OPINION OF ADVOCATE GENERAL LÉGER
delivered on 10 January 1995 *

1. It very infrequently happens that, by reason of the reopening of the oral procedure and as a result of happenstance in the order of business of the Court, Opinions are successively delivered by two Advocates General in the same case.

2. Having been called upon to state my views following delivery of the Opinion of my predecessor, I have found that my task has been eased; I concur, in effect, with the position adopted by him on 14 July 1994, and will merely add a few observations in answer to certain arguments advanced after the delivery of his Opinion, particularly during the second oral procedure.

3. It will be recalled that the facts are as follows: Miss Shevill, domiciled in the United Kingdom, and three companies established in different Contracting States have brought an action for defamation in the High Court against the company which publishes the newspaper *France-Soir*. The High Court has dismissed an objection of want of jurisdiction, which has now come before the House of Lords on appeal. The latter court has sought a preliminary ruling from this Court on seven questions.

4. It cannot be seriously disputed that the defamation action falls within the class of actions concerning liability in tort and delict, and is covered by Article 5(3) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter 'the Convention'). [1] [2]

5. Mr Darmon suggests that, apart from the courts of the State in which the defendant is domiciled, the courts having jurisdiction to hear and determine an action for defamation by a press article are either those of the place where the publication was printed, which are competent to award compensation in respect of the whole of the damage arising from the unlawful act, or the *courts of each Contracting State in whose territory the article has been distributed*, which have jurisdiction with regard to the specific damage caused in that State. [3]

* Original language: French.

1 — As amended by the Accession Convention of 25 October 1982 (OJ 1982 L 388, p. 1).

2 — As to this point, see paragraph 9 of the Opinion of Advocate General Darmon and paragraph 11 of the Commission's observations.

3 — Paragraph 71 of Mr Darmon's Opinion.

6. I am satisfied that that view is correct, for the following reasons.

7. As is well known, the jurisdictional options laid down by the rules of special jurisdiction contained in Article 5(3) of the Convention are justified by reasons relating to '... the sound administration of justice and the efficacious conduct of proceedings'. [4]

8. In circumstances as complex as those of the present case, the determination of the forum must necessarily result from a *compromise*. The point has been made that 'the objective of the sound administration of justice can be achieved only by maintaining a fine balance between, on the one hand, the requirement of *proximity* between the forum and the dispute and, on the other, the need for a degree of jurisdictional *concentration*'. [5]

9. Given that the Convention embodies a *unified* system for the determination of judicial competence, the prime objective must be the designation of a *centralized forum*. The problem here lies in the special nature of non-material or non-pecuniary damage: it is difficult to identify, assess and compensate. Significantly, in certain areas of intellectual property law, such as that of trade marks, which also recognizes damage of that kind, international jurisdiction in cases of infringement is determined not according to the damage caused but on the basis of the *sole causal event*: the act of infringement itself. [6]

10. That interpretation accords squarely with the case-law of the Court. Thus, according to Messrs Bischoff and Huet, commenting on the judgment in *Rüffer*, [7]

'... one of the major threads running through the Court's case-law on the interpretation of the Convention is its desire to avoid the "dismemberment" of the issues referred to it (and the jurisdictional fragmentation which that might cause), and to incline instead towards a degree of unification, by applying the maxim *accessorium sequitur principale* and thereby relating *the consequential act or matter* back to *the causative act or matter*'. [8]

11. Consequently, Mr Darmon rightly concluded in his Opinion that the courts of the place where the publication was printed — that is to say, where the causal event occurred — must be defined as the central forum having jurisdiction to determine the whole of the damage caused throughout the Community.

4 — Paragraph 17 of the judgment in Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49.

5 — P. Bourel: 'Du rattachement de quelques délits spéciaux en droit international privé', *Recueil des cours, Académie de droit international de La Haye*, 1989, II, volume 214, point 136, p. 366.

6 — See Articles 93(5) and 94 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

7 — Case 814/79 [1980] ECR 3807.

8 — *Journal du droit international*, 1982, No 1, p. 464, at p. 472 (emphasis added).

12. Nevertheless, that forum cannot be the sole forum, for two reasons.

13. First, that forum coincides most frequently — if not invariably — with the courts of the State in which the defendant is domiciled. In its judgment in *Mines de potasse d'Alsace*, [9] the Court held that '... to decide in favour only of the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness'.

14. Second, the courts of the place where the damage arose (that is to say, the place of distribution) cannot be excluded as a potential forum. They must constitute a possible choice for the purposes of ensuring the '... particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile' [10] on which the special jurisdiction attributed by Article 5(3) of the Convention is founded. [11]

15. For example, the victim of defamation arising from the publication in Contracting State A of a newspaper which is also distributed in Contracting State B, where that person is particularly well known, must be able, at his option, to sue in the courts of State A, if he considers that the damage suffered by him extends to the whole of the Community, or in those of State B, if he considers that the damage is limited to the territory of that latter State.

16. For that reason, it is suggested that the plaintiff should be able, at his option, to sue not only in the courts of the defendant's domicile and those of the place in which the causal event occurred but also in the courts of the place in which the damage arose. [12]

17. That solution obviates any risk of forum-shopping: each court before which proceedings are brought in places where distribution has occurred can award compensation for *separate damage*. Moreover, the courts of the place where the article was printed, having jurisdiction in respect of the whole of the damage, will generally apply, as regards damage arising in other Contracting States, the substantive laws of those States.

18. Such a solution accords with the principle that the rules of special jurisdiction must be interpreted restrictively.

19. It confers competence on the courts which are best qualified to assess the damage arising in their locality: the 'particularly close connecting factor' between the court seised and the dispute is undeniable.

9 — Case 21/76 [1976] ECR 1735, paragraph 20.

10 — Judgment in *Dumez France and Tracoba*, cited above (footnote 4), paragraph 17.

11 — Ibid.

12 — See Mr Darmon's Opinion, paragraph 58.

20. It is true that one major objection may be raised against such a solution: it gives rise to a potential multiplicity of competent forums, whereas the concentration of proceedings is '... one of the primary objectives of the Convention'. [13]

21. The tendency of the Convention is to avoid the proliferation of forums, because such proliferation increases the *risk of the irreconcilability of judgments*, which constitutes a ground for non-recognition (Article 27(3) and (5) of the Convention) or for refusing an application for enforcement in Contracting States other than that in which such judgments have been given.

22. *No such risk exists in the present case.*

23. It is true that the judgments of courts seised in different Contracting States may conflict with one another, since they are governed by different substantive laws. They will not be *irreconcilable*, because they will each relate to *compensation for a distinct head of damage* (that arising in the territory of the Contracting State concerned).

24. I would add that, in any event, the plaintiff will always have the option of suing in respect of the whole of his claim before the courts of the defendant's domicile and those of the place in which the causal event occurred.

25. I now turn to the four points which seem to me to be central to the matter following the re-opening of the oral procedure in this case.

26. First, the 'place where the harmful event occurred', within the meaning of Article 5(3), cannot amount to *the place of distribution* of the publication. In commenting on this point I will refer to the arguments submitted by the United Kingdom.

27. Second, the courts of the place in which the damage is suffered cannot constitute an appropriate forum.

28. Third, it appears to me that the solution arrived at in the judgment in *Shenavai* [14] must also be rejected.

29. Fourth, the courts of each place in which distribution takes place cannot be competent to determine the whole of the damage.

13 — P. Bourel, op. cit., paragraph 188, p. 357.

14 — Case 266/85 [1987] ECR 239.

I — Determination of the 'place where the harmful event occurred'

30. It is well known that, since delivering its judgment in *Mines de potasse d'Alsace*, cited above, the Court has regarded 'the place where the harmful event occurred' as an independent concept. [15] It ruled that 'Where the place of the happening of the event which may give rise to liability in tort, delict or quasidelict and the place where that event results in damage are not identical ...', that expression covers both '... the place where the damage occurred and the place of the event giving rise to it'. [16]

31. The United Kingdom's view as regards defamation is that the place of the causal event is the same as that in which the damage occurred. It is the place in which a defamatory document is communicated to a third party:

'... the communication of defamatory material ..., rather than the editing or printing of the newspaper, is the causal event which, both as a matter of English law, and in fact, immediately damages the victim'. [17]

'The communication of the material is the immediate and direct cause of the damage. This act, therefore, constitutes a harmful event, and jurisdiction ... may be taken at the place where it occurred'. [18]

32. I do not agree.

33. In my view, the situation in this case is the same as that with which the judgment in *Mines de potasse d'Alsace* was concerned, namely the geographical separation between the causal event and the place where the damage occurred. The places where the newspaper was distributed do not coincide with the place where it was published.

34. Consequently, to maintain that the causal event occurred where the article was distributed is to forego a forum which the Convention, as interpreted in *Mines de potasse d'Alsace*, recognizes as being available to the victim.

15 — See Mr Darmon's Opinion, paragraph 21 et seq.

16 — Operative part of the judgment in *Mines de potasse d'Alsace*.

17 — Paragraph 16 of the United Kingdom's observations.

18 — Ibid., paragraph 17.

35. The Court justified that duality of jurisdiction by pointing out, in its judgment in *Mines de potasse d'Alsace*, that:

'... a decision in favour only of the place where the damage occurred would, in cases where the place of the event giving rise to the damage does not coincide with the domicile of the person liable, have the effect of excluding *a helpful connecting factor with the jurisdiction of a court particularly near to the cause of the damage*'. [19]

36. The solution advocated by the United Kingdom effectively *confuses* [20] the place where the causal event arose with the place in which the damage occurred, and does not take the Court's case-law into account.

37. Consequently, a distinction must be drawn between the place of the causal event, such as that in which the newspaper was printed, and the place in which the harmful event occurred, such as that in which it was distributed.

19 — Paragraph 21 (emphasis added).

20 — See in that regard the observations of the Commission, paragraphs 19 and 19a, and of the defendant, paragraph 2.21.

II — The courts of the place in which the damage is suffered cannot constitute an appropriate forum

38. In matters relating to tort, delict or quasi-delict, can the words 'place where the harmful event occurred' be construed as meaning the place where the damage is suffered, given that such an interpretation would effectively enshrine the concept of the *forum actoris* since the damage is generally suffered by the victim at his domicile? [21]

39. The Convention is based on the general jurisdictional rule *actor sequitur forum rei*, laid down in Article 2. Only in the exceptional cases restrictively enumerated in Articles 5(2), 8 and 14 does the Convention confer jurisdiction on the *forum actoris*, a forum not contemplated by the ordinarily applicable rules of law:

'... save in cases for which express provision is made, the Convention appears to be clearly hostile to the attribution of jurisdiction to the courts of the plaintiff's domicile ...'. [22]

40. Furthermore, it seems to me particularly difficult to bring the *forum actoris* within the

21 — Opinion of Advocate General Darmon in Case C-364/93 *Marinari*, paragraph 31.

22 — Paragraph 17 of the judgment in Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139.

framework of the *special* jurisdiction established by Article 5(3), which makes no express provision for it. That jurisdiction constitutes a derogation from the principle that jurisdiction is vested in the courts of the State of the defendant's domicile, and as such must be interpreted *restrictively*. [23]

41. In matters relating to liability in tort or delict, the Court has never attributed jurisdiction to the courts of the place where the damage is suffered. It has even formally excluded such jurisdiction in the case of an indirect victim. [24] Advocate General Darmon has shown, in his Opinion in the *Marinari* case, [25] currently at the stage of deliberation, that the rationale of Article 5(3) is based not on any compelling need to protect the victim but 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 ...', [26] and that the courts of the place where the damage was suffered do not meet that requirement.

42. Consequently, I am unable to see how jurisdiction to hear and determine an action for compensation for non-pecuniary damage resulting from defamation can vest in the courts of the place where the damage is suffered, when such special jurisdiction is excluded in actions for compensation for physical damage. Is it conceivable, for example, that a German tourist who has been seriously injured in an accident in Spain should have to sue in the courts of that State — Spain being the place where the damage occurred and where the causal event took place — whereas the victim of defamation perpetrated by a publication should enjoy the benefit of the *forum actoris*?

43. True, it could be maintained that the victim of a defamatory press article is the target of an act which he neither desired nor sought, and that there is no risk that, in conferring jurisdiction on the courts of his domicile, the Court is enabling the victim to choose his forum. Can it be said, however, that the victim of physical damage desired or sought to any greater extent the act from which he suffered? Why should the Court grant to the former a privilege which the Brussels Convention denies to the latter?

44. Lastly, it might be thought that damage as specific as an attack on a person's reputation or honour is inseparable from that person and that it must necessarily occur in the place where he resides.

45. I am convinced that in such circumstances the place where the damage occurs coincides with the territory in which the publication is distributed. The damage is *severable* from the forum of the victim's domi-

23 — Judgments in Cases 189/87 *Kalfelis* [1988] ECR 5565 (paragraph 19) and C-26/91 *Handte* [1992] ECR I-3967 (paragraph 14).

24 — Judgment in *Dumez France and Tracoba*, cited above.

25 — Cited in footnote 21 above, paragraph 16.

26 — Paragraph 17 of the judgment in *Dumez France and Tracoba*, cited above.

cile, which, as the United Kingdom has clearly shown, [27] does not necessarily have any connection with the damage. [28]

46. Finally, the adoption of the forum of the place where the damage is suffered — and thus of the *forum actoris* — would raise a particular problem in the dispute pending before the national court. Three of the four plaintiffs in the main proceedings are legal persons. How can their domicile be determined? Is it their seat or the place where they maintain their principal establishment?

47. The Convention does not define the domicile of legal persons any more than it defines that of natural persons. Article 53 provides that the *seat* of a company or other legal person is to be treated as its domicile and that, in order to determine that seat, '... the court shall apply its rules of private international law'. The solutions applied by the laws of the different Contracting States vary greatly. [29] As has been pointed out, 'There is the risk that those differences may have unfortunate results', [30] particularly as regards concurrent jurisdictions. Regrets have thus been expressed concerning 'the absence of any uniform conflicts rule which is capable of being applied with certainty to any given case'. [31]

48. Even though this problem is specific to the dispute before the national court, I consider that it represents an additional argument for rejecting the idea that competence vests in the courts of the place where the damage is suffered.

III — It is inappropriate to apply the solution arrived at in *Shenavai*

49. In its judgment in *Shenavai*, cited above, the Court applied the maxim *accessorium sequitur principale*: '... in other words, where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction'. [32] The Court concluded from this that:

'For the purposes of determining the place of performance within the meaning of Article 5(1) of the Convention ..., the obligation to be taken into consideration in a dispute concerning proceedings for the recovery of fees commenced by an architect commissioned to draw up plans for the building of houses is

27 — Paragraph 20 of its observations and paragraph 46 of Mr Darmon's Opinion.

28 — As to this point, compare the analysis of the Supreme Court of the United States in *Keeton* v *Hustler Magazine Inc.*, 465 US 770, 79 L Ed 2d790, 104 S Ct 1473, particularly [10]: 'There is no justification for restricting libel actions to the plaintiff's home forum. The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has "certain minimum contacts ... such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice ..."'.'

29 — These are listed in Rideau and Charrier: *Code de procédures européennes*, Litec, 1st edition, p. 461.

30 — H. Gaudemet-Tallon: *Les conventions de Bruxelles et de Lugano*, LGDJ, 1993, no 73. See also Rideau and Charrier, op. cit., p. 461, and Beraudo: 'Convention de Bruxelles', *J. Cl. Pr. Civ.*, fasc. 52-1, no 28.

31 — Beraudo, op. cit., ibid.

32 — Paragraph 19.

the contractual obligation which forms the actual basis of legal proceedings'. [33]

50. The defendant in the present case suggests that the Court should apply the same principle here. [34]

51. That possibility has been convincingly dismissed in the earlier Opinion. [35] I would add that the Court has previously declined to apply the principle *accessorium sequitur principale* in the context of Article 5(3). In its judgment in *Kalfelis*, [36] it held that a court seised of an action by virtue of the special jurisdiction conferred by Article 5(3) does not also have jurisdiction 'over that action in so far as it is not so based'. [37]

52. Lastly, how can the place where the *main* damage occurs be determined without appraising the reputation of the defamed person in the various Contracting States concerned, without calculating the number of copies distributed in each of those States, *in short, without appraising the substance of the dispute*? The Court has expressed the view that an interpretation of Article 5 consistent with 'the purposes and spirit of the Convention' must enable '... the national court to rule on its own jurisdiction without being compelled to consider the substance of the case'. [38]

53. Otherwise, a plaintiff could no longer be certain that the court in which he sues would accept jurisdiction. That would run counter to the requirement that jurisdictional rules must be predictable, as the Court ruled in *Rösler* [39] and in *Handte*, [40] cited above.

IV — The courts of each Contracting State in whose territory the article has been distributed are competent to determine the specific damage caused in that State

54. In matters relating to liability in tort and delict, '(the) jurisdiction (of the court of the place where the damage occurred) is ... by its nature functionally limited. According to the judgment in *Bier* v *Mines de potasse d'Alsace*, it is founded solely on the requirements of the sound administration of justice, and more precisely on the need for the existence of a connecting factor between the dispute and the court which is called upon to hear and determine it, particularly as regards mat-

33 — Operative part.

34 — See also A. Huet: *Journal de droit international*, 1994, p. 169, and T. Hartley: 'Article 5(3) of the Brussels Convention', *European Law Review*, 1992, volume 17, p. 274.

35 — Paragraph 80 et seq.

36 — Cited above, footnote 23.

37 — Paragraph 21.

38 — Judgment in Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913, paragraph 20. See also the judgment in Case 34/82 *Peters* [1983] ECR 987, paragraph 17, final sentence.

39 — Case 241/83, [1985] ECR 99, paragraph 23.

40 — Cited above, footnote 23, paragraph 19.

ters of evidence and procedural organization'. [41]

55. It follows that no sufficient link exists between the courts of a Contracting State and damage caused in another Contracting State, inasmuch as that damage is not connected with those courts by virtue either of the place where it occurred or of the place where the wrongful act was committed. The link of proximity between the forum and the dispute required by the Court's case-law exists only in respect of damage occurring in the territory of the State of the forum seised.

56. It is clear that any contrary solution would encourage forum shopping: the English courts could even find themselves in danger, by reason of their 'generosity' towards victims of defamation, of becoming the natural choice of forum in such matters.

57. The need to prevent any risk of forum shopping is particularly great when the subject-matter of the dispute is an area in which the substantive law applying in the Contracting States is not harmonized and gives rise to solutions which are markedly divergent from one Contracting State to another. That is particularly so in the case of the law of defamation.

58.For those reasons, I adopt the wording of the operative part of the Opinion delivered on 14 July 1994 by Mr Darmon.

41 — P. Bourel, op. cit., paragraph 115, p. 355.