneration.[22] There are therefore *obligations freely assumed* between the company and the director which fall within the scope of 'matters relating to a contract' within the meaning of Article 5(1) of the Lugano II Convention and of the Brussels I Regulation. In my view, that is true whether or not that director has been formally appointed (*ex jure* directorship) or, without any formal appointment, actually conducts himself as such (de facto directorship).[23]

40. Under the 'contractual obligations' which thus bind the director and the company, the director provides the company with services in return for remuneration. Following the explanations given in point 34 above, their relationship must be classified as an 'individual contract of employment', within the meaning of Section 5, only if the director is subordinate to the company in the performance of his duties.

41. In that regard, in *Holterman*, the Court held that, for the purposes of Section 5, the question of whether a relationship of subordination exists 'must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties'. The Court also stated that a director holding a sufficient share of the capital to influence in a 'non-negligible' manner the persons normally competent to give him instructions and to supervise their implementation cannot be subordinate to the company.[24]

42. It would be wrong to read that reasoning *a contrario*, as meaning that an officer who does not hold a share in the share capital, as was the case of the defendants in the main proceedings, is, by that fact alone, subordinate to the company. While the Court has indicated, in that judgment, a circumstance excluding a subordination in all events, it has not ruled on the elements likely to characterise it.

43. With regard to those elements, it is possible to draw on the Court's case-law on the concept of 'worker' within the meaning of Article 45 TFEU and certain harmonisation directives. According to that case-law, what characterises a relationship of subordination is the fact that a worker finds himself under the direction of another person, one that determines not only what work he will carry out, but also and especially the manner in which it is to be carried out and whose instructions and internal rules and regulations must be followed. In order to determine whether such a relationship of

21 Arcadia has argued before the domestic courts that the choice of the defendants in the main proceedings to be formally employed by Arcadia London or Arcadia Singapore, but not Arcadia Switzerland, is explained by the simple fact that they had opted to be taxed in Switzerland under a regime which precluded any gainful activity in that State. See Court of Appeal (England & Wales) (Civil Division), 19 August 2016, *Peter Miles Bosworth and Colin Hurley* v *Arcadia Petroleum Ltd and others* [2016] EWCA Civ 818, paragraph 71.

22 This was the case here. The fact that the remuneration of the defendants in the main proceedings was paid solely by certain companies of the Arcadia group is, in my view, irrelevant. The form that the remuneration takes and the way in which its payment is organised does not matter. See, by analogy, judgment of 19 December 2013, *Corman-Collins* (C-9/12, EU:C:2013:860, paragraphs 39 and 40).

23 See the judgment in *Holterman*, paragraphs 53 and 54. See also, on the concept of 'matters relating to a contract' within the meaning of Article 5(1) of the Brussels I Regulation, judgments of 17 June 1992, *Handte* (C-26/91, EU:C:1992:268, paragraph 15), and of 17 September 2002, *Tacconi* (C-334/00, EU:C:2002:499, paragraph 23).

24 See the judgment in *Holterman*, paragraphs 46 and 47.

subordination exists it is therefore necessary to have regard to the autonomy and flexibility enjoyed by the worker in choosing the time, place and method of performing the tasks entrusted to him and/or to the supervision and control which the employer exercises over the way in which the worker performs his duties. [25]

44. It follows that, as the Arcadia Group and the Swiss Confederation point out, a company director is subordinate to the company only if he is subject to the effective direction of another person in the exercise and organisation of his duties. The existence of such a direction is assessed in the light of the nature of the functions in question, the context in which they are exercised, the extent of the powers of the person concerned and the control to which he is effectively subject within the company. [26]

45. However, by hypothesis, company directors, such as the defendants in the main proceedings, who, according to the information given by the referring court, in their capacities as CEO and CFO, *enjoy the broadest powers in managing the company and in acting in the name of and on behalf of the company and have complete control and complete autonomy* over the day-to-day management of its affairs and the performance of their duties, as is demonstrated in the present case by the fact that their successive employment contracts were drawn up by them or under their direction and that they chose the wording of those contracts and their formal employer, are not subordinate to the company in those duties.

46. In particular, contrary to the argument of the defendants in the main proceedings, there cannot be any confusion between subordination and the general directives which a director may be given by the shareholders for the orientation of the company's business. Such general directives *do not concern the actual performance of the director's duties or the manner in which he organises them*. A company director is mandated to act for the company and, as such, may receive reasonable instructions regarding his mission. For the same reasons, the control mechanisms which the law establishes for shareholders do not in themselves point to the existence of a subordination relationship. Every agent must render certain accounts to his principal. Furthermore, the mere fact that the shareholders have the power to revoke a directorship is not sufficient to demonstrate a relationship of subordination. The fact that they have such a power of revocation does not mean that they have involved themselves in the way of directing the company. Here again, in the context of any mandate, a principal may unilaterally terminate the relationship with his agent, without this circumstance in itself demonstrating subordination.

47. In light of all the foregoing, I am of the opinion that, in the present case, there were indeed reciprocal contractual obligations of the type referred to in Article 5(1) of the Lugano II Convention between the defendants in the main proceedings and each of the Arcadia companies. Those obligations have sometimes been formalised in contracts, sometimes not. In any event, those same obligations cannot be regarded as 'individual contracts of employment' within the meaning of the provisions of Section 5.

25 See judgments of 3 July 1986, *Lawrie-Blum* (66/85, EU:C:1986:284, paragraph 18); of 13 January 2004, *Allonby* (C-256/01, EU:C:2004:18, paragraph 72); of 4 December 2014, *FNV Kunsten Informatie en Media* (C-413/13, EU:C:2014:2411, paragraphs 36 and 37); and of 20 November 2018, *Sindicatul Familia Constanța and Others* (C-147/17, EU:C:2018:926, paragraph 45).

26 See, by analogy, judgment of 11 November 2010, *Danosa* (C-232/09, EU:C:2010:674, paragraph 47), and, to that effect, the Opinion of Advocate General Cruz Villalón in *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:309, point 32).

48. Contrary to the argument of the defendants in the main proceedings, that interpretation is not called into question by the judgments in *Danosa*[27] and *Balkaya*.[28] I would point out in this connection that, in the first of those judgments, the Court of Justice held, with reference to Directive 92/85/EEC,[29] that, while it 'cannot be ruled out' that company directors are not covered by the concept of 'worker' within the meaning of that directive, 'in view of the specific duties entrusted to them, as well as the context in which those duties are performed and the manner in which they are performed', a director will be subordinated to a company where (1) he is an integral part of the company, (2) he must report on his management to another company body and cooperate with it, and (3) he may be relieved of his duties by a shareholder's meeting.[30] In the judgment in *Balkaya*[31] the Court applied that reasoning to Directive 98/59/EC[32] and, on the basis of similar indicators, found a director to be a 'worker' within the meaning of that directive.

49. However, the interpretation which the Court of Justice gives to a concept in one field of EU law cannot automatically be applied in a different field.[33] As I have indicated, this is only one source of inspiration. The concept of 'individual contract of employment', within the meaning of Section 5, must be interpreted principally by reference to the scheme and objectives of the Lugano II Convention and the Brussels I Regulation[34] and to the general principles emerging from national legal systems.[35] The abovementioned precedents may therefore be transposed to those instruments only with caution. I would also note that, in the judgment in *Holterman*, the Court did not apply that case-law in express terms; it merely referred to it on certain points.

50. I would, in this connection, observe that the three indicators on which the Court relied in finding, in its judgment in *Danosa*,[36] that a company director was a 'worker' within the meaning of Directive 92/85, are present in the case of the vast majority of them. Indeed, to a certain extent, a company director is generally (1) 'integrated' into the company, (2) has reporting duties to another company body (administration or supervisory board, shareholders' meeting and so on) and (3) may be relieved of his duties by such a body.

51. However, while the Court did decide to extend to company directors, in the judgments in *Danosa*[37] and *Balkaya*,[38] the protection against dismissal afforded by the EU harmonisation directives, to apply the logic emerging from those judgments to the jurisdictional rules laid down in the Brussels I Regulation and the Lugano II Convention would result in a large part of the litigation between a company and its directors being viewed through the prism of the concept of 'individual contract of employment' and being governed by the provisions of Section 5.

27 Judgment of 11 November 2010 (C-232/09, EU:C:2010:674).

28 Judgment of 9 July 2015 (C-229/14, EU:C:2015:455).

29 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

30 Judgment of 11 November 2010, *Danosa* (C-232/09, EU:C:2010:674, paragraphs 48 to 51).

31 Judgment of 9 July 2015 (C-229/14, EU:C:2015:455, paragraphs 37 to 41).

32 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

33 See, to that effect, judgment of 23 April 2009, *Falco Privatstiftung and Rabitsch* (C-533/07, EU:C:2009:257, paragraphs 33 to 40), and my Opinion in *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:312, point 112).

34 See the Opinion of Advocate General Cruz Villalón in *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:309, point 25).

35 See, to that effect, judgments of 3 October 2013, *Schneider* (C-386/12, EU:C:2013:633, paragraph 18); of 19 December 2013, *Corman-Collins* (C-9/12, EU:C:2013:860, paragraph 28); and of 14 July 2016, *Granarolo* (C-196/15, EU:C:2016:559, paragraph 23).

36 Judgment of 11 November 2010 (C-232/09, EU:C:2010:674).

37 Judgment of 11 November 2010 (C-232/09, EU:C:2010:674).

38 Judgment of 9 July 2015 (C-229/14, EU:C:2015:455).

52. I should point out in this connection that, in the domestic legal systems of the Member States, the relationships between companies and their directors are governed not by employment law, but by *company law*. Directors are social bodies. The duties of managing director, and the powers and obligations which flow from those duties, are determined by company statutes and applicable legal provisions. Admittedly, in certain Member States, including the United Kingdom, directors and companies may frame their respective rights and obligations in a contract — which may be a management contract, an agency agreement or a contract of employment.[39] Nevertheless, company law remains at the heart of their relationship.

53. In particular, disputes relating to the liability of company directors to their companies and their shareholders — and that is the background to the present case — are disputes which fall under company law in that they generally concern specific provisions of the laws of the Member States which govern the conditions for and extent of such liability.[40]

54. Such a marked discord between domestic classifications and classification for the purposes of the Lugano II Convention and the Brussels I Regulation would not aid the application of those two instruments or the predictability of the jurisdictional rules which they lay down. Moreover, the practical disadvantages that would flow from the generalised application of Section 5 to company directors would ill serve the special nature of disputes concerning their liability and would not be very consistent with the objective of the proper administration of justice. In this area, the joint and several liability of the various company directors of a company for harm they have caused to their company in its management is a normal solution.[41] However, if Section 5 were to apply, each director would have to be sued separately in the courts of his place of domicile, without it being possible to bring that dispute before a single forum.

55. In addition, I would point out that the jurisdictional rules of the Brussels I Regulation and, by extension, of the Lugano II Convention must be interpreted in a manner consistent with the rules on conflicts of laws laid down in the Rome I Regulation.[42] However, although the Rome I Regulation does contain, in Article 8, provisions relating to 'individual employment contracts', it also provides, in Article 1(2)(f), that 'questions governed by the law of companies' concerning, inter alia, the 'internal organisation' of companies are excluded from its scope.

39 See the Opinion of Advocate General Cruz Villalón in *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:309, footnote 28). See *The Companies Act* 2006, *Part 10, Chapter 5*, § 227, entitled 'Director's service contracts'. By contrast, in other Member States, including France, the combining of a directorship and a contract of employment is only possible if the director carries out technical duties that are distinct from the duties inherent in a directorship. In some cases, therefore, a person may have *two separate positions* and his directorial duties will be governed by company law rules, while his duties as employee will be governed by employment protection rules, and he will receive separate remuneration for each set of duties. See Bavozet, F., 'dirigeants salariés et assimilés. — Affiliation au régime des salariés. — Conditions de cumul d'un contrat de travail et d'un mandat social', *JurisClasseur*, fasc. S-7510, 7 February 2018.

40 See, by way of example, Article L 223-22 of the French Code de commerce (Commercial Code), Article 236 et seq. of the Spanish Ley de Sociedades de Capital (Spanish law on capital companies) of 2 July 2010 (BOE No 161, 3 July 2010, p. 58472) and Articles 361, 363, 364 and 365 of the Danish Selskabsloven (Law on companies). Those rules have been slightly harmonised by Articles 106 and 152 of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L 169, p. 46). See also Article 51 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (OJ 2001 L 294, p. 1).

41 See, by way of example, Article L 223-22 of the French Code de commerce (Commercial Code) and Article 237 of the Spanish law on capital companies.

42 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6). See recital 7 of that regulation and judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraphs 43 to 45).

56. It is generally acknowledged that the issues relating to the powers and functioning of the company bodies, including those of the company's directors, and to their liability to the company and its shareholders or members in the event of the misuse of those powers fall within that category.[43] Given the exclusion provision thus provided for by the Rome I Regulation, it is the *conflict of laws rules of each Member State* that will determine the law applicable to those issues.

57. In the light of all the above, I strongly doubt that the European Union legislature or drafters of the Lugano II Convention intended to extend the application of Section 5 to disputes concerning the civil liability of company directors. The interests at stake in such disputes are, moreover, quite different from the interests surrounding the liability of employees to their employer. The balance that needs to be struck is not the same and the rules of private international law help to achieve that balance.[44]

58. In other words, it is not possible to adopt, for the purposes of Section 5, the same interpretation of the concept of 'subordination' as was used by the Court in its judgments in *Danosa*[45] and *Balkaya*,[46] since that would create real confusion between the rules of employment law and those of company law, one that might be excusable in the context of those two judgments, but which would be particularly troublesome in the context of the jurisdictional rules laid down in the Lugano II Convention.

59. The interpretation suggested in points 45 to 47 of this Opinion is equally not called into question by the argument of the defendants in the main proceedings that the rules of Section 5 do not distinguish between categories of employees. Indeed, I do not suggest that the Court should draw any distinctions between subordinated workers not contemplated by the drafters of the Lugano II Convention. I merely propose that it should construe the concept of 'subordination', for the purposes of the application of that section, in a way which accommodates the particularities of company law and the reality of social mandates.

60. In light of all the foregoing considerations, I suggest that the Court's answer to the second question should be that a company director who has total control and total autonomy over the day-to-day operation of the business of the company which he represents and the performance of his own duties is not subordinated to the company and, consequently, does not have an 'individual contract of employment' with the company within the meaning of Article 18(1) of the Lugano II Convention. The fact that the shareholders of the company have the power to relieve the director of his duties does not call that interpretation into question.

43 It is also generally recognised that those issues fall within the *lex societatis*. See the Report on the Convention on the law applicable to contractual obligations, by Giuliano and Lagarde, cited in footnote 21, p 12; Cour de Cassation (Court of Cassation), 1st Civil Chamber (France), 1 July 1997, No 95-15.262, *Mr X* v *Société Africatours*; Cohen, D., 'La responsabilité civile des dirigeants sociaux en droit international privé', *Revue critique de droit international privé*, 2003, p. 585, and Menjucq, M., *Droit international et européen des sociétés*, LGDJ, Paris, 2011 (3rd edition), pp. 116-117.

44 It is a delicate weighing in the balance of, on the one hand, the objective of protecting the interests of the members and maintaining the degree of confidence that is necessary to the smooth operation of any undertaking by ensuring, with the threat of liability, that directors act reasonably and, on the other hand, the need to not paralyse the management and direction of companies — which entails a degree of risk-taking — with a systematic, excessive regime of liability. See Guyon, Y., 'Responsabilité civile des dirigeants', *JurisClasseur Sociétés Traité*, paragraph 1 and the works of legal theory cited.

45 Judgment of 11 November 2010 (C-232/09, EU:C:2010:674).

46 Judgment of 9 July 2015 (C-229/14, EU:C:2015:455).

C. The test for determining whether claims are 'matters relating to' individual contracts of employment (the first and third questions)

61. At the outset, if the Court of Justice should hold, as I suggest, that there can be no 'individual contracts of employment' within the meaning of Article 18(1) of the Lugano II Convention between company directors as omnipotent as the defendants in the main proceedings were and the companies for which they carry out their duties, it will not be necessary to answer the first and third questions put by the referring court. I shall therefore examine them only in the alternative.

62. That said, I would reiterate that, in this instance, the claims made by Arcadia against the defendants in the main proceedings rest, essentially, on the tort *unlawful means conspiracy* and the tort of *breach of fiduciary duty*. In English law, those legal bases are tortious.

63. In that context, by its first and third questions, the referring court seeks to establish whether a claim made by one of the parties to an 'individual contract of employment' against the other and constructed on a tortious legal basis can fall within the scope of Section 5 and, if so, according to which criteria.

64. According to Arcadia, Section 5 does not apply to its claims since they are based not on an obligation arising from the employment contracts of the defendants in the main proceedings,[47] but on the breach of legal duties existing independently of those contracts. Section 5 is, by nature, a subdivision of the category of 'matters relating to a contract' referred to in Article 5(1) of the Lugano II Convention. Any claim with such legal bases will fall within a 'matter relating to tort', as referred to in Article 5(3) of the Convention, and will therefore fall outside the scope of Section 5.

65. The defendants in the main proceedings, on the other hand, argue that, for the purposes of applying Section 5, the decisive criterion is whether, irrespective of the substantive rule of law on which the employer bases its claim, the conduct complained of *may constitute a breach of contractual obligations* arising from an individual contract of employment, on which it could have relied.[48] This is the case here. In that regard, it is common ground that Arcadia could have based its claims on *breach of express and/or implied contractual duties* arising from the individuals' contracts of employment.[49] Section 5 therefore applies to the dispute in the main proceedings.

66. Having regard to the arguments of the parties in the main proceedings, and in order to propose an exhaustive answer to the questions of the referring court, I think it useful first to go over the issue of tort claims submitted between co-contracting parties generally and to analyse the relevant applicable solutions in the context of Article 5(1) and Article 5(3) of the Brussels I Regulation and the Lugano II Convention (1). I shall then explain the reasons for which Section 5 calls for a different solution (2).

1. The issue of claims in tort made against a contractual partner

67. In theory, in the area of civil liability, the distinction between what is a contractual matter and what is a tortious matter depends on the nature of the obligation on which the claimant relies against the defendant. In short, it is a question of determining whether the obligation results from the breach of a duty derived immediately from the law and enforceable against everyone (the obligation is thus tortious), or from the effect of a voluntary agreement between two persons (in which case the obligation is contractual).[50]

47 This is the criterion to which Question 1(b) and Question 3(b) essentially relate.

48 This is the criterion to which Question 1(a) and Question 3(a) essentially relate.

49 As indeed it did in its initial particulars of claim, until the defendants in the main proceedings argued the applicability of Section 5 and it amended its claim.

50 Of course, the *primary source* of all obligations is the law, given that no obligation could exist if the law did not permit it (for example, by imposing rules which give agreements their binding effect and validity).

68. Nevertheless, it may be the case that the same harmful behaviour constitutes both a breach of a contractual obligation and a failure to fulfil a legal duty enforceable against everyone. In such a case there will be *potentially concurrent liabilities* (or concurrent contractual and tortious obligations).

69. The fraud which the Arcadia Group alleges the defendants in the main proceedings to have committed gives rise to such concurrent liabilities. Indeed, there is in English law a general duty not to conspire with the aim of causing harm to another. Failure to comply with that duty is a tort of conspiracy. Independently of that, a worker's causing harm to his employer constitutes a breach of his contractual duty of loyalty. The harmful conduct thus potentially gives rise to two distinct liabilities.

70. Faced with such concurrent liabilities, some national legal systems, including English law, leave it to the applicant to *choose* whether to base his claim against his contractual partner on tortious liability and/or contractual liability.[51] Other systems, by contrast, including French law, *in principle rule out such a choice*, in accordance with the rule of 'non-accumulation': an applicant cannot rely on a non-contractual obligation against a contractual partner where the facts alleged also constitute a breach of contract.

71. The Brussels I Regulation and the Lugano II Convention make this same distinction between 'matters relating to a contract' Article 5(1)) and 'matters relating to tort' (Article 5(3)) and lay down different jurisdictional rules according to which of those categories the claim falls under. The problem of concurrent liabilities therefore extends to these two instruments. In this context, it is necessary to establish whether the claimant's choice of basing his claim against his contractual partner on contractual liability and/or on non-contractual liability is decisive in determining jurisdiction.

72. The Court considered this issue for the first time in its judgment in *Kalfelis*.[52] The case which resulted in that judgment concerned an action by an individual against his bank for compensation for losses he had sustained in connection with stock exchange transactions. The individual alleged (1) contractual liability, (2) liability in tort and (3) unjust enrichment (a quasi-contractual claim). The particular question which arose was whether the court which had jurisdiction under Article 5(3) of the Brussels Convention to give judgment on the issue of tortious liability also had jurisdiction in relation to the contractual and quasi-contractual claims.

73. The Court held that the concept of 'matters relating to tort, delict and quasi-delict' had to be regarded as an independent concept covering 'all actions which seek to establish the liability of the defendant and which are not related to a "contract" within the meaning of Article 5(1)' of the Brussels Convention. Read in isolation, that passage might suggest that a claimant's decision to construct a claim against a contractual partner on tortious liability is not relevant to the issue of jurisdiction: it will in any event be a 'matter relating to a contract'. However, the Court held that 'a court which has jurisdiction under Article 5(3) [of that convention] over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based'.[53]

74. Despite the somewhat ambiguous nature of its answer, it seems that, in that judgment, the Court considered that *each of the legal bases relied on by the applicant* — that is to say the various rules of substantive law used as *cause* for his claims — must be classified as either 'relating to a contract' or 'relating to a tort or delict'. That jurisdiction is therefore liable to vary according to the substantive rule on which the applicant relies.[54] I make it clear that, for the purposes of the Brussels I Regulation

51 In the substantive laws of the Member States, contractual liability and tortious liability may be governed by different regimes in terms of the burden of proof, the extent of damages available, time bars, and so on. The claimant may therefore have an interest in choosing one legal basis rather than the other.

52 Judgment of 27 September 1988 (189/87, EU:C:1988:459).

53 Judgment of 27 September 1988, *Kalfelis* (189/87, EU:C:1988:459, paragraphs 16 to 19).

54 The Court subsequently confirmed that approach: see, in particular, judgment of 16 May *Melzer* (C-228/11, EU:C:2013:305, paragraph 21). See also Zogg, S., 'Accumulation of Contractual and Tortious Causes of Action Under the Judgments Regulation', *Journal of Private International Law*, 9:1, pp. 39-76, spec. pp. 42 and 43.

or the Lugano II Convention, it is not a question of adopting the classification provided for in national law. In fact, for the Court, the rule invoked refers to an obligation. It is this obligation that, for the purposes of those instruments, must be classified *autonomously* as 'contractual' — if it is freely assumed between the parties [55] — or as potentially a 'matter relating to tort, delict or quasi-delict', if it does not fall under the former category. Where, in the context of the same action, the applicant invokes separate legal grounds, he relies on different obligations — contractual, tortious, etc. — likely to fall within the competence of as many courts. [56]

75. The Court again considered the issue in its judgment in *Brogsitter*. [57] In the case which led to that judgment an individual was seeking an award of damages in tort against his contractual partners on the basis of the rules of German law against unfair competition. In that context, he complained, in particular, that they had breached a duty of exclusivity under their contract. The Court of Justice was asked how the claims must be classified for the purposes of the Brussels I Regulation.

76. Taking as its point of departure the dictum in the judgment in *Kalfelis* [58] that 'matters relating to tort' covered all actions which seek to establish the liability of the defendant and which are not related to a 'contract', the Court held that, in order to place the claims in question in one of the categories or other, it was necessary to check 'whether they are, regardless of their classification under national law, *contractual in nature*'. [59]

77. According to the Court, that would be the case 'where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract', [60] and 'will a priori be the case where the interpretation of the contract … is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of …'. [61] Therefore, it was for the national court to 'determine whether the purpose of the claims brought … is to seek damages, the legal basis for which [62] can reasonably be regarded as a breach of the rights and obligations set out in the contract … which would make its taking into account indispensable in deciding the action'. [63]

78. The judgment in *Brogsitter* [64] marks, in my view, a departure from the approach taken in the judgment in *Kalfelis*, [65] with the Court appearing to have adopted a different viewpoint in its classification, for the purposes of the jurisdictional rules laid down in Article 5(1) and Article 5(3) of the Brussels I Regulation and the Lugano II Convention. Instead of a classification which takes as its point of departure *the legal substantive basis* relied on by the applicant, it decided on a classification based on *the facts supporting the claim*. The manner in which the applicant formulates that claim appears to be irrelevant in the analysis.

55 17 June 1992, *Handte* (C-26/91, EU:C:1992:268, paragraph 15).

56 In accordance with that approach, in the present case Arcadia's various *claims* against the defendants in the main proceedings are based on so many causes — *breach of fiduciary duty, conspiracy*, etc. — which must be classified separately. In this respect, the tort of *conspiracy* refers, as I indicated, to the infringement of a legal duty binding on all parties and therefore falls within a 'matter relating to tort'. On the other hand, the tort of *breach of fiduciary duty* falls within a 'matter relating to a contract'. The fiduciary obligations in question were freely assumed by the defendants in the main proceedings in respect of Arcadia (see point 39 of this Opinion).

57 Judgment of 13 March 2014 (C-548/12, EU:C:2014:148).

58 Judgment of 27 September 1988 (189/87, EU:C:1988:459, paragraph 17).

59 Judgment of 13 March 2014, *Brogsitter* (C-548/12, EU:C:2014:148, paragraphs 20 and 21) (my emphasis).

60 Judgment of 13 March 2014, *Brogsitter* (C-548/12, EU:C:2014:148, paragraph 24). The point is repeated, in substance, in the answer given in paragraph 29 and the operative part of the judgment.

61 Judgment of 13 March 2014, *Brogsitter* (C-548/12, EU:C:2014:148, paragraph 25).

62 Here the Court seems to have accepted the notion of 'cause' not referring to the substantive law relied on by the applicant in support of his claim (the meaning in which that concept is used in point 74 of this Opinion), but to the facts mentioned in the application.

63 Judgment of 13 March 2014, *Brogsitter* (C-548/12, EU:C:2014:148, paragraph 26).

64 Judgment of 13 March 2014 (C-548/12, EU:C:2014:148).

65 Judgment of 27 September 1988 (189/87, EU:C:1988:459).

79. The precise import of the judgment in *Brogsitter*[66] is, however, uncertain. Arcadia argues that the 'Brogsitter test' is to be found in paragraph 25 of the judgment: a claim will be a 'matter relating to a contract' where it is *indispensable to interpret the contract to establish the lawful or, on the contrary, unlawful nature of the conduct complained of as a tort*. I share that view. To my mind, the Court meant to classify as 'contractual' claims of liability in tort the merits of which depend on the content of the contractual duties binding the parties to the dispute.[67]

80. The defendants in the main proceedings, on the other hand, are of the opinion that the 'Brogsitter test' is set out in paragraphs 24 and 29 of the judgment: a claim is a 'matter relating to a contract' where the conduct complained of *may be considered* — that is to say, *may constitute — a breach of contract*, whether the applicant argues that or not. Accordingly, it is unnecessary to ascertain whether it is indispensable to establish the content of the contractual obligations in order to rule on the lawfulness of the conduct complained of in the field of tort; it is instead necessary to establish whether a potential correlation between the conduct complained of and the content of those obligations exists. Where, in the light of the facts, that conduct is capable of constituting both a tortious fault and a breach of contract, and where the applicant could thus rely on one and/or the other, the contractual classification prevails for the purposes of jurisdiction.

81. However, it seems to me that, in some of its recent judgments, the Court has understood the judgment in *Brogsitter*[68] in the same way as the defendants in the main proceedings. In particular, in *Holterman*, which, I would reiterate, also concerned a situation in which various legal bases were relied on in support of the same claim for compensation, the Court held that, in order to establish whether such a claim was a 'matter relating to a contract' or a 'matter relating to tort', it was simply necessary to establish whether the conduct complained of *could be considered a breach of contract*.[69] Nevertheless, the Court merely reaffirmed this criterion without really applying (or explaining) it. Consequently, it is difficult to be sure of the meaning which the Court intended to give it.

82. It follows, in my view, from all the foregoing that the case-law of the Court is ambiguous, to say the least, in so far as concerns the way in which Article 5(1) and Article 5(3) of the Brussels I Regulation and the Lugano II Convention are to be applied in cases where there are concurrent liabilities. It would be useful for the Court to clarify its position in this regard.

83. In my opinion, for the purposes of the link between Article 5(1) and Article 5(3) of the Brussels I Regulation and the Lugano II Convention, taking into account the objectives of legal certainty, foreseeability and good administration of justice inherent in those instruments, it is preferable to adopt the logic resulting from the *Kalfelis*[70] judgment and to classify a claim as 'contractual' or 'tortious' with regard to the substantive legal basis relied on by the applicant. At the very least, the Court should hold onto a strict reading of the judgment in *Brogsitter*[71] set out in point 79 of this Opinion. In other words, if a claim submitted between contracting parties is based not on an obligation under the contract but on the rules of tortious civil liability, and it is not necessary to establish the content of the contractual obligations in order to rule on the lawfulness of the conduct complained of, that claim should be covered by Article 5(3) of those instruments.[72]

66 Judgment of 13 March 2014 (C-548/12, EU:C:2014:148).

67 See, for a similar understanding, Opinion of Advocate General Cruz Villalón in *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:309, paragraph 48), and Opinion of Advocate General Kokott in *Granarolo* (C-196/15, EU:C:2015:851, points 14 and 18). Advocate General Cruz Villalón thus proposed, in those Opinions, to apply that test to Section 5.

68 Judgment of 13 March 2014 (C-548/12, EU:C:2014:148).

69 The judgment in *Holterman*, paragraphs 32 and 71, which refer to paragraphs 24 to 27 of judgment of 13 March 2013, *Brogsitter* (C-548/12, EU:C:2014:148). Although the Court referred to those four paragraphs, it ultimately relied only on paragraph 24. See also judgment of 14 July 2016, *Granarolo* (C-196/15, EU:C:2016:559, paragraph 21).

70 Judgment of 27 September 1988 (189/87, EU:C:1988:459, paragraph 20).

71 Judgment of 13 March 2014 (C-548/12, EU:C:2014:148).

72 Under that approach, Arcadia's claims, to the extent that they rely on the tort of *conspiracy*, would fall into that category, assuming that Section 5 does not apply. It is not necessary to establish the content of the contractual obligations binding the defendants in the main proceedings to Arcadia in order to hold that conduct constituting that tort is unlawful.

84. Admittedly, I accept that, to allow the substantive legal basis relied on by the applicant to determine which courts have jurisdiction would be to authorise a degree of *forum shopping*, enabling the applicant to choose jurisdiction, by stating the appropriate rules. Moreover, the same harmful conduct, apprehended by the applicant from the viewpoint of different legal bases, could then in theory fall within the jurisdiction of different fora, entailing possible fragmentation of the action. In that context, a solution such as that proposed by the defendants in the main proceedings would prevent such *forum shopping* and offer the advantage of channelling disputes arising from a contractual relationship toward the jurisdiction which governs the contract.

85. However, the problems which I have outlined must be put into perspective. Indeed, the drafters of the Lugano II Convention and of the Brussels I Regulation themselves permitted a certain degree of forum shopping, allowing applicants some options as to jurisdiction. In the event of a competition of responsibilities, both the contractual and the tortious courts have a close link with the dispute, and those instruments *do not provide for a hierarchy between the courts in question*. As regards the risk of fragmentation of actions, as the Court itself pointed out in the judgment in *Kalfelis*,[73] the applicant can always bring his action before the courts for the place where the defendant is domiciled, in accordance with Article 2 of those instruments, which would then have jurisdiction to rule on the action in its entirety.

86. I also recognise that a practical aspect weighs in the balance. Certain legal systems, including English law, impose on claimants a standard of *strict pleading*, requiring them to state in their applications not only the facts and subject matter of the claim, but also the legal bases on which they rely. Others, by contrast, including French law, do not constrain claimants which such a requirement. Nevertheless, a certain degree of relativism is again called for. The fact that an applicant is not required to state the legal basis on which he relies does not mean that, where he has taken care to do so, it should be disregarded.

87. But, beyond those considerations, my position is essentially motivated by the imperative of simplicity attaching to the rules on jurisdiction. I would point out that the objective of legal certainty requires that the national court seised may easily decide on its own competence, without being obliged to examine the merits of the case.[74]

88. In that regard, by making jurisdiction dependent on the substantive legal basis (or the obligation) on which the claimant relies, the reasoning of the court seised will be simple: as I have mentioned, it is this obligation that it will have to classify as 'contractual' or as potentially a 'matter relating to tort', for the purposes of the Brussels I Regulation or the Lugano II Convention. Conversely, if the court were required to classify claims, in the light of the facts — is there a contractual breach on which the applicant could have relied? — that would complicate its task considerably. As Arcadia points out, that would amount to requiring the court to hypothesise about the way in which a case *might have been pleaded*. To verify, at the jurisdiction stage, in fact, a possible correlation between the conduct complained of and the content of the contractual obligations is not always a small matter. In a good number of cases it would be especially burdensome for the court to have to determine or even imagine, at that early stage, the content of those obligations: it would have to establish which law applied, which will determine not only the method for interpreting the contract (essential for establishing its content), but also all the implied terms of contracts of the type in question. That difficulty could well diminish the predictability of the rules on jurisdiction.

73 Judgment of 27 September 1988 (189/87, EU:C:1988:459, paragraph 20).

74 Judgments of 3 July 1997, *Benincasa* (C-269/95, EU:C:1997:337, paragraph 27), and of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 61)

89. Moreover, I would point out that, in principle, the court seised must be able to establish whether it has jurisdiction on the basis of the *claimant's allegations alone*.[75] Conversely, to require the court to make an overall assessment of the facts would mean in practice that the defendant could negate the rule of jurisdiction in a 'matter relating to tort' of Article 5(3) of the Brussels I Regulation and the Lugano II Convention, simply by arguing the existence of a contract between the parties and the possible correlation between the conduct complained of and the obligations contained in the contract.[76]

90. Finally, I recall again that, in a 'matter relating to a contract', under Article 5(1) of the Brussels I Regulation and the Lugano II Convention, and leaving aside the case of the specific contracts specified in Article 5(1)(b), jurisdiction lies with the court of the place where *the obligation on which the claim is based has been or must be performed*. However, I wonder about the implementation of that rule where the applicant's claim is not specifically based on a particular contractual duty but must still be classified as 'contractual' in the light of the facts.

2. The issue of claims in tort made against a contractual partner in the context of Section 5

91. That being the case, as I have already indicated, the problem of tort claims presented between co-contracting parties calls, in my view, for a different solution in the context of the application of Section 5.

92. In this connection, having regard inter alia to the fact that there are linguistic differences between the German, English and French versions of Article 18(1) of the Lugano II Convention and the Brussels I Regulation,[77] particular attention must be paid to the general scheme of those instruments and to the objective of protection pursued by Section 5.[78]

93. The autonomous, mandatory nature of Section 5, and the same protective purpose demand, in my opinion, that that section not be amenable to circumvention by employers merely by their formulating claims in tort.[79] In this context, the employer cannot have a choice. Otherwise the section would lose its effectiveness.[80] Those factors tip the balance in favour of classification not by reference to the substantive legal bases on which the applicant relies, but by reference to the facts of the dispute.

94. Consequently, I am of the opinion that a claim is a 'matter relating to an individual contract of employment', for the purposes of Section 5, where, in the light of the facts, there is a material link between the claim and such a 'contract'. This is the case if the claim relates to a dispute *arising in connection with the employment relationship*, whether or not the claimant bases his claim on the 'contract', and whether or not it is necessary to establish the content of the contractual obligations in

75 See judgment of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 62).

76 See, by analogy, judgment of 4 March 1982, *Effer* (38/81, EU:C:1982:79, paragraph 7).

77 While the wording of the last two versions is relatively broad ('in matters relating to individual contracts of employment'; 'en matière de contrat individuel de travail'), that of the first version is significantly narrower ('[b]ilden ein individueller Arbeitsvertrag oder Ansprüche aus einem individuellen Arbeitsvertrag den Gegenstand des Verfahrens').

78 See, by analogy, judgment of 30 May 2013, *Genil 48 and Comercial Hostelera de Grandes Vinos* (C-604/11, EU:C:2013:344, paragraph 38 and the case-law cited). The Court emphasised that that protection objective must be taken into account in interpreting the provisions of Section 5. See judgment of 19 July 2012, *Mahamdia* (C-154/11, EU:C:2012:491, paragraph 60).

79 The strategic pleading which such an approach would entail is particularly visible where, as in the present case, the applicant initially alleges breach of contract and then amends his claim to remove all contractual aspects.

80 The case-law of the courts of England and Wales is very instructive in this regard. Initially, the High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court) held, in its judgment in *Swithenbank Foods Ltd.* v *Bowers* (Judge McGonigal) ([2002] 2 All ER (Comm) 974, paragraphs 24 to 26), that Section 5 applied only where the employer based his claim against the employee on the employment contract. The Court of Appeal (England & Wales) (Civil Division) departed from that ruling in its judgment in *Alfa Laval Tumba* v *Separator Spares* ([2012] EWCA Civ 1569, paragraphs 24 and 25), specifically to prevent the risk of Section 5 being circumvented, and instead adopted a broader approach centred on the substance of the dispute.

order to decide on its merits. That condition must be given a broad interpretation. In other words, to the extent that that condition is fulfilled, even a claim based on tort rules (such as Arcadia's *conspiracy claim*), which would fall, in principle, within the scope of Article 5(3) of the Brussels I Regulation or the Lugano II Convention, falls within Section 5.[81]

95. In so far as concerns, more specifically, the issue which underlies the questions referred by the national court, that is to say, claims for compensation made by an employer against an employee, I am of the opinion that such claims fall within Section 5 if, as the Court found in the judgment in *Holterman*, the employer is relying on *alleged wrongdoings on the part of the employee in the performance of his duties*.[82]

96. I cannot, however, leave it at that. Indeed, apart from the situations in which the alleged wrongdoing clearly occurred in the course of the performance of the duties assigned to the employee and situations in which there is, by contrast, no connection between the wrongdoing and the employee's duties,[83] there will also be a number of 'grey areas'. These will be where the employee was not, at the time of the alleged wrongdoing, acting with the intention of fulfilling his duties but the wrongdoing can nevertheless be associated with those duties by a connection of time, place or means.[84] Is there reason therefore to refine the test outlined in the previous point?

97. I do not think so. In my opinion, while some refinement might be possible in substantive law, by way of conditions governing the establishment of employee liability, it would be inappropriate to make the analysis any more complex at the stage where jurisdiction is being established. It should be recalled that, in this respect, the court seised must be able to decide easily whether it has jurisdiction without any searching analysis of the facts.

98. In light of the foregoing considerations, I would suggest excluding from the scope of Section 5 only claims of the employer against the employee which concern harmful conduct that is not connected by any objective circumstance pertaining to time, place, means or purpose with the duties performed by the employee.[85]

99. That interpretation is not called into question by Arcadia's argument that, in accordance with the case-law of the Court, the rules of special jurisdiction must be interpreted strictly and cannot be interpreted in any way that goes beyond the assumptions which they envisage.[86]

100. In my opinion, that case-law merely implies that it is not possible to dispense with the clear terms of those special rules, even if that would be in line with the objective pursued by them.

81 See, to the same effect, Hess, B., Pfeiffer, T., and Schlosser, P., *The Brussels I Regulation 44/2001: Application and Enforcment in the EU* (the Heidelberg report), C.H. Beck, Munich, 2008, paragraphs 356 to 359; Merrett, L., 'Jurisdiction over individual contracts of employment' in Dickinson, A., and Lein, E. (eds.), *The Brussels I Regulation Recast*, pp. 242-243; Grušić, U., op. cit., p. 92; Baker Chiss, C., op. cit., paragraphs 49 and 50. The fact that a claim could have been based on a breach of contractual obligations is a good indication in this regard. Nevertheless, it cannot be a test in itself, given its complexity, emphasised in point 88 of this Opinion.

82 Judgment in *Holterman*, paragraph 49. Given that a single person may have several different duties within an undertaking, regard must be had to the duties that are carried out in the context of the employment relationship.

83 To give two extreme examples, there could be the case of a lorry driver who, in the course of a delivery, causes an accident by driving while inebriated and, by contrast, the case of an employee who causes an accident which is damaging to his employer on a day when he is neither working nor at his place of work and is using his own vehicle.

84 I am thinking of cases where the wrongdoing occurred during working hours or at the place of work or where the wrongdoing was only made possible by, or was facilitated by the employee's duties.

85 In situations where a person carries out some duties as an employee and others in some different capacity, it will be necessary to ascertain which duties the alleged wrongdoing relates to: Section 5 will apply only in the case of duties carried out by a person in his capacity as employee.

86 See, inter alia, judgments of 27 September 1988, *Kalfelis* (189/87, EU:C:1988:459, paragraph 19); of 20 January 2005, *Engler* (C-27/02, EU:C:2005:33, paragraph 43); and of 22 May 2008, *Glaxosmithkline and Laboratoires Glaxosmithkline* (C-462/06, EU:C:2008:299, paragraph 28).

101. The interpretation which I suggest in no way departs from the terms of Article 18(1) of the Lugano II Convention, the importance of which, moreover, must not be overstated, given the linguistic divergences I have mentioned. In a situation in which an employee causes injury to his employer, the employment relationship will, as a general rule, form part of the context. That relationship will have placed the employee in the location where the wrongdoing occurred (for example, at the employer's premises) or will have provided him with the necessary means (such as access to confidential information belonging to the employer). In short, leaving aside cases where there can be no connection with the employee's duties, there will be, between an employer's claim for compensation and the obligations arising under an 'individual contract of employment', a sufficiently material link to justify that claim relating to that 'contract', as required by the terms of that provision.

102. Nor is the same interpretation called into question by Arcadia's argument that only a claim which is a 'matter relating to a contract' within the meaning of Article 5(1) of the Lugano II Convention and the Brussels I Regulation may be 'matters relating to individual contracts of employment' for the purposes of the provisions of Section 5. Admittedly, an 'individual contract of employment' is a category of contract falling within that 'matter relating to a contract'. To that extent, that section is a *lex specialis* in relation to Article 5(1). However, that finding does not preclude assessing the relationship between a claim and the 'contract' more generously in the context of that section, as long as it is necessary to ensure the imperative nature of that same section.

103. Having regard to all the foregoing considerations, I suggest that the Court should answer the first and third questions to the effect that a claim made by an employer against an employee is 'a matter relating to' an individual contract of employment within the meaning of Article 18(1) of the Lugano II Convention, where it relates to a dispute *arising in connection with the employment relationship*, irrespective of the substantive legal grounds relied on by the employer in his application. In particular, a claim for compensation brought by an employer against an employee falls within the scope of Section 5 where the conduct complained of is in fact related to the duties performed by the employee.

D. The concept of 'employer', in particular within a group of companies (the fourth question)

104. The defendants in the main proceedings are being sued in the courts of England and Wales by Arcadia London, Arcadia Singapore and Arcadia Switzerland, and by the sole shareholder of the group, Farahead. However, they had a contract of employment, within the meaning of substantive law, with only one Arcadia company the identity of which varied over time. Thus, by its fourth question, the referring court asks, in substance, whether claims against an employee made by a person that is not his employer under substantive law — like the companies other than the employing company in this instance — may fall within the scope of Section 5 and, if so, under what conditions.

105. Of course, once again, it would not be necessary to answer that question if the Court should consider, as I suggest, that the defendants in the main proceedings did not have an 'individual contract of employment', within the meaning of the provisions of Section 5, with any of the Arcadia companies. I shall therefore address this question too in the alternative, proceeding on the hypothesis that the defendants in the main proceedings are 'employees' within the meaning of those provisions.

106. That said, in accordance with the provisions of Section 5, a claim will fall within the scope of that section only if it is made by one of the parties to an 'individual contract of employment', that is to say, the employee or the employer, against the other party. In that context, the employer will typically be the natural or legal person for whom or for which the employee performs, for a certain period of time and under that person's direction, services in return for which that person pays remuneration.

107. On the other hand, claims made against an employee or employer by a third party that is not party to such a 'contract' and claims made by one or other of the parties to such a 'contract' against a third party do not fall within that section. There are two nuances, particularly in the case of a group of companies.

108. First or all, as I indicated in my analysis of the second question, the fact that 'individual contract of employment' is an independent concept and the relationship of subordination test make it possible to hold the view that a person who does not have a contract within the meaning of substantive law with a given company nevertheless has a 'contract' with that company. In a group of companies, the 'employer' of an employee who has a formal contract of employment with company A may in fact be company B, or even both companies, depending on which of them actually exercise managerial authority. [87]

109. Secondly, if, under the relationship of subordination test, an employee has an 'individual contract of employment' solely with company A, but is sued by company B, the objective of protection pursued by Section 5 justifies the adoption of an approach better suited to the reality of the dispute: if company B's claim concerns the employee's conduct in the performance of his 'contract' for company A, then company B should also be regarded as the 'employer' for the purposes of Article 20(1) of the Lugano II Convention. Companies belonging to the same group should be subject to the same jurisdictional restrictions. [88] If it were otherwise, I fear that that would once again leave scope for the circumvention of Section 5 by international employers. As long as there is an organic and economic link between those two companies and the latter has an interest in the proper performance of the contract, this would not contravene the objective of legal certainty. [89] Moreover, it makes it possible, in a timely manner, to avoid the multiplicity of jurisdictions competent for the same employment relationship and thus participates in the proper administration of justice.

110. In the light of the foregoing, I suggest that the Court should answer the fourth question to the effect that where, within a group of companies, an employee has a contract of employment, within the meaning of substantive law, with a given company and is sued by another company, the latter company may be regarded as the employee's 'employer', for the purposes of the provisions Section 5, if:

– the employee, as a matter of fact, performs services for and under the direction of the latter company, or

– the latter company sues the employee on account of the employee's conduct in the performance of his contract with the former company.

V. Conclusion

111. In light of all the foregoing considerations, I suggest that the Court answer the questions referred by the Supreme Court of the United Kingdom for a preliminary ruling as follows:

(1) Article 18(1) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008 ('the Lugano II Convention'), must be interpreted as meaning that a company director who has total control and total autonomy over the day-to-day operation of the business of the company which he represents and the performance of his own duties is not subordinated to the company

87 See, by analogy, judgment of 15 December 2011, *Voogsgeerd* (C-384/10, EU:C:2011:842, paragraphs 59 to 65).

88 See, to that effect, Court of Appeal (England & Wales) (Civil Division) *Samengo-Turner* v *J & H Marsh & McLennan (Services) Ltd*, [2007] EWCA Civ 732, paragraphs 32 to 35, and *James Petter* v *EMC Europe Limited, EMC Corporation* [2015] EWCA Civ 828, paragraphs 20 and 21.

89 See, by analogy, judgment of 10 April 2003, *Pugliese* (C-437/00, EU:C:2003:219, paragraphs 23 and 24).

and, consequently, does not have an 'individual contract of employment' with the company within the meaning of that provision. The fact that the shareholders of the company have the power to relieve the director of his duties does not call that interpretation into question.

(2) A claim made by an employer against an employee is a 'matter relating' to an individual contract of employment, within the meaning of Article 18(1) of the Lugano II Convention where it relates to a dispute *arising in connection with the employment relationship*, irrespective of the substantive legal grounds relied on by the employer in his application. In particular, a claim for compensation brought by an employer against an employee falls within the scope of Section 5 of Title II of that convention where the conduct complained of is in fact related to the duties performed by the employee.

(3) Where, within a group of companies, an employee has an contract of employment, within the meaning of substantive law, with a given company and is sued by another company, the latter company may be regarded as the employee's 'employer', for the purposes of the provisions of Title II, Section 5 of the Lugano II Convention, if:

– the employee, as a matter of fact, performs services for and under the direction of the latter company, or

– the latter company sues the employee on account of the employee's conduct in the performance of his contract with the former company.