

OPINION OF ADVOCATE GENERAL

LÉGER

delivered on 15 January 2004¹

1. In this case, the Oberster Gerichtshof (Austria) (Supreme Court) asks the Court to define the scope of Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.²

transactions involving certain of his assets which he had previously invested in a Contracting State which was not the State of his domicile.

2. More specifically, the question is whether the expression 'place where the harmful event occurred', contained in this article, can be construed as covering the place where the victim is domiciled in the sense of the place where 'his assets are concentrated', so that the victim is entitled to bring an action for recovery of damages in the courts of that territory. That question arises in the particular context of an action for recovery of financial loss suffered by an individual as a result of the liquidation of stock exchange

I — Legal background

3. The first paragraph of Article 2 of the Brussels Convention lays down the principle whereunder 'persons domiciled in a Contracting State shall... be sued in the courts of that State'.

1 — Original language: French.

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

4. In addition to that general rule of jurisdiction, the Brussels Convention sets out a series of optional rules of special jurisdiction, which allow the claimant to choose to bring proceedings before courts other than those of the State in which the defendant is domiciled.

5. These rules of special jurisdiction include Article 5(3) of the Brussels Convention, which provides that in matters relating to tort, delict or quasi-delict, the defendant may be sued in the courts 'for the place where the harmful event occurred'.

6. According to case-law, where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred', in Article 5(3) of the Brussels Convention, must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the claimant, in the courts for either of these places.³

II — Facts and procedure in the main proceedings

7. Mr Rudolf Kronhofer, domiciled in Austria, brought an action for damages before the Austrian courts against a number of persons domiciled in Germany, in their

capacity as directors and/or investment consultants of the investment company Protectas Vermögensverwaltungs GmbH (hereinafter 'Protectas'), which also had its registered office in Germany.

8. In the action, the claimant seeks to recover damages for financial loss which he claims to have suffered as a result of the conduct of the defendants, who had persuaded him, by telephone, to enter into a call option contract relating to shares, without having warned him of the risks involved in the transaction.

9. As a result of these inducements, Mr Kronhofer transferred the sum of USD 82 500 to Germany, into an investment account with Protectas. This sum was invested on the financial markets in London (United Kingdom), in highly speculative call options. That market transaction was liquidated, with the loss of part of the sum invested.

10. Before the Austrian courts, Mr Kronhofer claims payment of the sum of USD 31 521.26 in respect of his loss. In support of his claim, he argues that the Austrian courts have jurisdiction by virtue of Article 5(3) of the Brussels Convention, on the ground that the alleged damage was sustained in his place of domicile, namely Austria.

3 — Case 21/76 *Bier v Mines de potasse d'Alsace* [1976] ECR 1735, paragraphs 24 and 25.

11. The court of first instance (the Landesgericht Feldkirch (Feldkirch Regional Court) (Austria)) declined jurisdiction on the ground that the claim for damages lay in contract and was not based in tort, delict or quasi-delict. Accordingly, Article 5(3) of the Brussels Convention did not apply, and could not be used to found the jurisdiction of the Austrian courts. Mr Kronhofer appealed against this decision.

12. The appeal court (Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) (Austria)) also declined jurisdiction, but on different grounds from those adopted by the court of first instance. It accepted that the claimant's action was based exclusively on claims in tort or delict, so that Article 5(3) of the Brussels Convention applied. However, it held that this provision did not give it jurisdiction, as neither the place where the event which resulted in damage occurred nor the place where the resulting damage was sustained was in Austria.

13. With respect to the place where the event which resulted in damage occurred, according to the appeal court this is the place where the defendants telephoned the claimant in order to persuade him to enter into the contract which gave rise to the the stock exchange transactions in dispute, namely Germany. As regards the place where the resulting damage was sustained, according to that court it is also in Germany, at the place where the claimant's investment account was opened, into which he transferred the sums

which were then invested, and in relation to which the financial losses in dispute have arisen. In that regard, the appeal court noted that this analysis was correct notwithstanding the fact that the financial losses suffered by Mr Kronhofer ultimately affected the entirety of his assets, 'as a whole'.

14. The claimant appealed against this decision on a point of law to the Oberster Gerichtshof. That court held first of all that, if, as Mr Kronhofer claimed, there had never been any contractual relations between the parties to the dispute, his claim was based in tort or delict and not in contract.⁴

15. On the basis of that assumption, the Oberster Gerichtshof next considered its own jurisdiction with regard to the Court's case-law relating to the expression 'place where the harmful event occurred', contained in Article 5(3) of the Brussels Convention.

16. With respect to the place where the event which resulted in damage occurred,

⁴ — This point was confirmed at the hearing before the Court. It appears, in fact, that only Mr Kronhofer and Protectas had entered into contractual relations. The claimant stated that he had not brought proceedings against Protectas with a view to putting their contractual liability in issue (in relation to a potential duty to inform and to advise), as that company had gone into liquidation.

that court took the view that the alleged damage was not caused, as Mr Kronhofer claims, by the transaction under which he decided, in Austria, to transfer certain funds to an investment account in Germany, but by the fact that, contrary to what he had been told by telephone, the sums in question were invested by the German investment company in speculative options, which gave rise to financial losses on the claimant's part.

17. As regards the place where the resulting damage was sustained, the Oberster Gerichtshof is inclined to the view that the Court's case-law on the matter, which is based on the distinction between initial and consequential damage, does not apply in the present case.⁵ The specific feature of the present case, on which Mr Kronhofer relies, arises from the fact that the loss of part of his assets, invested in a Member State other than that in which he was domiciled, affected, at the same time and in the same way, the entirety of his assets, with the result that what is involved is damage which is identical and simultaneous, and not indirect or consequential loss.

18. In the light of those circumstances, the national court asks whether the connecting factor for determining the place where the resulting damage was sustained should be

the place where, according to the claimant, his assets are concentrated, and, accordingly, the place of his domicile or habitual residence.

III — The question referred

19. The Oberster Gerichtshof therefore decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the expression "place where the harmful event occurred" contained in Article 5(3) of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968 to be construed in such a way that, in the case of purely financial damage arising on the investment of part of the injured party's assets, it also encompasses in any event the place where the injured party is domiciled if the investment was made in another Member State of the Community?'

IV — Analysis

20. By this question, the national court asks, in essence, whether Article 5(3) of the Brussels Convention should be construed

⁵ — The national court refers to Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49; Case C-68/93 *Shevill and Others* [1995] ECR I-415; and Case C-364/93 *Marinari* [1995] ECR I-2719.

as meaning that the expression 'place where the harmful event occurred' may cover the place where the claimant is domiciled and where 'his assets are concentrated', on the ground that the claimant has suffered financial damage there affecting the entirety of his assets by reason of the loss of a part of those assets which arose and was incurred in another Contracting State.

21. In my opinion, this question should be answered in the negative. A claim which is based exclusively on 'tort, delict or quasi-delict', within the meaning of Article 5(3) of the Brussels Convention,⁶ cannot, on that ground alone, be raised before the courts of the Member State in which the claimant is domiciled.

22. I shall base my analysis on three sets of arguments, the first relating to the general scheme of the Brussels Convention, the second to the requirements of the sound administration of justice and the efficacious conduct of proceedings, and the third to the requirement that rules relating to the attribution of jurisdiction should be clear and certain.

6 — In that regard, the circumstances of the main proceedings are more straightforward than those considered by the Court in Case 189/87 *Kalfelis* [1988] ECR 5565, which involved a claim for damages based both on 'matters relating to contract' and 'matters relating to tort, delict or quasi-delict'. In such a case, the Court held that a court which has jurisdiction under Article 5(3) of the Brussels 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.

23. First, as regards the general scheme of the Brussels Convention, it should be noted that the system for the attribution of jurisdiction which it introduced is based on the general principle that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction (the first paragraph of Article 2 of the Convention).

24. Moreover, as the Court stated in *Dumez France and Tracoba*, cited above, 'the hostility of the Convention towards the attribution of jurisdiction to the courts of the claimant's domicile was demonstrated by the fact that the second paragraph of Article 3 precluded the application of national provisions attributing jurisdiction to such courts for proceedings against defendants domiciled in the territory of a Contracting State'.⁷

25. It is only on exceptional grounds, having regard to certain special circumstances, that the Brussels Convention, in Article 14 and in Articles 5(2) and 8(2), expressly attributes jurisdiction to the courts of the Contracting State in which the claimant is domiciled, that is to say the jurisdiction of the *forum actoris*. These special regimes were established in order to protect the consumer or the holder of an insurance policy, as the contracting party deemed to be economically weaker and less experienced in legal matters than his professional co-contractor, and the mainte-

7 — Paragraph 16.

nance creditor; who is deemed to be in difficult financial circumstances.⁸

26. Apart from these cases which are provided for expressly in the Brussels Convention, the courts of the Contracting State in which the claimant is domiciled do not, in general, have jurisdiction, in particular on the basis of Article 5(3) of the Convention.⁹

27. It is only by way of derogation from the general rule that jurisdiction is vested in the courts of the State where the defendant is domiciled that Section 2 of Title II of the Brussels Convention makes provision in a number of cases for special jurisdiction, which the claimant may opt to choose. Among these rules of special jurisdiction is that specified in Article 5(3) of the Convention.

28. It follows that Article 5(3) should be restrictively interpreted,¹⁰ 'since otherwise the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the Contracting State where the

defendant is domiciled are to have jurisdiction would be negated, with the result that, in cases other than those expressly provided for, jurisdiction would be attributed to the courts of the claimant's domicile, a solution which the Convention does not favour ...'.¹¹ As is discussed below, such an interpretation of Article 5(3) of the Convention should be based on the requirements of the sound administration of justice and the efficacious conduct of proceedings.

29. Secondly, with respect to the requirements of the sound administration of justice and the efficacious conduct of proceedings, it should be noted that the cases of special jurisdiction enumerated in Section 2 of Title II of the Brussels Convention, including the jurisdiction specified in Article 5(3), are 'based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings'.¹²

30. As mentioned above, in *Mines de potasse d'Alsace*, cited above, the Court accepted that where the place where the event giving

8 — For the regime applying to consumers, see, *inter alia*, Case C-96/00 *Gabriel* [2002] ECR I-6367, paragraph 39.

9 — See, *inter alia*, to that effect *Dumez France and Tracoba*, cited above, paragraph 19; *Marinari*, cited above, paragraph 13, and Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 29.

10 — See, to that effect, *Kalfelis*, cited above, paragraph 19.

11 — See, in that regard, *Marinari*, cited above, paragraph 13, and *Réunion européenne and Others*, cited above, paragraph 29.

12 — See *Dumez France and Tracoba*, cited above, paragraph 17. See, also, *Mines de potasse d'Alsace*, cited above, paragraphs 10 and 11, *Schevill and Others*, cited above, paragraph 19 and *Réunion européenne and Others*, cited above, paragraph 27.

rise to the damage and the place where the damage occurred are not identical, the expression 'place where the harmful event occurred' within the meaning of Article 5(3) of the Brussels Convention may cover both places.¹³

31. This case-law is clearly based in considerations relating to the sound administration of justice and the efficacious conduct of proceedings.

32. The Court held that liability in tort, delict or quasi-delict can only arise provided that a causal connection can be established between the damage and the event in which the damage originates.¹⁴ It inferred from that that, taking into account the close connection between the component parts of every sort of liability, it does not appear appropriate to opt for one of the two significant connecting factors which the place of the event giving rise to the damage and the place where the damage occurred represent, since each of them can, depending on the circumstances, be particularly helpful from the point of view of the evidence and of the conduct of the proceedings.¹⁵

33. It was only on these grounds that the Court held that the meaning of the expression 'place where the harmful event occurred' in Article 5(3) of the Brussels Convention must be established in such a way as to acknowledge that the claimant has an option to commence proceedings either at the place where the damage occurred or at the place of the event giving rise to it.¹⁶

34. The Court's reasoning is based entirely on the need to ensure that jurisdiction is attributed to the courts which are objectively the best placed to assess whether, in the specific case, the factors giving rise to liability are present. In other words, it was not prompted by a concern that the victim should be given the right to choose which courts should have jurisdiction, by extending the application of Articles 5(2), 8(2) and 14 of the Brussels Convention.

35. The judgment in *Mines de potasse d'Alsace* should therefore not be seen as laying down the principle, in matters of tort, delict or quasi-delict, that the *forum actoris* is to have jurisdiction, even if it is possible that in some cases one or other of the criteria for attributing jurisdiction specified in that case, namely the place where the event which resulted in damage occurred or the place where the resulting damage was sustained, may coincide in practice with the place where the victim is domiciled.

13 — That case involved cross border pollution arising from the discharge of saline waste into the waters of the Rhine in France, which caused damage to a horticulturalist domiciled in the Netherlands.

14 — *Ibidem*, paragraph 16.

15 — *Ibidem*, paragraph 17, read in conjunction with paragraph 15.

16 — *Ibidem*, paragraph 19.

36. *Marinari*, cited above, clearly confirms this analysis. In accordance with the principles of the sound administration of justice and the efficacious conduct of proceedings, the Court stated that the expression ‘place where the harmful event occurred’, within the meaning of Article 5(3) of the Brussels Convention, ‘cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere’.¹⁷

37. Accordingly, the Court held that ‘that term cannot be construed as including the place where ... the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State’.¹⁸

38. In order to clarify the scope of *Marinari*, cited above, I should explain that in that case an individual domiciled in Italy had brought proceedings in Italy against Lloyds Bank, whose registered office was in London, the conduct of whose staff had led to the sequestration of promissory notes lodged by him with that establishment, in light of their dubious origin, and to his arrest in the United Kingdom. In that action, the claimant

sought not only payment of the face value of the promissory notes not restored to him, but also compensation for the damage he claimed to have suffered as a result of his arrest, breach of several contracts and damage to his reputation.

39. As Advocate General Darmon pointed out in his Opinion in *Marinari*, cited above, that case involved a causal event (the conduct imputed to the employees of the bank) and the direct harmful consequences (sequestration of the promissory notes and imprisonment of the claimant), which occurred in one territory (the United Kingdom), with that initial damage adversely affecting in turn the victim’s assets (financial losses arising from the breach of several contracts) in another Contracting State (Italy).¹⁹

40. That is therefore not the same situation as that considered by the Court in *Mines de potasse d’Alsace*, cited above, where the place where the event which resulted in damage occurred was the territory of a State other than that in which the damage as a whole occurred, and where it was thus necessary to allow for a choice of jurisdictions in order not to exclude one or the other of these significant connecting factors regarding the assessment of the component parts of liability.

17 — Paragraph 14 (referred to in *Réunion européenne and Others*, cited above, paragraph 30).

18 — *Ibidem*, paragraph 15.

19 — Points 26 and 27.

41. In other words, in *Marinari*, cited above, the only factor relied on for recognising the jurisdiction of the Italian courts, in place of that of the courts in the United Kingdom, was that the claimant had suffered a financial loss in Italy consequential to initial damage arising and suffered in the United Kingdom. That was held not to constitute a significantly close link to justify attributing jurisdiction to the Italian courts.

produced its harmful effects upon the person who is the immediate victim of that event'.²⁰ In other words, those provisions of the Brussels Convention could not be interpreted as 'permitting a claimant pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets'.²¹

42. This case-law was followed in *Dumez France and Tracoba*, cited above.

43. In *Dumez France and Tracoba*, the alleged damage was no more than the indirect consequence of the harm initially suffered by other legal persons who were the direct victims of damage sustained at a place different from that where the indirect or secondary victim subsequently suffered his own harm.

45. I agree with Mr Zeki Karan, the Austrian Government and the Commission of the European Communities that a point which applies to consequential or indirect financial damage, that is to say damage which is accessory to initial damage arising and suffered by a direct victim in another Contracting State, in terms of *Dumez France and Tracoba*, cited above, applies necessarily and all the more strongly to financial damage which has simultaneous and co-extensive consequences in a Contracting State other than that in which it arises and is suffered by the victim.

44. In that situation, the Court held that '... the expression 'place where the harmful event occurred' contained in Article 5(3) of the Convention ... can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly

46. There is nothing in such a situation to justify attributing jurisdiction to the courts of a Contracting State other than that on whose territory the event which resulted in damage occurred and the entirety of the damage was

20 – *Dumez France and Tracoba*, cited above, paragraph 20.

21 – *Ibidem*, paragraph 22.

sustained, that is to say all of the elements which give rise to liability. Such a new ground of jurisdiction would not meet any objective need as regards evidence or the conduct of proceedings; to allow it would amount to extending the choice of the claimant beyond the special circumstances justifying it.

47. Thirdly, with respect to the need to provide for a clear and certain attribution of jurisdiction, I would point out that the Court has stated that it is a fundamental objective of the Brussels Convention.²²

48. To attribute jurisdiction to the place where the claimant is domiciled and where the 'his assets are concentrated' would clearly be contrary to this fundamental objective.

49. As the Commission has rightly pointed out, there must be a strong risk that to attribute jurisdiction to the courts on the basis of the place where the claimant is

domiciled, or where 'his assets are concentrated', would give rise to serious difficulties, particularly as even if these places can be established, they do not necessarily coincide both in law and in fact.

50. It follows that to found jurisdiction on these grounds would not meet the requirement of certainty laid down by the Court either, particularly where the place of domicile or that where the 'the claimant's assets are concentrated' could be altered at the claimant's election.²³ It cannot be ruled out that such an arrangement would not amount to encouraging 'forum shopping', by giving the victim the opportunity, in choosing or changing his domicile or the place where 'his assets are concentrated', to select the courts which are to have jurisdiction.

51. Accordingly, the answer to the question referred should be that Article 5(3) of the Brussels Convention should be construed as meaning that the expression 'place where the harmful event occurred' does not cover the place where the claimant is domiciled and where 'his assets are concentrated' and where he claims to have suffered financial damage affecting the entirety of his assets by reason of the loss of a part of those assets which arose and was incurred by him in another Member State.

22 — See, to that effect, Case 38/81 *Effer* [1982] ECR 825, paragraph 6; Case 241/83 *Rösler* [1985] ECR 99, paragraph 23; Case C-26/91 *Handte* [1992] ECR I-3967, paragraphs 18 and 19; Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 11; *Marinari*, cited above, paragraph 19; Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 29; and *Réunion européenne and Others*, cited above, paragraphs 34 and 36.

23 — See, to that effect, *Dumez France and Tracoba*, cited above, paragraph 19, and *Réunion européenne and Others*, cited above, paragraph 34.

V — Conclusion

52. In the light of all the foregoing considerations, I propose that the Court should answer as follows the question referred for a preliminary ruling by the Oberster Gerichtshof:

Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Republic of Portugal, and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, should be construed as meaning that the expression ‘place where the harmful event occurred’ does not cover the place where the claimant is domiciled and where ‘his assets are concentrated’ and where he claims to have suffered financial damage affecting the entirety of his assets by reason of the loss of a part of those assets which arose and was incurred in another Member State.