In Case 12/76

Reference under Article 1 of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Oberlandesgericht Frankfurt am Main for a preliminary ruling in the action pending before that court between

INDUSTRIE TESSILI ITALIANA COMO, whose registered office is in Como, Italy,

and

DUNLOP AG, whose registered office is in Hanau am Main (Federal Republic of Germany),

on the interpretation of the concept of 'place of performance of the obligation in question' within the meaning of Article 5 (1) of the Convention of 27 September 1968,

THE COURT

composed of: R. Lecourt, President, H. Kutscher and A. O'Keeffe, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, Lord Mackenzie Stuart and F. Capotorti, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts, procedure and observations submitted under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters may be summarized as follows:

I — Facts and written procedure

After the conclusion of negotiations conducted by one of its employees at the offices in Como of the company Industrie Tessili Italiana Como (hereinafter referred to as 'Tessili' and after receipt of several samples, the

company Dunlop A.G. (hereinafter referred to as 'Dunlop'), whose registered office is in Hanau, sent an order by letter dated 29 April 1971 to Tessili for 310 women's ski suits.

Printed on Dunlop's letter were its conditions of purchase containing in particular the following clause:

'Jurisdiction: the court in Hanau am Main shall have jurisdiction to deal with disputes arising from this contract'.

Tessili completed the ski suits ordered and sent them on 31 July 1971 to Dunlop through the intermediary of a transport undertaking appointed by the latter. Dunlop took delivery on 18 August 1971.

Also on 31 July 1971 Tessili made out an invoice which Dunlop received on 3 August 1971 and on the back of which Tessili's general conditions of sale were printed. These contained in particular the following clause:

'The court in Como shall have jurisdiction in any dispute which may arise and the purchaser waives his right to have the dispute decided by any other court whether by means of a consolidation order or by joinder of actions'.

Dunlop considered that there were defects in the manufacture of the ski suits delivered by Tessili and on 28 June 1973, after a voluminous exchange of correspondence with Tessili brought an action before the Landgericht Hanau (Hanau Regional Court) for annulment of the contract.

Tessili argued before the Landgericht that German courts had no jurisdiction and in particular that the Landgericht Hanau had no jurisdiction *ratione loci*. Dunlop, on the other hand, claimed that the Landgericht Hanau did have jurisdiction.

By interlocutory judgment dated 10 May 1974 the Landgericht Hanau dismissed the objection to jurisdiction.

On 22 July 1974 Tessili appealed against this decision to the Oberlandesgericht Frankfurt am Main (Frankfurt am Main Higher Regional Court).

Dunlop cited Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which provides that a person domiciled in a Contracting State may, in another Contracting State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question and the 21st Civil Senate of the Oberlandesgericht considered that the matter should be brought before the Court of Justice under Articles 2 (2) and 3 (2) of the Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968. By order dated 14 January 1976 it stayed the proceedings until the Court had given a preliminary ruling on the interpretation of the concept of 'place of performance of the obligation in question' within the meaning of Article 5 (1) of the Convention.

The order of the Oberlandesgericht Frankfurt am Main was registered at the Court on 13 February 1976.

In accordance with Article 5 (1) of the Protocol of 3 June 1971 and Article 20 of the Statute of the Court of Justice of the EEC written observations were lodged on 15 April 1976 by the Commission of the European Communities, on 21 April by Tessili, on 28 April by the Government of the Federal Republic of Germany and by Dunlop and on 20 May by the Government of the United Kingdom of Great Britain and Northern Ireland.

To the question whether Member States which are not parties to the Convention

of 27 September 1968 are entitled to submit observations in the present case, an answer in the affirmative has been given to the Court by Tessili and Dunlop, the Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland and by the Commission of the European Communities, and an answer in the negative by the Government of the French Republic which cites in particular Articles 4 (4) and 5 of the Protocol of 3 June 1971.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without a preparatory inquiry.

II — Written observations submitted to the Court

The appellant *Tessili* takes the view that, having regard to the increase which has taken place or is sought in international commercial relations more particularly in the context of the European Community, the objective of the Convention of 27 September 1968 is to lay down uniform rules on jurisdiction applicable to the settlement by courts of disputes arising from these relations and likely to guarantee that in the future similar situations will be dealt with in the same way. Article 5 (1) of the Convention establishes the jurisdiction in international law of the court of the place of performance; having regard to the unification which the Convention seeks to achieve this rule implies the recognition in advance of a uniform jurisdiction in respect of every contractual relationship of international law regarded as a whole, both with regard to the performance originally provided for by the contract and any 'retroactive settlement' particularly in the event of actions for breach of warranty in respect of defective goods.

It follows that in the absence of agreements to the contrary conferring jurisdiction within the meaning of Article 17 of the Convention, all the vendor's obligations must be performed at the vendor's registered place of business. It would be right therefore to reply to the question put to the Court that as regards the obligations imposed on a vendor under an international contract of sale the 'place of performance of the obligation in question' within the meaning of Article 5 (1) of the Convention of 27 September 1968 is always the domicile or registered place of business of the vendor.

The respondent to the appeal, *Dunlop*, observes that the concept of 'place of performance of the obligation in question' may either be interpreted uniformly on the basis of comparative law or be interpreted on the basis of principles of international law and in particular of the substantive law applicable.

(a) The first proposition would no doubt favour the unification of European law. But it would force the Court to go beyond the narrow sphere of procedural law which is the subject of the Convention of 27 September 1968 and create also a substantive European law of obligations. Thus by the indirect means of case-law relating to procedural questions a law of obligations would develop at the European level; the result of such 'unification' would not be the simplification sought but on the contrary much greater complexity by reason of the different rules obtaining in the Community.

In any event as regards more particularly Article 5 (1) of the Convention, complete unification is already stultified by Article I, relating to Luxemburg, of the Protocol annexed to the Convention of 27 September 1968.

Far from leading to the unification of Community law this concept would

involve for all national legal systems recognizing the concept of place of performance, a diminution in the extent of unification: the concept of the place of performance would completely change in meaning according to each case.

(b) The imperative of judicial certainty militates in favour of an interpretation of the concept of place of performance in terms of the national law of conflict of laws in question in each case and of the corresponding substantive law. In this way, the possibility of the same legal concept's having quite different meanings would be avoided. Uniform interpretation, within the meaning of the national substantive law applicable to each case, of the concept of place of performance is no doubt capable of leading to diverse results; this should not however involve serious inconvenience for one of the two parties. The legal systems of all the States which are parties to the Convention have a system of rules of conflict of laws which meet the requirements of pending litigation and for which the two parties to a case may sufficiently prepare themselves.

(c) Even if the Court of Justice were to consider that the concept of place of performance is determined not by the principles of the national rules of conflict of laws and the substantive national law but by a uniform 'European' law it would not necessarily have to subscribe to the view that the place of performance of an obligation on a vendor must be the latter's domicile. Such an extensive assimilation of the place of performance to the domicile of the debtor would deprive Article 5 (1) of the Convention of any purpose: the jurisdiction of the court of the debitor's domicile already follows from Article 2 of the Convention.

To take the general view with regard to contracts of sale that the domicile of the vendor was the place of performance would lead to unjust and unacceptable solutions. The desirable unification of the concept of place of performance would be disregarded in so far as that concept applies *a priori* only to contracts of sale. Moreover a not inconsiderable number of purchasers would be put at a great disadvantage: in international trade goods are not always delivered free on board; in numerous cases vendors deliver their products to the purchaser's address and also bear the risks of transport. There is no reason in such cases to regard the vendor's domicile as the place of performance.

In short only the place where the service has actually been supplied may be regarded as the place of performance; it depends on the facts of the case and in particular on the nature of the particular obligation. Agreements between parties derogating from these factual elements can be recognized only if they satisfy the formalities laid down in Article 17 of the Convention.

With regard to obligations arising under warranties this solution would lead to the felicitous result that these obligations must be performed at the place where the defective goods are. It is at this place that any defects may be most easily examined and if appropriate made good.

It would therefore appear fair to regard as the place of performance of obligations under warranties the place where the defective goods are.

The *Government of the Federal Republic of Germany* would be happy to see the Court of Justice hold that the concept of the court for the place of performance within the meaning of Article 5 (1) of the Convention depends on the national law applicable in each case. There are however certain difficulties in this respect: the concept of 'place of performance' differs in the various Member States since the provisions of private international law and the substantive law applicable in each case have not yet been harmonized. The Federal Government likewise considers it in accordance with the given legal

position that the Court of Justice should have recourse to the relevant national law in providing an interpretation. Article 5 (1) of the Convention should however be interpreted in such a way that there is only one court for the place of performance for one and the same party under obligation.

(a) In view of the wording of Article 5 (1) of the Convention, the expression 'obligation' within the meaning of this provision must include the main obligation and all the ancillary obligations on one of the parties. For the purpose of determining the court for the place of performance it would also be possible to relate jurisdiction separately to each of the main or ancillary obligations, for example in the present case, the obligation of warranty. The solution for which the German Government would finally opt is to regard the place where the whole of the obligation of a party to a contract must be performed as being the only place where he may be sued to enforce the performance of his obligations under the contract. This solution however assumes that the interpretation of Article 5 (1) of the Convention does not depend on the question whether the substantive law applicable to the contract separates the different obligations arising from it and stipulates an individual place of performance for each of these obligations; it postulates on the contrary that there is within the meaning of the Convention a uniform concept of the court for the place of performance which may be directly inferred from the Convention.

(b) The place of performance within the meaning of the provision of international procedural law represented by Article 5 (1) may be determined by the substantive law of the court before which the matter is brought. According to this method the court must first of all determine which law applies to the substance of the case; this must be inferred from the private international law of the court before which the matter is brought. The private international law may refer to the court's own substantive law but it may also refer to the substantive law of another State. However, private international law does not necessarily contain concrete provisions on the law applicable which on the contrary may very often be determined only on the basis of principles formulated by legal writers and case-law. In this case the law applicable may be determined in terms of the centre of gravity of the legal relationship.

The substantive law of the States which are parties to the Convention differs greatly with regard to the place of performance. As long as obligations are not governed by a uniform law or uniform rules of conflict of laws, private international law and the substantive law of each State will determine the place of performance of an international contract according to this method. The place of performance determined by the substantive law is likewise the place of performance within the meaning of Article 5 (1) of the Convention and thus provides the basis of the international jurisdiction of courts.

This interpretation would have the advantage of enabling the place of performance to be determined at least theoretically on the basis of the provisions of the substantive law of a State. However, the various national legal systems determine the place of performance variously. To determine its jurisdiction within the meaning of Article 5 (1) of the Convention a court is bound to have recourse to subtle considerations based on its own private international law and possibly of a foreign substantive law. Moreover the place of performance may be determined variously according to whether the matter is first brought before the courts of this or that State. The possibility of all courts' disclaiming jurisdiction also seems not to be ruled out.

In the present case the action for annulment should be brought, if the German law of obligations were to apply, in the place where the goods are whereas the place of performance of the obligation is in Italy.

(c) Having regard to the objective of the Convention there may be a temptation to regard the court for the place of performance as the sole venue for all the States which are parties to the Convention.

Numerous concepts used in the Convention, the meaning of which depends on the national legal systems, could be defined in terms of the law of the State of the court before which the matter is brought; but it would also be possible to give a uniform interpretation on the basis of the Convention itself. Such a uniform interpretation would however involve difficulties: the substantive laws of the States of the Community are very different; a uniform interpretation of the concepts used in the Convention would very often be possible only in so far as there was a comparative study of the laws in force in the Contracting States. The Court of Justice should to some extent define the meaning of certain concepts at a Community level without having recourse to Community law or to any Convention binding on the Contracting States. A uniform interpretation of the concepts used in the Convention would have a considerable influence on the policy of integration; by the indirect means of the Convention it would reflect the tendency to partial unification of the international law of civil procedure.

In the present case the place of performance must be interpreted uniformly since this concept, derived from substantive law, is defined exclusively in terms of conferring jurisdiction. Regard must be had in this respect to the main service owed in each case by a party or to the centre of gravity of his obligation. Recourse would thus be had to a method similar to that which is already employed at present in private international law to resolve the question of what is the law applicable to determine the concept of 'place of performance'. Such a uniform interpretation would be facilitated by a uniform interpretation of the concept of place of performance for each party to the contract.

It is necessary to accept in the context of this interpretation that the concept of the substantive law of the place of performance may not coincide in certain cases with that given by the rules of procedure.

The *Government of the United Kingdom* observes that the objective of the Protocol of 3 June 1971, like that of Article 177 of the EEC Treaty, is to achieve uniform application of the Treaties to the factual or legal matters which may arise before national courts, but not to unify the substantive law of the Member States to which the Treaty provisions are to apply. Both in the context of the Convention of 27 September 1968 and in that of the EEC Treaty it is necessary to distinguish clearly the jurisdiction of the Court of Justice to give a general interpretation and the application to particular factual situations which is for the national courts. Unless this distinction is clearly drawn there is a risk of far-reaching disturbance of the substantive national law of Member States.

If the Court were to answer the question where the place of performance of an obligation is to be found by reference to the particular facts of the case before the referring court, it would, for practical purposes, be determining that place as a matter of substantive law of contract, which would need to be applied as such in all Member States. For although the ruling would be for the purpose of establishing jurisdiction under the Convention, that jurisdiction is by Article 5 (1) founded on a duty to perform an

obligation as between the parties to a contract. Seeing that national laws at present differ on where performance is to take place, the ruling given by the Court would result in a change of the law of some, perhaps all, of the Member States; the effect of the ruling would extend to all aspects of performance of contracts of the type in question and would have repercussions even beyond the performance of the contract to other aspects of the law which are directly or indirectly linked with performance.

Moreover, the question where performance is to take place would call for a separate answer for every different type of contractual relationship, and would in every instance ultimately be a matter to be referred to the Court of Justice. Serious uncertainty would be introduced into the law.

In the present case the Court should confine itself to laying down the method by which national courts must themselves arrive at the appropriate answer on the facts before them. What the relevant obligations are under a particular contract, which obligations under the contract are in issue in the proceedings and where the relevant obligations are to be performed should be matters to be determined by the national court. That court should apply national law, including the rules of private international law forming part of that national law, to determine what law governs the contract. Applying the law so found to the contract, the national court should then determine the nature of the obligations which flow from the contract and the place where those obligations are to be performed. Where the contract is one for the sale of goods, and the issue before the national court concerns the failure of the seller to deliver satisfactory goods, the place of performance of that obligation should therefore depend on the rules regarding the place of delivery on a sale of goods laid down by the law governing the contract.

A uniform interpretation of Article 5 (1) of the Convention and the taking into account of the national law on the place of performance as a matter of comparative study leading to a uniform Community rule would have undesirable consequences. It is true that, if national courts apply their national law in the way suggested by the Government of the United Kingdom, they could arrive at different results on the same facts and that there would consequently still be some lack of uniformity. Greater uniformity of application can, however, ultimately be achieved by the adoption of uniform rules throughout the Community on the choice of law applicable to contractual obligations. By adopting the method of ascertainment of the nature and place of performance of obligations which the United Kingdom has suggested, national courts would then, on any given facts, arrive at the same result in the great majority of cases.

The United Kingdom does not regard it as profitable to put forward any arguments as to what should be the place of performance of the seller's obligation in the type of contract which has come before the Oberlandesgericht Frankfurt. The United Kingdom would not agree that, as suggested by that court, the permanent residence of the seller is the most appropriate place of performance. The place of performance of a contractual obligation should, for the purposes of Article 5 (1), be determined by the national court in which the proceedings are instituted in accordance with the law applicable to the contract; and that applicable law should be determined by the rules of private international law of the legal system of the national court.

The *Commission of the European Communities* states that Article 5 (1) of the Convention must be considered together with the first paragraph of Article 2 thereof; the Convention distinguishes between general jurisdiction — the defendant's domicile

— and special jurisdiction — in the present case, the court for the place of performance — the plaintiff having the choice of the competent court. The plaintiff has this choice provided that it has not been agreed that a court of a Contracting State should have exclusive jurisdiction in accordance with Article 17 of the Convention; it is for the Oberlandesgericht Frankfurt to decide whether this is so in the present case.

As regards the interpretation of Article 5 (1) it should be observed that the Convention itself contains no actual definition of 'place of performance'. In this respect it is proper to mention a number of factors: the intention of the parties, the uniform provisions of international law relating to sale which may be applicable, the rules of conflict of laws of the *lex fori*, having regard to the fact that the Convention attempts to achieve unification of the law in the sphere which it governs.

With regard to the express or implied intention, the parties are, according to the legal systems of the Member States, free to determine the place of performance of their contractual obligations or, in the case of contracts containing mutual obligations, to determine several places of performance. The Convention does not in any way interfere with the parties' independence in this matter.

With regard to the international purchase of goods, there is a uniform law, the Convention of The Hague of 1 July 1964 on the International Sale of Goods. According to the Oberlandesgericht Frankfurt this 'uniform law' does not apply to the contract in question in the main action.

There is as yet no uniform law of conflict of laws in the EEC in respect of contractual obligations and the Convention of 27 September 1968 does not alter the position since it is for the national court to settle according to its own law of conflict of laws the preliminary question whether the place of performance has been determined. According to the German private international law the place of performance is determined in accordance with German law.

In this respect it should be noted that at least in German law there is not necessarily only one place of performance of contracts containing mutual obligations.

The Convention on the other hand has regard to the place 'of performance of the obligation in question'.

This concept should be given a uniform interpretation and for this purpose account should be taken on each occasion only of the main obligation of a contract to the exclusion of ancillary or secondary obligations which may arise, for example, from the defective performance of the main obligation. It would thus be possible to avoid expressly determining in respect of each of the obligations of a party the place of performance in terms of the private international law of a State, which could lead to a multiplicity of places of performance of the contract and thus of courts having jurisdiction.

This interpretation finds support in the objective of the Convention, which is to contribute to the unification of European law and thus to have connected claims brought before and tried as far as possible by one court.

The question raised should be answered as follows:

Article 5 (1) of the Convention of 27 September 1968 must be interpreted as meaning that as regards the determination of the 'place of performance of the obligation in question' reference must be made in the first place to the intention of the parties, in the second place to relevant international Conventions and in the third place to the national law of conflict of laws. In so far as the latter is decisive

account should be taken of the necessity of having, if possible, only one place of performance for all the obligations on a party under the contract. To this end the place of performance should logically be that of the main contractual obligation, the non-performance or defective performance of which is the basis of the litigation.

III — Oral procedure

The appellant, Tessili, represented by Dieter Helm, Rechtsanwalt, Frankfurt am Main, the respondent to the appeal, Dunlop, represented by Peter Toelle, Rechtsanwalt, Frankfurt am Main, the Government of the United Kingdom, represented by Peter Scott, and the Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, submitted oral observations and gave answers to questions raised by the Court at the hearing on 30 June 1976.

The Advocate-General delivered his opinion at the hearing on 15 September 1976.

Law

1 By order dated 14 January 1976, received at the Court Registry on 13 February 1976, the Oberlandesgericht Frankfurt am Main referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the Interpretation of the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention') a question on the interpretation of Article 5 (1) of the Convention.

2 It appears from the order of reference that at this stage the case, which has been brought as an appeal to the Oberlandesgericht, relates to the jurisdiction of the court of first instance at Hanau to hear a case brought by an undertaking established within the jurisdiction of that court against an Italian undertaking with its registered office at Como in connexion with the performance of a contract relating to the delivery by the Italian undertaking to the German undertaking of a consignment of women's ski suits. It appears from the file that the goods were manufactured by the Italian undertaking in accordance with instructions given by the German undertaking and delivered to a carrier in Como appointed by the German undertaking.

3 The German undertaking after taking delivery of the goods and selling some of them considers as a result of complaints from its customers that the suits delivered by the manufacturer are defective and do not correspond to the specifications agreed between the parties. For this reason it brought an action in its local court against the Italian manufacturer.

4 The court by interlocutory judgment dated 10 May 1974 declared itself to have jurisdiction to hear the case whereupon the Italian undertaking brought an appeal before the Oberlandesgericht Frankfurt am Main. In the view of this latter court the question of jurisdiction raised must be settled in accordance with the provisions of the Convention. In its view there is no valid agreement between the parties conferring jurisdiction within the meaning of Article 17 of the Convention. On the other hand the Oberlandesgericht does not rule out the possibility that the court of first instance may have jurisdiction under Article 5 (1) of the Convention as being the place 'of performance of the obligation in question'. To settle this question it asks the Court of Justice to rule on the interpretation of that provision.

Procedure

5 The Republic of Ireland and the United Kingdom submitted observations during the written procedure and the Court therefore requested the parties in the main action, the Member States and the Commission to give their views on the question whether the new Member States which are not yet parties to the Convention are entitled to participate in proceedings relating to its interpretation.

6 Article 3 (2) of the Act of Accession provides that 'The new Member States undertake to accede to the Conventions provided for in Article 220 of the EEC Treaty, and to the Protocols on the interpretation of those Conventions by the Court of Justice, signed by the original Member States, and to this end they undertake to enter into negotiations with the original Member States in order to make the necessary adjustments thereto'. The first paragraph of Article 63 of the Convention provides that 'The Contracting States recognize that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last paragraph of Article 220 of the Treaty establishing the European Economic Community'. The new Member States thus have an interest in expressing their views when the Court is called upon to interpret a Convention to which they are required to become parties.

7 It should further be observed that Article 5 (1) of the Protocol of 3 June 1971 stipulates that, except as otherwise provided, 'the provisions of the Treaty establishing the European Economic Community and those of the Protocol

on the Statute of the Court of Justice annexed thereto, which are applicable when the Court is requested to give a preliminary ruling, shall also apply to any proceedings for the interpretation of the Convention'.

8 As a result the new Member States to which Article 177 of the EEC Treaty and Article 20 of the Protocol on the Statute of the Court of Justice apply are entitled to submit observations in accordance with the said articles in proceedings for the interpretation of the Convention. No valid objection to this conclusion is constituted by Article 4 (4) of the Protocol of 3 June 1971 on a special procedure which is not relevant for the present purposes. Further in the context of that Protocol, which originated before the enlargement of the European Communities, the words 'Contracting States' refer to all the Member States.

The interpretation of the Convention in general

9 Article 220 of the EEC Treaty provides that Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals the establishment of rules intended to facilitate the achievement of the common market in the various spheres listed in that provision. The Convention was established to implement Article 220 and was intended according to the express terms of its preamble to implement the provisions of that article on the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and to strengthen in the Community the legal protection of persons therein established. In order to eliminate obstacles to legal relations and to settle disputes within the sphere of intra-Community relations in civil and commercial matters the Convention contains, *inter alia,* rules enabling the jurisdiction in these matters of courts of Member States to be determined and facilitating the recognition and execution of courts' judgments. Accordingly the Convention must be interpreted having regard both to its principles and objectives and to its relationship with the Treaty.

10 The Convention frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Member State to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Member States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought.

11 Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the Treaty. In any event it should be stressed that the interpretation of the said words and concepts for the purpose of the Convention does not prejudge the question of the substantive rule applicable to the particular case.

The question raised by the national court

12 Article 5 of the Convention provides: 'A person domiciled in a Contracting State may, in another Contracting State, be sued: (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question'. This provision must be interpreted within the framework of the system of conferment of jurisdiction under Title II of the Convention. In accordance with Article 2 the basis of this system is the general conferment of jurisdiction on the court of the defendant's domicile. Article 5 however provides for a number of cases of special jurisdiction at the option of the plaintiff.

13 This freedom of choice was introduced in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may be most conveniently called upon to take cognizance of the matter. Thus in the case of an action relating to contractual obligations Article 5 (1) allows a plaintiff to bring the matter before the court for the place 'of performance' of the obligation in question. It is for the court before which the matter is brought to establish under the Convention whether the place of performance is situate within its territorial jurisdiction. For this purpose it must determine in accordance with its own rules of conflict of laws what is the law applicable to the legal relationship in question and define in accordance with that law the place of performance of the contractual obligation in question.

14 Having regard to the differences obtaining between national laws of contract and to the absence at this stage of legal development of any unification in the substantive law applicable, it does not appear possible to give any more substantial guide to the interpretation of the reference made by Article 5 (1) to the 'place of performance' of contractual obligations. This is all the more true since the determination of the place of performance of obligations depends on the contractual context to which these obligations belong.

15 In these circumstances the reference in the Convention to the place of performance of contractual obligations cannot be understood otherwise than by reference to the substantive law applicable under the rules of conflict of laws of the court before which the matter is brought.

Costs

16 The costs incurred by the Government of the Federal Republic of Germany, the Government of the United Kingdom of Great Britain and Northern Ireland and the Commission of the European Communities which have submitted observations to the Court are not recoverable and, as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Oberlandesgericht Frankfurt am Main, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Oberlandesgericht Frankfurt am Main by order dated 14 January 1976, hereby rules:

The 'place of performance of the obligation in question' within the meaning of Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be determined in accordance with the law which governs the obligations in question according to the rules of conflict of laws of the court before which the matter is brought.

Lecourt Kutscher O'Keeffe Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart Capotorti

Delivered in open court in Luxembourg on 6 October 1976.

A. Van Houtte
Registrar

R. Lecourt
President