OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 15 June 1988 *

Mr President,
Members of the Court,

1. The Bundesgerichtshof has referred to the Court two questions — each involving two difficulties — relating to the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (which I shall refer to as 'the Convention'). The two provisions to be interpreted by the Court are Article 6 (1) and Article 5 (3) of the Convention.

I — Article 6 (1)

2. It is necessary first to determine, in view of the lack of any guidance in that regard in Article 6 (1), whether there must be a connection between the claims made against the various defendants. Both legal writers [1] and the national case-law [2] on the Convention are unanimous in answering that question in the affirmative. The *raison d'être* of such a requirement lies in the concern to ensure that the rule *actor sequitur forum rei* prevails as a principle, so as to 'prevent . . . [Article 6 (1)] from being used solely for the purpose of ousting the jurisdiction of the courts of the domicile of one of the parties'. [3]

3. Notwithstanding an opinion [4] put forward by some, definition of the connection cannot be left to the Contracting States. The terms used in the Convention must be interpreted uniformly

'having regard to the objectives and the general scheme of the Convention . . . in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned'. [5]

4. The national court offers an alternative: either jurisdiction is conferred by virtue of Article 6 (1) whenever the claims are similar in fact and in law, or else it is conferred only where that course is necessary in order to avoid irreconcilable judgments in separate proceedings. This alternative appears in fact to relate to the distincion in German law [6] between ordinary joinder of parties [7] and compulsory joinder of parties. [8]

5. The criterion to be chosen by the Court in this case must strike a balance between the following two imperatives:

* Translated from the French.

1 — See in particular P. Jenard's Report, OJ C 59, 5.3.1979, p. 26; Droz: *Compétence judiciaire et effets des jugements dans le marché comun*, p. 71, No 88; Kropholler: *Europäisches Zivilprozeßrecht*, p. 76, Article 6, No 5.

2 — See, for example, Corte di Cassazione, 6 November 1975, Dir. com. Scambi int., 1976, p. 383; Cour d'appel de Paris, 28 June 1978, R. c. d. i. p., p. 444, note by Santa Croce.

3 — Gothot and Holleaux: *La convention de Bruxelles du 27 septembre 1968, compétence judiciaire et effets des jugements dans la CEE*, p. 62, No 111.

4 — Droz, op. cit., No 88, p. 71; Desantes Real: *La competencia judicial en la Comunidad europea*, 1986, p. 330.

5 — Case 34/82 *Peters* v *ZNAV* [1983] ECR 987. See more generally the decisions of this Court cited below in footnote 20.

6 — Comparable with the Italian concepts of 'litisconsorzio facoltativo' and 'litisconsorzio necessario' and the French concepts of 'connexité' and 'indivisibilité' — see below, footnote 12.

7 — Einfache Streitgenossenschaft.

8 — Notwendige Streitgenossenschaft.

(i) ensuring the proper administration of justice by avoiding, in particular, the risk of incompatible decisions, [9] and

(ii) ensuring that the rule laid down in Article 2 of the Convention continues to prevail as a principle.

6. The terms 'un lien sérieux' [10] and 'un lien qui ne serait pas artificiel' [11] seem to me too vague in their definition.

7. A subjective criterion, which would involve trying to decide whether or not the plaintiff was trying to deny any of the defendants the right to be sued in the court which would normally have jurisdiction, would be difficult to apply in practice. Legal certainty would be poorly served by an analysis, as delicate as it would be uncertain, of the plaintiff's intentions.

8. A definition inspired by the concept of compulsory joinder [12] as understood in German and Italian law seems to me excessively restrictive. The Commission rightly points out that if jurisdiction under Article 6 (1) were restricted to cases of compulsory joinder of parties that provision would virtually cease to have any practical application in view of the infrequency of such cases.

9. The concept of 'litisconsorzio necessario' in Italian law provides interesting guidance as to the objective pursued. [13] It presupposes that the *petitum* or the *causa petendi* is in part or in whole common to the claims. [14] It is closely related to the 'einfache Streitgenossenschaft' of German law and also, albeit with subtle distinctions, to the 'connexité' of French law.

10. But it seems to me that an abstract formulation, based in particular on the concepts of identity of cause and of subject-matter [15] is fraught with real difficulties. In particular the concept of cause is one so difficult to apply that I have very serious doubts as to whether it is appropriate to the requirements of an independent interpretation common to the Contracting States.

11. The approach which seems without doubt to be the most logical here consists in relying upon the third paragraph of Article 22 of the Convention. That provision describes as related those actions which

9 — Jenard Report, *supra*.

10 — Gothot and Holleaux, op. cit., p. 62, No 111.

11 — Cour d'appel, Paris, 28 June 1978, *supra*, footnote 2.

12 — There is no doubt that this concept of 'litisconsorzio necessario' (note 6 supra; see Carpi, Colessanti, Taruffo: *Commentario breve al codice di procedura civile*, 1984, p. 102, No. 102) must be associated with the 'indivisibilité' or 'connexité renforcée' of French law (see Solus and Perrot: *Droit judiciaire privé*, 1973, Vol. II, La Compétence, p. 604, No 552 et *seq.*).

13 — 'Ratio della norma è quella di favorire soluzioni armoniche, ... evitando il pericolo di giudicati anche solo logicamente contraddittori e rispondendo ad esigenze di economia processuale' — Carpi, Colessanti, Taruffo, op. cit., p. 103, No 103.

14 — Ibid.

15 — See in particular, with regard to 'connexité', Solus and Perrot, who consider that 'the parallel method must be deliberately abandoned. An examination of the case-law shows that although, where those three elements (party, cause, subject-matter) are not all identical, a situation which is necessarily ruled out by the fact that the two cases are different, there may exist between connected cases either identity of subject-matter, or identity of cause or even identity of parties, such identity does not appear to be a necessary and sufficient precondition for connexity', op. cit., p. 588, No 541, and p. 569.

'are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

12. The *prevention* of the irreconcilability of decisions is the *ratio legis* both of Article 6 (1) and of the third paragraph of Article 22. In those circumstances I cannot see any good reason for not transposing the 'purpose-related' criterion of the latter provision to cases where there are several claims. [16]

13. We should note however that the Bundesgerichtshof appears to place the need to preclude irreconcilable judgments and cases of compulsory joinder of parties on the same footing. Without doubt, in the case of irreconcilability, the national court has in mind 'the impossibility of enforcing two decisions simultaneously', [17] a much more restrictive concept than a mere conflict of decisions which does not necessarily prevent each of them from being executed separately.

14. The following example will illustrate the distinction: two actions commenced separately against two persons allegedly responsible for an accident may give rise to two judgments, one upholding the claim and the other dismissing it on the ground that the characteristics of the damage are such that it cannot be repaired. The decisions are certainly contradictory, if not irreconcilable. [18] But that does not mean that there is any question of their simultaneous enforcement being impossible.

15. To emphasize this distinction, it will, without any doubt, be appropriate to refer expressly to 'contradictory decisions' in order to stress, unequivocally, that the choice made favours a solution of sufficient breadth.

II — Article 5 (3)

16. Must the concept of 'matters relating to tort, delict or quasi-delict' mentioned in Article 5 (3) be taken to have an independent meaning? This Court has not so far disposed of that question. But Mr Advocate General Warner, in his Opinion in the case of *Rüffer*, [19] explained at length and, in my view, very accurately, the reasons for which an affirmative answer is called for. I shall confine myself to mentioning the two main reasons which he put forward in support of his view.

17. In the first place, with the exception of the case of *Tessili* v *Dunlop*, [20] whenever the Court has been called upon to say whether a concept incorporated in the Convention must be interpreted by reference to the national legislation or must be given an independent meaning, it has opted for the second solution. [21] It will be recalled that in

16 — See Kropholler: *Europäisches Zivilprozeßrecht*, 1982, p. 76, note 5. See also Lasok and Stone: 'No attempt is made by Article 6 (1) to define the degree of connection between the claims against various defendants which will suffice to make it applicable, but assistance may be derived from the definition of "related actions" given in Article 22 (3) . . .', *Conflict of laws in the European Community*, 1987, p. 253. See also Born and Fallon: *Journal des tribuneaux*, 1983, No 66.

17 — Solus and Perrot, op. cit., p. 555, No 608.

18 — Although I consider that it is appropriate to adopt a similar concept of irreconcilability for both Article 6 (1) and the third paragraph of Article 22, I consider on the other hand that the irreconcilability referred to in Article 27 (3) must be understood in a more restrictive sense. The concern in the first case is to *preclude* difficulties whereas in the second it is, by way of exception to the principles and objectives of the Convention, to *refuse* recognition or an order for enforcement. See judgment of 4 February 1988 in Case 145/86 *Hoffmann* [1986] ECR 645.

19 — Case 814/79 *Netherlands* v *Rüffer* [1980] ECR 3807.

20 — Case 12/76 [1976] ECR 1473.

21 — Cases 14/76 *De Bloos* v *Bayer* [1976] ECR 1497; 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541; 21/76 *Bier* v *Mines de potasse d'Alsace* [1976] ECR 1735; 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183; 43/77 *Industrial Diamond Supplies* v *Riva* [1977] ECR 2175; 150/77 *Bertrand* v *Ott* [1978] ECR 1431; 133/78 *Gourdain* v *Nadler* [1979] ECR 733; 814/79 *Rüffer* [1980] ECR 3807; 34/82 *Peters* v *ZNAV* [1983] ECR 987; and 9/87 *Arcado* [1988] ECR 1539 (judgment of 8 March 1988).

Peters the Court attributed an independent meaning to the concept of 'matters relating to contract', and it may be considered that 'matters relating to tort, delict and quasi-delict' constitute the counterpart of that concept in Article 5 (1).

18. Furthermore, in so far as the concepts used in the Convention do not correspond to legal concepts known in each Contracting State — and Mr Advocate General Warner clearly demonstrated that to be the case here — it cannot be considered that they are based on national law.

19. I would add that a lack of concordance between the meanings attributed to concepts, depending on whether the *lex causae* is being applied or jurisdiction is being determined under the Convention, will not militate against the adoption of an independent interpretation. A court may, drawing a very clear distinction, refer to different juridicial categories for the purposes of determining that it has jurisdiction and, thereafter, adjudicating upon the case before it.

20. Is it in fact necessary, however, to work out a definition for the concept of 'matters relating to tort, delict and quasi-delict'? Closely examined, the wording of the question submitted by the national court does not call for such an analysis. In that regard, Mr Advocate General Warner made an amusing reference to the difficulties inevitably involved in arriving at such a definition: 'Like the proverbial elephant', he said, 'tort is easier to recognize than to define'.

21. Academic writers also consider that a very prudent approach should be adopted, [22] which in the present case merely means that no abstract standard should be formulated, particularly when the Court has not been asked to provide one. In any event, the interpretation which I propose that the Court should adopt in answering the last question should enable the difficulty facing the national court to be resolved.

22. The Bundesgerichtshof wishes to know to what extent Article 5 (3) confers, as a result of connexity, accessory jurisdiction for matters not relating to tort, in an action based on 'claims in tort and contract and for unjustified enrichment'.

23. Needless to say, such an eventuality can arise only where national procedure allows the 'overlapping' of grounds for a single court action, as appears to be the case in the Federal Republic of Germany, the Netherlands and the United Kingdom.

24. The difficulty clearly arises only where the Court cannot *derive* from the Convention any *direct* jurisdiction regarding the accessory grounds.

22 — 'It is no less probable that the Court will be unable, in a single judgment, to arrive at a comprehensive definition of "matters relating to tort, delict or quasi-delict" as used in Article 5 (3). Even if it is conceded that such a definition is possible — which is doubtful — it would be liable to create fresh difficulties by its excessively abstract nature .... The Community meaning will therefore in all probability be developed *progressively*, by subtle analysis and at the price of a period of *inevitable* uncertainty' — Gothot and Holleaux in *La convention de Bruxelles du 27 septembre 1968*, Ed. Jupiter, 1985, pp. 47 and 48, No 86 (emphasis added). Similarly, see Desantes Real, op. cit., p. 315, Bischof, Clunet, 1982, pp. 470 and 471.

25. Let me say at the outset that I agree with the Commission's analysis, which appears to take the most judicious points from the previous decisions of the Court and in particular from its judgment in *Peters*, [23] in which it stated:

'*multiplication of the bases of jurisdiction* in one and the same type of case is not likely to encourage legal certainty and effective legal protection throughout the territory of the Community. The provisions of the Convention should therefore be interpreted in such a way that the court seised is not required to declare that it has jurisdiction to adjudicate upon certain applications but *has no jurisdiction to hear certain other applications, even though they are closely related*'. [24]

26. That need to rationalize jurisdiction provides justification [25] for saying that

'because of the *close links created by a contract* between the parties thereto, it should be possible for *all the difficulties which may arise on the occasion of the performance of a contractual obligation* to be brought before the same court: that for the place of performance of the obligation'. [26]

27. The Court thus formulated the reasons which militate in favour of an 'attraction' towards Article 5 (1), an attraction which must extend to the *grounds* of the claims, whether they derive from a tort or unjust enrichment under the *lex causae*, provided that, as in the present case, they are based 'for the most part on the non-performance of contractual obligations'. [27]

28. The manifest practical advantages [28] must also be mentioned: the court dealing with the contract is best placed to understand its context and its implications as regards legal proceedings.

29. In other words, it is thus appropriate to conclude that where there are overlapping grounds of that kind, only Article 5 (1) will determine the jurisdiction of the court, since the matters relating to contract will 'channel' all the aspects of the dispute.

30. The effect of such a solution thus, by implication but of necessity, is in such circumstances to *exclude* from the scope of Article 5 (3) even those grounds relied on in a single action which are non-contractual under the national law in favour of the forum designated by Article 5 (1), [29] in so far as the action itself constitutes the expression of 'difficulties which may arise on the occasion of the performance of a contractual obligation'. [30]

23 — Case 34/82, *supra*.

24 — Paragraph 17, emphasis added.

25 — In that connection, the rule that the secondary issue should follow the first is expressly mentioned in the Court's judgment of 15 January 1987 in Case 266/85 *Shenavai* [1987] ECR 239, paragraph 19.

26 — Paragraph 12, emphasis added.

27 — See Kropholler, op. cit., p. 64, Art. 5, No 32, who considers that 'it is the contractual relationship and not the delictual relationship which is decisive'.

28 — See *Peters*, *supra*, paragraph 14.

29 — But the special provisions of Article 1 of the Protocol concerning persons domiciled in Luxembourg should be noted.

30 — See footnote 26, *supra*.

31. I therefore propose that the Court should rule as follows:

(i) The application of Article 6 (1) of the Convention of 27 September 1968 requires that the claims should be related in such a way that it is expedient to hear and determine them at the same time in order to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(ii) The term 'tort, delict and quasi-delict' in Article 5 (3) of the Convention must be construed independently;

An action based on tort and contract and unjust enrichment is governed exclusively by the rules laid down for contractual matters in Article 5 (1) of the Convention.