REPORT FOR THE HEARING
delivered in Case 32/88 *

I — Facts and procedure

1. *The relevant provisions*

According to Article 2 of the Brussels Convention, subject to the provisions thereof, persons domiciled in a Contracting State are, whatever their nationality, to be sued in the courts of that State.

The version of Article 5 of the Convention in force at the start of the legal proceedings giving rise to this reference for a preliminary ruling and applicable to the facts of the case reads as follows:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

(1) in matters relating to a contract, in the courts for the place of performance of the obligation

...'

The 1978 Convention of Accession (Official Journal 1978, L 304, p. 1) replaced point 1 with the following text:

'in matters relating to a contract, in the courts for the place of performance of the obligation in question'.

2. *Background to the dispute*

By an instrument of 28 March 1979, Mr Humbert was engaged in Brussels by Six Constructions Ltd, whose registered office, according to the court making the reference, is in Brussels. The instrument, drafted in English, and entitled 'Employment contract' gave jurisdiction in any dispute arising under the contract to the Brussels courts. The said instrument was never signed by Mr Humbert. Six Constructions sent him to Libya to prepare the site for the construction of a military airport, with which he was occupied for almost four months. However, the contract between Six Constructions and the Libyan State was terminated by the latter and Six Constructions sent Mr Humbert first to Zaïre and then to Abu Dhabi. On 10 December 1979, he was dismissed because it appeared that the construction of the airport had been definitively abandoned. Mr Humbert, who at that time resided in Labrède (Gironde), brought an action against Six Constructions before the conseil de prud'hommes (Labour Conciliation Tribunal), Bordeaux, for payment of certain amounts by way of compensation in lieu of notice, damages, gratuities for 1979 and various other amounts by way of compensation and arrears of salary. Before that court, Six Constructions raised an objection alleging a lack of jurisdiction based on the fact that the contract of employment gave jurisdiction to the Brussels courts. However, the conseil de prud'hommes decided that it had jurisdiction on the basis of R 517-1 of the code du travail (Labour Code).

* Language of the case: French.

According to that provision, the court having jurisdiction in disputes concerning matters of labour law is, in regard to employed persons who do not work in a fixed place, the court in whose territorial jurisdiction the employed person is domiciled. Six Constructions appealed against that decision to the cour d'appel (Court of Appeal), Bordeaux, once again contesting the jurisdiction of the tribunal. The cour d'appel dismissed the appeal and confirmed the tribunal's jurisdiction. In its further appeal to the Cour de cassation, Six Constructions put forward two submissions.

The first submission, alleging an infringement of Article 17 of the Brussels Convention, was rejected by the Cour de cassation. That court considered that the validity of a clause conferring jurisdiction is made subject by Article 17 of the Convention to the existence of an agreement in writing or an oral agreement evidenced in writing. Moreover, according to the case-law of the Court of Justice, the fact that no objections are raised to the terms of a contract issued unilaterally by a party does not, in principle, amount to acceptance, within the meaning of Article 17 of the Convention, of the jurisdiction clause contained therein. The situation would be different if an oral agreement came within the framework of a continuing trading relationship between the parties. That, however, is not the case here.

In its second submission, Six Constructions alleged that the Convention does not provide any basis for the jurisdiction of the French courts. Mr Humbert had no choice but to bring proceedings before either the courts of the State in which the defendant had his domicile (Article 2), or those for the place of performance of the obligation (Article 5 (1)). The questions referred to the Court by the Cour de cassation concern that submission.

3. *The questions referred to the Court*

By judgment of 14 January 1988, the Cour de cassation stayed proceedings and referred the following questions to the Court of Justice:

'(1) What is the obligation to be taken into account for the purposes of the application of Article 5 (1) of the Brussels Convention of 27 September 1968 where the court is hearing an action based on obligations arising under a contract of employment binding an employee residing in France to a company having its registered office in Belgium which posted him to several countries outside Community territory?

(2) Must the characteristic obligation be considered as being performed in the establishment which engaged him, or must jurisdiction be determined pursuant to Article 2 of the Brussels Convention?'

In its order for reference, the Cour de cassation points out that according to the judgment of the Court of Justice in Case 25/79 *Sanicentral* v *Collin* [1979] ECR 3423, employment law comes within the substantive field of application of the Convention and it follows that the rules of jurisdiction are those laid down by the Convention to the exclusion of those contained in the French code du travail. The Cour de cassation also points out that according to the judgment in Case 133/81 *Ivenel* v *Schwab* [1982] ECR 1891, the obligation to be taken into account for the purposes of the application of Article 5 (1) of the Convention in the case of a contract of employment is the obligation which characterizes the contract. However, the dispute relates to a contract of employment which was not performed in a specific establishment but in several countries outside the territory of the Community. The Cour de

cassation wonders what obligation is to be taken into account in that case and whether, should it not be possible to determine jurisdiction on the basis of the place of performance, Six Constructions must be sued in a court of the State in which it is domiciled, in accordance with Article 2 of the Convention.

4. *Procedure*

The order for reference was received at the Court Registry on 28 January 1986.

Pursuant to Article 20 of the Protocol on the Statue of the Court of Justice of the European Communities, written observations were submitted by P. Humbert, the defendant in the main proceedings, represented by H. Masse-Dessen and B. Georges, avocats au Conseil d'Etat et la Cour de cassation, Paris, by the Government of the Federal Republic of Germany, represented by C. Böhmer, acting as Agent, by the Government of the French Republic, represented by R. de Gouttes and C. Chavance, acting as Agents, by the Government of the Italian Republic, represented by L. Ferrari Bravo, acting as Agent, assisted by O. Fiumara, avvocato dello Stato, by the United Kingdom, represented by S. J. Hay, acting as Agent, assisted by C. L. Carpenter, and by the Commission of the European Communities, represented by Georgios Kremlis, a member of its Legal Department, acting as Agent, assisted by G. Cherubini, an Italian civil servant working with the Commission.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and to assign the case to the Sixth Chamber.

II — Summary of written observations submitted to the Court

The judgments of the Court on the interpretation of Article 5(1) of the Convention which are relevant to this case may, according to the observations submitted to the Court, be summarized as follows.

In the judgment in Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497, the Court held that the word 'obligation' in Article 5 (1) referred to the contractual obligation forming the basis of the legal proceedings. In that regard, the Court considered, in particular, that the objectives of the Convention imply the need to avoid, as far as possible, creating a situation in which a number of courts have jurisdiction in respect of one and the same contract. Because of this, Article 5 (1) cannot be interpreted as referring to any obligation whatsoever arising under the contract in question.

In the judgment in Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473, the Court held that the 'place of performance of the obligation in question' within the meaning of the provision at issue is to be determined in accordance with the law which governs the obligations in question according to the rules on conflict of laws applied by the court before which the matter is brought.

In the judgment in Case 133/81 *Ivenel* v *Schwab*, cited above, the Court considered that Article 5(1) of the Convention is particularly concerned to attribute jurisdiction to the court of the country which has a close connection with the dispute. In the case of a contract of employment the connection lies particularly in the law applicable to the contract. That law is determined by the obligation characterizing the contract in question and is normally the obligation to carry out work. Consequently, the obligation to be taken into account for the purposes of the application of Article 5 (1) is the obligation which characterizes the contract of employment, that is to say, in principle, the obligation to carry out work. In the Court's view, such an interpretation is inspired, in particular, by concern to afford proper protection to the party to the contract who is the weaker from the social point of view and to prevent the court hearing the action from finding that it has jurisdiction to adjudicate upon certain claims but not on others.

Finally, in the judgment of 15 January 1987 in Case 266/85 *Shenavai* v *Kreischer* [1987] ECR 239, the Court confirmed the general rule flowing from the judgment in *De Bloos*, cited above, to the effect that the obligation to be taken into account was that which corresponded to the contractual right on which the plaintiff's action was based. However, the Court also confirmed that the general rule thereby defined admits of certain exceptions, for example, in regard to contracts of employment. The Court pointed out in that regard that contracts of employment differ from other contracts by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements. The Court considered that it is on account of those particularities that the court of the place in which the characteristic obligation of such contracts is to be performed is considered best suited to resolving the disputes to which one or more obligations under such contracts may give rise.

It is on the basis of those decisions in particular that the arguments put forward in the observations are based.

Mr Humbert refers first to *Ivenel* and *Shenavai*, according to which the obligation to be taken into account is the obligation to carry out work. However, if the criterion of the place in which the work is carried out cannot be applied, as in this case, another stable connecting factor must be sought. Stability would be ensured if the criterion employed was, for example, the consideration for the work carried out, namely the execution by the employer of his obligations, such as the payment of salary. In that case, the obligation to be taken into account for the application of Article 5(1) would be that of the employer to make the contractual payments. In this case, the place in which the obligation is performed would therefore be Mr Humbert's domicile. That solution is quite consistent with the Court's case-law. Jurisdiction based on the obligation to pay salary whose enforcement is being sought in the legal proceedings would permit the attribution of jurisdiction of a single court and would respect the rights of the employee. Moreover, that solution would ensure that the plaintiff has a genuine choice between the courts of the defendant's country (Article 2) and those of the plaintiff's country (Article 5 (1)), whereas any other solution could lead to only the courts of the place where the employer is established having jurisdiction.

The German and French Governments and the United Kingdom consider that, in principle, the rule in *Ivenel* applies. However, if an employee does not normally carry out his work in a single country, jurisdiction under Article 5(1) of the Convention in disputes arising out of the contract of employment is conferred on the courts for the place in which the establishment which engaged the employee is located.

In that regard, the German Government observes that the Court's interpretation of Article 5 (1) of the Convention is inspired by a desire to prevent, as far as possible, courts in different countries having jurisdiction over parts of one contract. It is therefore necessary to base jurisdiction solely on the *forum executionis*, which is certain and predictable. That is necessary in particular in the case of an employee who worked in several countries. Because reference to the work to be performed as a connecting factor would have the effect of giving jurisdiction to courts in different countries, it is the lasting contractual relationship between employer and employee, existing in the place in which the establishment which engaged the employee is located, that should be taken into account.

The German Government and the United Kingdom also draw attention to the draft convention parallel to the Brussels Convention to be concluded between the Member States of the Community, on the one hand, and certain EFTA countries, on the other. Article 5 (1) of that draft reads as follows:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

(1) in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged.'

That formulation, which is in conformity with the judgments of the Court in *Ivenel* and *Shenavai*, may be of guidance to the Court in this case.

Finally, the United Kingdom and the French Government argue that the judgment in *Ivenel* is based on a desire to ensure that the court having jurisdiction is the court of the State whose law governs the contract. However, Article 6 (2) of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, referred to by the Court in *Ivenel*, provides that a contract of employment is to be governed by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he has been temporarily employed in another country or, if the employee does not habitually carry out his work in any one country, by 'the law of the country in which the place of business through which he was engaged is situated'.

The Italian Government considers that the criterion of the place where the obligation which characterizes the contract of employment is carried out can be applied only if that place is also the place where the work in respect of which the salary is paid is performed. If that is not the case, there is no reason to derogate from the general rule laid down in *De Bloos*. Account must therefore be taken of the obligation actually relied on before the court, in this case, the employer's obligation to pay various emol-

uments to the employee. The place of performance of the obligation is to be determined in accordance with the 'Tessili rule'.

The Commission analyses in detail the solution proposed by the French and German Governments and the United Kingdom. However, it ultimately rejects that solution for the following reasons. First, such a solution would involve departing even further from the terms of Article 5 (1). The connecting factor used in that provision is the place of performance of the obligation in question or, in regard to a contract of employment, the characteristic obligation. The solution based on the location of the employer's establishment concerns the interpretation of the expression 'place of performance' rather than the 'obligation to be taken into account'. Its effect is therefore to depart from the decision in *Tessili*. Furthermore, the solution proposed by the three Member States does not take account of the need to protect the weaker party. Finally, it makes the interpretation of the Brussels Convention too dependent on solutions adopted in regard to conflicts of laws by the Rome Convention. The Commission points out in that regard that the solutions adopted in Article 6(2) of the Rome Convention apply only where the parties have not made any choice. The Commission contends that no special rules should be introduced for contracts of employment since the draftsmen of the Convention deliberately refrained from laying down special rules concerning jurisdiction in such matters. Consequently, the general rule in Article 2 of the Convention (jurisdiction of the courts for the defendant's domicile) should prevail in a situation in which Article 5 (1) as interpreted by the Court in regard to contract of employment, cannot be applied.

For all those reasons, the Commission proposes the following replies:

'(1) The obligation to be taken into consideration for the purposes of applying Article 5 (1) where a court is hearing an action based on obligations arising under a contract of employment which has been performed entirely outside the territory of the Contracting States is the characteristic obligation of the employee to perform the work;

(2) When the characteristic obligation, the place of performance of which must be determined as a question of fact and is the place in which the work was actually performed under the contract of employment, is essentially performed outside the territory of the signatory States, Article 5 (1) does not apply.'

T. Koopmans
Judge-Rapporteur