OPINION OF ADVOCATE GENERAL F.G. JACOBS delivered on 8 April 1992 *

My Lords,

1. The French Cour de Cassation has asked for a preliminary ruling on the interpretation of Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereafter 'the Convention'), as amended by the Convention of 9 October 1978 on the Accession of Denmark, Ireland and the United Kingdom. The question referred is in substance whether proceedings brought by a purchaser of a product against the manufacturer of the product are to be classified as contractual and so as falling under Article 5(1) of the Convention where there is no direct contractual link between the parties. The question arises because in French law the purchaser of a product may bring proceedings based in contract directly against the manufacturer, notwithstanding the absence of a contract between them.

The background

2. The first respondent in the main proceedings is Traitements Mécano-chimiques des Surfaces ('TMCS'), whose registered office is at Bonneville, Haute-Savoie (France). The appellant in the main proceedings is Jakob Handte GmbH ('Handte Germany'), whose registered office is at Tuttlingen, Württemberg (Germany). In 1984 and 1985 TMCS purchased two metal-polishing machines from a Swiss company, Bula et Fils, which is the second respondent. It fitted to those machines a suction system manufactured by Handte Germany, but sold and installed by Société Handte France ('Handte France'). It is not clear what the relationship is between Handte France and Handte Germany.

3. On 8 and 9 April 1987 TMCS commenced proceedings against Bula et Fils, Handte France and Handte Germany in the Tribunal de Grande Instance, Bonneville, claiming damages on the ground that the equipment did not comply with the rules on hygiene and safety at work and was unfit for its purpose. That court declined jurisdiction over the Swiss defendant, but held that it had jurisdiction over Handte Germany on the ground that TMCS's action against that company was of a contractual nature under French law, with the result that the court had jurisdiction under Article 5(1) of the Convention. By way of derogation from the general jurisdiction rule set out in the first paragraph of Article 2 of the Convention, Article 5(1) confers jurisdiction, in matters relating to a contract, on the courts for the place of performance of the obligation in question.

4. Handte Germany's appeal to the Cour d'Appel, Chambéry, was dismissed by judgment of 20 March 1989. It then took the matter to the Cour de Cassation, which has

* Language of the case: French.

requested a preliminary ruling on the question:

'Whether Article 5(1) of the Convention, which provides for special jurisdiction in matters relating to a contract, applies to a dispute between a subsequent purchaser and the manufacturer, who is not the seller, of an object, in connection with defects in that object or its unsuitability for the purpose for which it was intended.'

5. It should be noted at the outset that it is not clear whether an answer to the question posed in these terms will necessarily determine the issue of jurisdiction in the circumstances of the present case. In the first place, it cannot be assumed, for reasons which I will give later, that, if Article 5(1) applies, the court in Bonneville may exercise jurisdiction over TMCS's claim against Handte Germany as the court for the place of performance of the obligation in question. If on the other hand Article 5(1) is not applicable, it cannot be assumed that Handte Germany must be sued in the courts for the place at which it has its seat, in accordance with Article 2 of the Convention. Indeed, there are several other provisions on which the jurisdiction of the French courts (though not necessarily those in Bonneville) might possibly be founded. Those provisions are as follows:

a. Article 5(3), which confers jurisdiction in matters relating to tort, delict or quasi-delict on the courts for the place where the harmful event occurred.

   This Court has construed that provision as conferring on the plaintiff a choice of jurisdiction; he may sue either at the place where the damage occurred or at the place of the event giving rise to it: Case 21/76 *Bier* v *Mines de Potasse d'Alsace* [1976] ECR 1735.

b. Article 5(5), which provides that, as regards a dispute arising out of the operations of a branch, agency or other establishment, proceedings may be brought in the courts for the place in which the branch, agency or other establishment is situated: see in particular, in relation to this head of jurisdiction, Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183 and Case 218/86 *SAR Schotte* v *Parfums Rothschild* [1987] ECR 4905.

   In the absence of any information about the legal relationship between Handte Germany and Handte France, it is impossible to say whether the latter might constitute a "branch, agency or other establishment" of the former.

c. Article 6(1), under which a person domiciled in a Contracting State may be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled.

   It may be noted that Handte Germany could be sued in Bonneville under Article 6(1) only if the jurisdiction of the Bonneville court over Handte France were based on Article 2 of the Convention (i. e. if Handte France has its seat

there). If, on the other hand, jurisdiction over Handte France were based solely on Article 5(1) or (3), it would not be possible to sue Handte Germany in Bonneville under Article 6(1), since none of the defendants would be domiciled there. Although the Order for Reference does not state where Handte France is domiciled, it may be noted that there is appended to Handte Germany's observations the judgment of the Cour d'Appel, Chambéry, of 20 March 1989, from which it is clear that Handte Germany argued that Article 6(1) was not applicable on the ground that Handte France was domiciled in Strasbourg.

d. Article 6(2), under which a person domiciled in a Contracting State may be sued as a third party in an action on a warranty or guarantee or in any other third party proceedings in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.

TMCS attempted to invoke Article 6(2) in the proceedings before the Cour d'Appel, which did not, however, make any ruling on the point.

6. In my view, the essential issue on which the Cour de Cassation seeks guidance is whether an action of this kind should be treated, for the purposes of the Convention, as contractual, with the consequence that Article 5(1) of the Convention will apply, or as founded in tort, delict or quasi-delict (for convenience, I shall refer to "delict" alone), with the consequence that Article 5(3) will apply. That also appears to be the way in which the issue has been understood by those who have submitted observations to this Court, namely Handte Germany, the German Government and the Commission.

7. Handte Germany criticises the French courts for having classified TMCS's claim under the *lex fori*, with the result that it is treated as contractual. Instead, the claim should receive an independent classification based on the system and aims of the Convention. The main obstacle to classifying the claim as contractual is the absence of any contractual link between the manufacturer and the sub-buyer. Moreover, the French classification of the claim as contractual is not adopted by all the other legal systems in the Contracting States, notably by English law.

8. The German Government also points out that the question whether a claim is contractual must be determined independently, rather than by reference to the *lex fori*. The French classification of the claim is not followed in German law, which treats the manufacturer's liability towards the sub-buyer as delictual. The German Government considers that the delictual nature of such liability is borne out by Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29), which imposes liability without fault and prohibits the limitation of liability by contract. Moreover, liability in contract presupposes that the manufacturer has, by some

independent act on his part, bound himself vis-à-vis the plaintiff; there is no such act as between the manufacturer and the end-user of a product.

9. The Commission gives a brief comparative survey of the law of several Member States. German, English and Dutch law are said to treat the sub-buyer's claim against the manufacturer as delictual, while French, Belgian and Italian law treat it as contractual. In fact, the information about Italian law appears to be incorrect (see paragraph 18 below).

10. The Commission considers that it is necessary to avoid interpreting Article 5(1) in such a way that different results ensue, as regards jurisdiction, depending on whether the plaintiff sues the manufacturer alone, the seller alone (with the possibility of third-party proceedings against the manufacturer), or the manufacturer and the seller together.

11. The Commission cites the judgment in Case 189/87 *Kalfelis* v *Bankhaus Schröder* [1988] ECR 5565, in which the Court held that:

'... the term 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of the Convention must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1).'

Delictual liability is therefore a residual category encompassing liability that is not contractual. Hence, if a contractual link can be identified in the relationship between the manufacturer and the sub-buyer, the action falls to be classified as contractual. Such a link exists in the form of the chain of contracts connecting the two parties. That is particularly so when the manufacturer could foresee that his product would be resold.

12. The disadvantage of classifying the action as contractual, according to the Commission, is that it may result in conferring jurisdiction on the courts at the place where the plaintiff is domiciled. Article 3 of the Convention and the Court's decision in Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49 do not look favourably on such a result. However, if TMCS had sued Handte France alone in Bonneville, Handte France could have brought Handte Germany in as a third-party under Article 6(2) of the Convention. Hence, in order to avoid the abusive conferring of jurisdiction on the courts of the plaintiff's place of domicile, the Commission considers it necessary to make the contractual classification of the sub-buyer's direct action against the manufacturer subject to the condition that such classification results in jurisdiction being conferred on the same court before which the manufacturer could be sued as a third-party under Article 6(2) of the Convention.

13. Before examining the principal issues raised by this case I will make two brief comments on the observations submitted to the Court. First, I do not think that Council Directive 85/374 ("the Product Liability

Directive"), which was referred to by the German Government, is directly relevant in this case. The Product Liability Directive is concerned only with damage to persons or to property other than the defective product itself. If the suction system bought by TMCS were so defective that it injured a worker at TMCS's factory, there might be a case of product liability. But no such injury is alleged to have occurred and TMCS is claiming damages for purely economic loss, namely the loss caused by the supply of goods that are not fit for their purpose. That type of claim has nothing to do with product liability, in the sense in which the term is generally understood and in the sense in which it is used in Directive 85/374. None the less, that directive does, as I shall explain, have some indirect bearing on the issue raised in this case.

14. Secondly, I will say at the outset that I cannot agree with the analysis put forward by the Commission. That analysis is, in my view, founded on dubious policy considerations. In particular, I disagree with the Commission's view that it is necessary to avoid interpreting Article 5(1) in such a way that different results ensue depending on whether the plaintiff is able to sue the manufacturer alone, the seller alone or both of them together. Certainly, I do not think that the Court should attempt to avoid that consequence by distorting the meaning of terms such as 'contract' and 'tort, delict or quasi-delict' in Article 5 of the Convention. In particular, I fail to see how the construction of the expression 'matters relating to a contract' in Article 5(1) can depend on national rules relating to third-party proceedings. If the sub-buyer's action against the manufacturer should properly be classified as contractual, it cannot cease to be contractual simply because that classification confers jurisdiction on a court that would not have jurisdiction over the manufacturer by way of a third-party claim brought under Article 6(2).

15. One other point should be noted at this stage. As I have already observed, we have no information about the precise relationship between Handte Germany and Handte France. The sharing of a name may suggest a relationship of parent and subsidiary or principal and agent. I have already alluded to the possibility that, if that is indeed the relationship between the parties, the courts in Strasbourg may acquire jurisdiction under Article 5(5) of the Convention as 'the courts for the place in which the branch, agency or other establishment is situated'. Furthermore, if Handte France acted as agent for Handte Germany when it contracted with TMCS, there might be a direct contractual relationship between TMCS and Handte Germany, in which case the issue now before the Court would not arise. However, in the absence of any information to the contrary, I shall assume in the remaining discussion that Handte Germany and Handte France are independent of each other. That indeed appears to be the premise underlying the national court's question.

The distinction between contract and delict

16. The distinction between contractual and delictual liability is an old one and doubtless exists in all developed legal systems. Contractual liability may be defined as civil liability for a failure to perform an obligation that one person owes to another by virtue of an agreement entered into by the parties. Delictual liability may be defined as civil liability for a failure to perform an obligation which the law imposes independently of any agreement between the parties, e. g. an obligation to exercise reasonable care when driving a motor vehicle.

17. Most legal systems have a rule to the effect that a contract cannot confer rights or impose obligations on persons who are not parties to the contract, except in limited circumstances. In English law that principle is known as the doctrine of privity of contract. In French law it is known as the "théorie de l'effet relatif des contrats". At first sight that rule would seem to preclude a contractual classification of the sub-buyer's claim against the manufacturer, in the absence of any contract between the two parties. That does indeed appear to be the case in all the legal systems of the Contracting States, with the exceptions of France, Belgium and Luxembourg. Certainly in English law the sub-buyer could not sustain a contractual action against the manufacturer, unless he could show the existence of a collateral warranty, i. e. a promise by the manufacturer which led him to buy the goods from the intermediate supplier (see Chitty on Contracts, 26th edition, 1989, vol.1, paragraphs 1321 et seq.). Similar rules exist in German law (H. Messer, in Produzenthaftung, by H. J. Kullmann and B. Pfister (eds.), vol.1, 1350 et seq; Graf von Westphalen, Produkthaftungshandbuch, vol.1, p. 99 et seq.). The doctrine of privity also exists in Irish law and, in a modified form, in Scots law.

18. The sub-buyer cannot bring a contractual action against the manufacturer, in the absence of a contractual relationship, in Italian law (judgment of the Corte di Cassazione of 28 July 1986, No 4833, with a note by M. Moretti, in Nuova Giurisprudenza Civile Commentata 1987, p. 246), Spanish law (judgment of the Tribunal Supremo (Sala Civil) of 25 November 1967, Aranzadi, Repertorio Cronológico de Jurisprudencia, 1967, No. 4769), Portuguese law (J. Calvão da Silva, Responsabilidade Civil do Produtor, 1990, p. 278), Greek law and, probably, Danish law (H. Nielsen, Produktansvar, 1987, p. 24).

19. As regards Dutch law, there is some case-law establishing that the sub-buyer may in certain circumstances bring a delictual action against the manufacturer if the goods are not fit for their purpose (see, for example, judgment of the Hoge Raad of 25 March 1966, Nederlandse Jurisprudentie 1966, No. 279, judgment of the Gerechtshof 's-Hertogenbosch of 21 December 1967, Nederlandse Jurisprudentie 1968, No. 402). A contractual action is excluded in the absence of a contract between the two parties. Although there was a proposal to introduce a direct contractual action for the benefit of consumers (which was referred to by the Commission in its observations), the proposal was apparently not adopted.

20. In the three legal systems which grant the sub-buyer a contractual claim against the manufacturer (France, Belgium and Luxembourg) the theoretical justification offered for such a solution is that the intermediate supplier transmits to the sub-buyer his contractual rights against the manufacturer (or against a previous intermediary) as an accessory of the goods. The theory was explained by a Luxembourg court, the Tribunal d'arrondissement, Diekirch, in a judgment of 24 March 1904 (Pasicrisie Luxembourgeoise, vol. VI, p. 503) in the following terms:

'L'obligation de délivrer la chose vendue comprend tous ses accessoires, donc également tous les droits compétents de ce chef au vendeur, lequel partant est censé transmettre la chose 'cum omni sua causa', subrogeant son successeur également dans toutes les actions découlant de la convention, lequel peut dès lors à son choix rechercher en garantie son propre vendeur, conformément à l'article 1641 du même Code [civil], ou bien, s'il le préfère pour éviter des frais et des lenteurs, s'en prendre au premier vendeur'.

It should be noted that the subject is not free from controversy in French law and that the case-law is not entirely consistent. In particular, the judgment of the plenary session of the Cour de Cassation of 12 July 1991 in the *Besse* case (Recueil Dalloz Sirey 1991, jurisprudence, p. 549) appears to mark a move away from contractual liability in favour of a delictual classification. In that case the Cour de Cassation held that an action against a sub-contractor in respect of badly executed building work was delictual in accordance with the basic proposition in Article 1165 of the Code Civil that "les conventions n'ont d'effet qu'entre les parties contractantes". It is not clear to what extent that judgment affects the traditional view of the French courts that the sub-buyer's action against the manufacturer is necessarily contractual. Some authors conclude that such an action continues to be contractual, where the alleged damage is due to a failure to supply goods of the appropriate quality (see J. Ghestin, Recueil Dalloz Sirey 1991, jurisprudence, p. 549; (C. Jamin, Recueil Dalloz Sirey, 1991, Chronique, p. 257).

21. It would, however, be an oversimplification to conclude from the above survey of national law that a claim by the sub-buyer against the manufacturer is classified as contractual in only three legal systems among the Contracting States and as delictual in all the remainder. So far as the type of claim in issue in these proceedings is concerned, which is a claim for economic loss alone (namely the loss caused by the supply of goods that are not fit for their purpose), where there is a chain of contracts but in the absence of any direct contractual link between the sub-buyer and the manufacturer, the fact is that most of the legal systems do not recognize such a claim at all, while those legal systems which do recognize it tend to treat it as contractual. If however the claim in issue were in respect of the harm caused to the plaintiff by the product, for example, physical damage to his person or property caused by the defective nature of the goods, rather than in respect of economic loss alone, then it would be right to say that such a claim would be classified by most of the Contracting States' laws as delictual.

The choice between an autonomous or national interpretation

22. According to the case-law of the Court, the term 'matters relating to a contract' in Article 5(1) must not be interpreted by reference to the national law of one or other of the States concerned. Instead it must be regarded as an independent concept to be interpreted by reference principally to the system and objectives of the Convention in order to ensure that the Convention is fully effective: see in particular Case 9/87 *Arcado* v *Haviland* [1988] ECR 1539, paragraphs 10 and 11.

23. It is true that in his Opinion in that case Advocate General Slynn said that, if the matter were free from authority, he thought there was much to be said for determining whether the case was contractual under the *lex causae*. That would avoid the conflict that might arise if an independent interpretation decided that the matter was contractual, whereas under the *lex causae* it was classified otherwise. However he considered that he was bound by the judgment in Case 34/82 *Martin Peters* v *Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987. It might seem paradoxical if, for example, the Court were to hold that the sub-buyer's action against the manufacturer were delictual and the French courts were to take jurisdiction under Article 5(3) of the Convention, but then apply the law of contract to the substance of the action. But I do not think that that entails serious consequences; see the Opinion of Advocate General Darmon in Case 189/87 *Kalfelis* v *Schröder* [1988] ECR 5565, paragraph 19. Such paradoxes are a frequent phenomenon of private international law. In fact, far more elaborate scenarios can be imagined. The French courts might, for example, take jurisdiction under Article 5(3) on the basis that the action is delictual, then classify it as contractual, then decide that the *lex causae* is German law and then discover that under the *lex causae* the action is delictual.

24. It is above all important to stress that the jurisdiction rules of the Convention deal solely with the issue of jurisdiction. They do not affect the classification of the action for such purposes as determining the applicable principles of liability or deciding what limitation period applies. A court that acquires jurisdiction under Article 5(1) is not prevented by the Convention from proceeding with the action on the basis that it is delictual and a court that acquires jurisdiction under Article 5(3) is not prevented by the Convention from proceeding with the action on the basis that it is contractual.

The choice between a contractual or delictual classification of the sub-buyer's action

25. It follows from the Court's existing case-law that it must determine, by reference to the system and objectives of the Convention, whether the sub-buyer's action against the manufacturer is contractual or delictual. The distinction between contractual and delictual liability was touched on in *Kalfelis*. There the Court regarded delictual liability as a residual category, stating (at paragraph 17) that: '... the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a

defendant and which are not related to a 'contract' within the meaning of Article 5(1)'; see also Case C-261/90 *Reichert* v *Dresdner Bank AG*, judgment of 26 March 1992, ECR 2149, paragraph 16. However, I do not think that the residual nature of delictual liability makes Article 5(1) a dominant jurisdiction rule in relation to Article 5(3). Nor do I think that it may be inferred from the *Kalfelis* judgment that an indirect relationship between the parties, through a chain of contracts, necessarily makes Article 5(1) applicable at the expense of Article 5(3).

26. In deciding whether the sub-buyer's claim against the manufacturer is contractual or delictual for the purposes of the Convention, I do not think that too much weight can be attached to the classification adopted in the laws of the Contracting States. In the first place, the results of the comparative survey set out above are inconclusive. Secondly, and more importantly, the policy considerations on which classification is based in national law may be very different from those that are relevant in interpreting the Convention. As I have remarked already, it is by reference to the system and objectives of the Convention that the issue now before the Court must be resolved.

27. The purpose of the special jurisdiction rules laid down in Article 5 is to ensure that certain actions which are closely connected with a particular locality are dealt with by the courts at the place in question. Stated negatively, that proposition means that Article 5 should not operate so as to confer jurisdiction on the courts for a place that has no real connection with the substance of the action. In particular, it should not be allowed to derogate from the general jurisdiction rule laid down in Article 2, unless there is a sound reason for removing the defendant from his natural forum. It is therefore necessary to examine what practical consequences would flow from the classification of the sub-buyer's action as contractual or delictual.

28. If TMCS's claim against Handte Germany is classified as contractual, the courts for the place of performance of the obligation in question will have jurisdiction under Article 5(1). The obligation in question is the one forming the basis of the legal proceedings (Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497). In the present case the obligation in question was presumably Handte Germany's obligation to supply equipment of the appropriate quality to Handte France. The place of performance of that obligation is to be determined in accordance with the law that is applicable to the contract under the conflict rules of the court seised (Case 12/76 *Industrie Tessili* v *Dunlop* [1976] ECR 1473). Whichever law is applicable, it seems unlikely that the place of performance could be at TMCS's factory in Bonneville, unless of course Handte Germany was required by its contract with Handte France to deliver the equipment directly to TMCS in Bonneville. If, on the other hand, Handte Germany was required to deliver the equipment to Handte France's premises in Strasbourg, the courts for that city may have jurisdiction under Article 5(1). In this respect there is an important difference between the general jurisdiction rule laid down in Article 2 and the special jurisdiction rules laid

down in Article 5. Article 2 confers jurisdiction on the courts of the Contracting State in which the defendant is domiciled, leaving to domestic law the task of determining in which part of that State the defendant may be sued. The provisions of Article 5 (with the exception of Article 5(6)) confer jurisdiction not on the courts in general of a Contracting State but on the courts of a particular place within a Contracting State (see the Jenard Report, OJ 1979 C 59, at p. 22).

29. It is only if the contractual classification is applied in the way indicated above that the outcome will be consistent with the principle that Article 5 should not operate so as to confer jurisdiction on a forum which has no real connection with the substance of the action. If, for example, a manufacturer in Dublin sells a product to a dealer in London who then resells it to someone in Marseille, and the product turns out not to be as sound as the French sub-buyer was entitled to expect in the light of his contract with the dealer in London, it would in my view be strange if the Dublin manufacturer, who may have had no intention of doing business in France, could be sued in Marseille. It might of course be different if the manufacturer had known that the dealer intended to resell the goods to an end user in France and it would certainly be different if the manufacturer agreed to deliver the goods directly to the sub-buyer. In the latter case the place of performance of the obligation in question would probably be Marseille.

30. If the action were classified as delictual, the courts for the "place where the harmful event occurred" would have jurisdiction under Article 5(3) of the Convention. That expression means either the place where the damage occurred or the place of the event giving rise to it: Case 21/76 *Bier* v *Mines de Potasse d'Alsace*, cited above in paragraph 5. In the present case the harmful event giving rise to the damage was the supply of allegedly defective equipment by Handte Germany to Handte France.[1] That event occurred at the place of performance of Handte Germany's obligation to supply goods of sound quality to Handte France (i. e. presumably either at Handte Germany's premises in Tuttlingen or at Handte France's premises in Strasbourg). The place where the damage occurred was arguably TMCS's place of business in Bonneville. Does that mean that the court in Bonneville would have jurisdiction under Article 5(3)?

31. If the test laid down in *Bier* v *Mines de Potasse d'Alsace* were applied literally, the answer to that question would be affirmative. However, it is clear from the Court's judgment in Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49 that the scope of the rule laid down in *Mines de Potasse d'Alsace* is much more limited. In *Dumez France* French plaintiffs sought compensation in France for damage which they claimed to have suffered as a result of the insolvency of their German subsidiaries; the insolvency was allegedly caused by the wrongful cancellation of loans by the defendant banks. The Court held (at paragraph 20)

1 — It may be noted that such a supply can properly be treated as a "harmful event" (*fait dommageable*) within the meaning of Article 5(3). It is clear that Article 5(3) is intended to refer to any event which could give rise to liability in delict.

that the concept of the place where the damage occurred, used in the *Mines de Potasse d'Alsace* judgment, "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 produced its harmful effects upon the person who is the immediate victim of that event". In the present case, if we assume that Handte Germany did not deliver the goods directly to TMCS's factory at Bonneville and did not know that the goods were intended for TMCS, the immediate victim of the harmful event was Handte France and the place where the damage was directly produced upon that company was the place where Handte Germany supplied the goods to Handte France. (i. e. presumably either Tuttlingen or Strasbourg, but not Bonneville).

32. Applied in this way, a delictual classification is again consistent with the principle that Article 5 should not operate so as to confer jurisdiction on a forum that has no real connection with the substance of the action. As in the case of Article 5(1), a different result might be produced if Handte Germany knew that the goods were intended for TMCS or actually undertook to deliver them directly to TMCS's factory in Bonneville. Certainly, in the case of direct delivery the harmful event itself would occur at the sub-buyer's premises; and if the manufacturer knows that the goods are specifically intended for a particular sub-buyer it might be possible to regard the sub-buyer as the immediate victim of the harmful event. But in the ordinary case of a manufacturer (or other supplier) who sells goods to a dealer, not knowing where or by whom the goods will ultimately be used, there seems little justification for allowing the manufacturer to be sued, under Article 5(3), at the place where the sub-buyer suffers the damage, if the damage complained of is purely financial loss due to the diminished value of the goods. Different considerations would of course apply if the goods, instead of simply being of inferior quality, were dangerous and caused physical damage to the sub-buyer's person or property. In such a case the sub-buyer would be the immediate victim.

33. The strongest argument in favour of a contractual classification is that the sub-buyer's right of action does not arise independently of contract. A right to claim damages for the supply of defective goods, where the alleged loss consists solely in the diminished value of the goods supplied, does not, it would seem, arise in the absence of a contractual link. The type of damage is essentially of a contractual nature and can only be measured by reference to a failure to fulfil obligations imposed by contract. The laws of the Contracting States do not appear to recognise any general obligation, owed by the manufacturer to the world at large, to ensure that goods placed in circulation are of a particular quality (other than an obligation to ensure that goods are safe). As I have observed already, the matter would be very different if the goods were dangerous and caused physical damage to the sub-buyer's person or property. One solution would be to distinguish between the two types of damage. An action in respect of damage consisting solely in the failure of the product to conform to the contractual stipulations as to quality would be treated as contractual, while an action in respect of physical damage

to the sub-buyer's person or property would be treated as delictual. Tempting though that solution is, I think that it must be rejected because it would hardly be satisfactory in practice to treat differently two claims which in practice will often arise together.

34. The main argument in favour of a delictual classification of the sub-buyer's action against the manufacturer for failure to supply goods of the appropriate quality is simply that there is no contract between the two parties. The 'contractual' link between the parties consists of two or more separate contracts which may of course contain very different terms, including conflicting jurisdiction clauses, and may be governed by a different *lex causae*. This appears to pose a major obstacle to a contractual classification of the sub-buyer's direct action, because it seems difficult to determine precisely what contractual obligations were owed by the manufacturer to the sub-buyer. The national court may, as a result, have considerable difficulty in determining the place of performance of the obligation. The question that will inevitably arise, in many such cases, is 'which obligation?' Is it the manufacturer's obligation to his purchaser, or the obligation of that purchaser-or of a subsequent purchaser-to the sub-buyer? In many internal situations, this may not matter; but in a case arising under the Convention, there are likely to be different answers available.

35. I have already suggested a solution to some of these problems (see paragraph 28). However, it cannot be pretended that that solution would be easy to apply in practice. Even in the case of much simpler transactions, the practical application of Article 5(1) has given rise to unexpected difficulties, as is proved by the Court's case-law. It seems to me that, if the sub-buyer's action against the manufacturer were classified as contractual, there is a danger, owing to the complexity of the jurisdiction rule contained in Article 5(1), that the defendant would unfairly be brought before a forum with which he has no real connexion. That is demonstrated by the willingness of the French courts in the present case to hold that Bonneville was the place of performance of the obligation in question, without apparently identifying the precise obligation owed by Handte Germany to TMCS and determining by what law that obligation was governed.

36. If, on the other hand, the action were classified as delictual, the practical application of the relevant jurisdiction rule would be relatively simple. The test laid down in *Bier* v *Mines de Potasse d'Alsace*, subject to the qualification introduced in *Dumez France*, should not give rise to major problems and should produce a logical and equitable result (see paragraphs 31 and 32 above).

37. There are other reasons which militate in favour of a delictual classification. As already mentioned, classification for the purposes of the Convention should not depend on the type of harm in respect of which the claim arises. There seems little justification for treating certain forms of direct action as contractual, and therefore adopting different

jurisdictional rules, simply because the loss claimed is purely economic. But where the loss is not purely economic, a part of the rationale for the contractual classification disappears: the sub-buyer can in any event sue the manufacturer of the product in delict. From the point of view of the Convention, it then seems logical that such an action should be treated as delictual, that is, treated in the same way as an action against the manufacturer by any other person, excluding only a person who has a contractual relationship with the manufacturer.

38. It may be noted, finally, that another part of the rationale for a contractual classification also disappears in such cases. Liability in contract is traditionally strict, while delictual liability historically required proof of fault. But in consequence of the developments in the law of product liability, and in particular in consequence of the Product Liability Directive, the same principles of liability are likely to govern both types of action in such cases. That consideration is not directly relevant under the Convention, since issues of liability are independent of questions of jurisdiction. It is however not irrelevant that the Product Liability Directive in effect requires the laws of the Member States to treat actions falling within its scope as in substance delictual, notably by precluding any contractual derogation: see Article 12 of the Directive. That may be regarded as providing confirmation of the view which seems to me in any event correct on the grounds previously stated, that the action should be regarded as delictual.

Conclusion

39. I am therefore of the opinion that the question referred to the Court by the Cour de Cassation should be answered as follows:

Where an action is brought against the manufacturer of a product by a subsequent purchaser, in the absence of any direct contractual relationship between the parties, in connection with defects in that product or its suitability for the purpose for which it was intended, such an action is to be classified as an action relating to tort, delict or quasi-delict with the consequence that the courts for the place where the harmful event occurred have jurisdiction in accordance with Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. That place is to be understood as the place where the event giving rise to the damage occurred or where it directly produced its harmful effects upon the person who was the immediate victim of that event.