OPINION OF ADVOCATE GENERAL TESAURO
delivered on 31 January 1995 *

1. The questions referred to the Court by the Court of Appeal concern the interpretation of Article 5(1) and (3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Convention'), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.

More specifically, the national court is asking whether, in proceedings for restitution in respect of money paid to the defendant by the plaintiff under a contract which is a nullity because one of the parties did not have capacity to enter into it, the defendant must be sued in the courts for the place of performance of the obligation in question, the case concerning a matter relating to a contract within the meaning of Article 5(1) of the Convention, or before the courts for the place where the harmful event occurred, since the dispute is a matter relating to tort, delict or quasi-delict, within the meaning of Article 5(3) of the Convention.

* Original language: Italian.

2. It should be pointed out straight away that, although the national court is seeking a ruling on the interpretation of the aforementioned provisions of the Convention, in the main proceedings the question to be determined is whether the London courts or the Glasgow courts have jurisdiction. Thus the case involves a conflict of territorial jurisdiction between the courts of a contracting State, namely the United Kingdom.

In order to assess the reasons which prompted the national court to make this reference it will be helpful to give a brief account of the relevant national legislation and of the facts underlying the main proceedings.

National legislation

3. Section 2 of the Civil Jurisdiction and Judgments Act 1982 provides that the Convention is to have the force of law in the United Kingdom (Section 2(1)) and that any question as to the meaning or effect of any provision of the Convention, if not referred to the European Court, is to be determined in accordance with the principles laid down

by and any relevant decision of the European Court (Section 3(1)), together with the assistance, if necessary, of the Reports of Messrs Jenard and Schlosser (Section 3(3)).

The Convention, contained in Schedule 1 to that legislation, manifestly applies only to the Member States. In order to resolve problems stemming from the fact that in the United Kingdom there are separate jurisdictions in civil matters (England and Wales, Scotland and Northern Ireland), the Civil Jurisdiction and Judgments Act 1982 lays down a scheme for resolving possible territorial conflicts of jurisdiction within the United Kingdom.

4. That scheme is contained in Section 16 of the legislation. As far as is relevant for these purposes, it provides:

'(1) The provisions set out in Schedule 4 (which contains a modified version of Title II of the 1968 Convention) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where:

(a) the subject-matter of the proceedings is within the scope of the 1968 Convention as determined by Article 1 (whether or not the Convention has effect in relation to the proceedings);

and

(b) the defendant or defender is domiciled in the United Kingdom or the proceedings are of a kind mentioned in Article 16 (exclusive jurisdiction regardless of domicile).

(2) ...

(3) In determining any question as to the meaning or effect of any provision contained in Schedule 4:

(a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that Court as to the meaning or effect of any provision of that Title; and

(b) without prejudice to the generality of paragraph (a), the reports mentioned in Section 3(3) may be con-

sidered and shall, so far as relevant, be given such weight as is appropriate in the circumstances.'

(2) ...

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or in the case of a threatened wrong is likely to occur.'

Article 2 of the aforementioned Schedule 4 provides:

'subject to the provisions of this Title, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part.'

Article 5 of Schedule 4 provides:

'a person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued:

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

5. Article 2 and Article 5(1) and (3) of Schedule 4 thus reproduce more or less verbatim the corresponding articles of the Convention, in the version contained in the 1978 Convention on Accession. [1] Even if it is not apparent from the documents in the case, it should be stated that whilst the modifications to Article 5(1) [2] made by the Convention on Accession of 1989 entered into force in the United Kingdom on 1 December 1991, Schedule 4 was amended in so far as is relevant with effect from 1 April 1993. That fact deserves to be underlined inasmuch as it shows that the provisions in question contained in Schedule 4 reproduce the corresponding provisions of the Convention but

1 — Apart from specific adjustments, the national scheme under discussion departs from the Convention, as amended in 1978, only in relation to matters of marginal importance. For present purposes, for example, it should be pointed out that Article 5(3) of the Convention refers solely to the place where the harmful event occurred and not also to the place where the harmful event is likely to occur, as the corresponding Schedule 4 provision does.

2 — That provision in the version currently in force in fact provides: 'in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to a contract 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, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated'. Although, as will be seen below, the amendments made by the 1989 Convention on Accession are not relevant for the purposes of the case before the Court, it is certainly significant that the United Kingdom legislature did not consider it necessary to adjust the corresponding provision contained in Schedule 4.

in a rigid, non-dynamic way in the sense that although the text of that schedule was that in force at a given time it may well not correspond to the current text of the Convention.

It should also be remembered that the 1982 legislation provides for the possibility of modifications to Schedule 4 'in view of any principle laid down by the European Court in connection with Title II of the 1968 Convention or of any decision of that Court as to the meaning or effect of any provision of that title' (Section 47(1)(b)). It is further stated that the modifications which may be made in that manner also include 'modifications designed to produce divergence between any provision of Schedule 4 (...) and a corresponding provision of Title II of the 1968 Convention', such as any interpretation given by the Court of Justice (Section 47(3)).

Facts

6. I now turn to the facts underlying these proceedings. As from September 1982 Kleinwort Benson Ltd (hereinafter 'Kleinwort Benson'), an English merchant bank, and the City of Glasgow District Council (hereinafter the 'District Council') entered into seven interest-rate swap contracts. [3] In performance of these contracts, Kleinwort Benson between 9 March 1983 and 10 September 1987 made payments to the District Council totalling £ 807 230.31.

On 24 January 1991 the House of Lords [4] held that interest-rate swap contracts entered into by local authorities such as the District Council were unlawful since they were *ultra vires* the local authorities. As a result of this judgment there is a dispute between the local authorities in question and the banks which are seeking to withhold sums not already paid or to recover payments made in performance of all the contracts held to be *ultra vires*. The District Council became involved in one such dispute.

7. It was against the District Council that on 6 September 1991 Kleinwort Benson brought an action before the High Court of Justice, Queen's Bench Division, Commercial Court, for restitution based on the principle of unjust enrichment. The District Council

3 — Under this type of bilateral contract one party undertakes to pay to the other during a certain period and at regular intervals sums calculated on the basis of the difference between a fixed rate of interest and the market interest rate applicable from time to time. The contract does not include the provision of any service the principal amount being purely theoretical in the sense that it exists only for the purposes of computing the liability of the parties to pay the differences. The essential feature of this type of contract is the fact that it is a speculative contract since the final financial outcome depends on the future movement of interest rates.

4 — *Hazell* v *Hammersmith and Fulham London Borough Council* (1992, 2 A. C.1).

contested the jurisdiction of the London courts and contended that in accordance with Article 2 of the aforementioned Schedule 4, the courts of the place in which the defender was domiciled had jurisdiction, and that the action should be brought before the Glasgow courts. That line of argument was upheld at first instance but Kleinwort Benson appealed against that decision to the Court of Appeal.

It was specifically in order to establish which court within the United Kingdom has jurisdiction to determine the dispute that the Court of Appeal made the reference to this Court. It asks whether an action for restitution, regard being had to the fact that it concerns contracts which are null and void *ab initio*, can be regarded as an action in a matter relating to a contract within the meaning of Article 5(1) of the Convention, or whether it comes within the terms of Article 5(3) which governs matters relating to non-contractual wrongs.

8. It is common ground between the parties that the contracts in question entered into in London are governed by English law and that England is 'the place of performance of the obligation in question' (Article 5(1) of Schedule 4) or the 'place where the harmful event occurred or in the case of a threatened wrong is likely to occur' (Article 5(3) of Schedule 4). It is therefore obvious that in either case, whether it is a matter relating to a contract or one relating to tort or quasi-delict, the English courts have jurisdiction to determine the dispute. It follows that the claim by the District Council that it should be sued in the courts of its domicile, that is to say in the Scottish courts, can be upheld only if it is concluded that an action for restitution based on the principle of unjust enrichment, such as that at issue in the main proceedings, is not covered by either Article 5(1) or (3) of the Convention.

Competence of the Court of Justice

9. As a preliminary observation I would point out that the Brussels Convention does not apply to the jurisdictional conflict underlying the main proceedings, as moreover is recognized by the parties and by the national court. Furthermore, the Convention itself states in its preamble that it refers to the determination of the *international* jurisdiction of the courts of the contracting States ('to determine the international jurisdiction of their courts') and not to internal conflicts as to territorial jurisdiction.

Therefore, however closely one examines the particular features of the United Kingdom's procedural system (in particular the division into three jurisdictions, save for the jurisdiction of the House of Lords in civil matters), no other conclusion as to the applicability of the Convention as such to the case before the national court may reasonably be con-

templated. [5] In any event it is not possible for the United Kingdom, even for the purposes of the Brussels Convention, to be deemed to be anything but a single contracting State, and for disputes as to territorial jurisdiction to come therefore within the scope of the Convention.

10. In the case before the Court, therefore, the dispute is governed by a national provision of law and not by a provision of the Brussels Convention. It follows therefore, as a preliminary matter, that it must be established whether the Court has jurisdiction to provide an interpretation of a Convention provision where the national provision, which is the one applicable, reproduces almost verbatim the corresponding Convention provisions, and where the national court on the basis of the same legislation is obliged to take account of the Court's case-law in the matter (Article 16(3)(a)) but is not obliged to apply it.

That is a new problem only with regard to the interpretation of the Convention. On several occasions, in fact, the Court has been requested under Article 177 of the Treaty to interpret Community law in regard to factual situations which are not governed by Community law but by national law, where the latter contains a *renvoi* to provisions of Community law in order to determine the provisions applicable to a purely internal situation. On those previous occasions the Court declared that it had jurisdiction to give a ruling. [6]

11. The parties to the main proceedings, together with the German and Spanish Governments, pleading in favour of the Court's jurisdiction, referred precisely to those judgments in which, although it was accepted that only domestic situations were involved, that is situations not governed by Community law but by national law, the Court declared itself competent to interpret the Community law. The French Government and the United Kingdom, together with the Commission, underlining the differences between the case before the Court in contrast to those decided on previous occasions, alleged that the Court did not have jurisdiction.

It is therefore appropriate, I think, to give a brief account of that case-law.

5 — See in this connection Cheshire and North's, *Private International Law*, p. 335; Anton and Beaumont, *Civil Jurisdiction in Scotland*, Supplement, 1987, esp. p. 7; and O'Malley and Layton, *European Civil Practice*, 1989, paragraphs 41.09 and 36.04. See also with regard to the Court's lack of jurisdiction in regard to the interpretation of the United Kingdom legislation which rendered provisions of the Rome Convention on Contractual Obligations applicable to conflicts internal to the United Kingdom, Jayme and Kohler, 'Das internationale Privat- und Verfahrensrecht der EG auf dem Wege zum Binnenmarkt', in *Praxis des Internationalen Privat- und Verfahrensrechts*, 1990, p. 358.

6 — See Joined Cases C-297/88 and C-197/89 *Dzodzi* v *Belgian State* [1990] ECR 3763 and in Case C-231/89 *Gmurzynska-Bscher* v *Oberfinanzdirektion Köln* [1990] ECR I-4003; see also judgments in Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127 — Summary publication — and Case C-88/91 *Federconsorzi* [1992] ECR I-4035.

12. The line of decisions began with the Thomasdünger judgment of 26 September 1985. [7] The Court first reaffirmed the principle that it is for the national court 'to determine in relation to the facts of each case whether the preliminary ruling is necessary in order to decide the dispute pending before it'. It therefore provided the national court with an interpretation of certain chapters of the common customs tariff, although it was common ground that this was being done in a context to which Community law did not apply, and that the customs chapters whose interpretation was sought had been used by the competent national authority for reference purposes in order to regulate various factual situations, that is the importation of goods not from non-member States but between Member States.

The Court's reasoning was more detailed and elaborate in the subsequent *Dzodzi* [8] and *Gmurzynska-Bscher* judgments [9] in which it declared itself competent to rule on the interpretation of Community provisions to which the national legislation of a Member State referred in order to determine the rules applicable to situations purely internal to that State. More specifically, in the *Dzodzi* judgment the Court provided the national court with the interpretation of certain provisions of Directive 64/221/EEC, [10] notwithstanding the fact that Article 2 of that directive expressly excludes from its scope a situation such as that of the applicant in the main proceedings. Then, in *Gmurzynska-Bscher*, it ruled on the interpretation of certain chapters of the common customs tariff in relation to a dispute not directly concerning the common customs tariff but in the purely domestic context of the national law of a Member State which expressly referred to the Community customs nomenclature in order to establish the amount of turnover tax. [11]

13. In both cases, the Court pointed out that Article 177 constitutes an instrument for cooperation between the Community judicature and national courts and that it is always for the latter to assess the relevance and pertinence of the questions which they submit. It went on to justify its own jurisdiction on the basis essentially of two arguments. On the one hand, it stressed the fact that 'it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied'. [12] On the other hand, it pointed out that Article 177 of the Treaty does not exclude from its scope situations such as that under discussion, and more specifically that 'it does not appear either from the wording of Article 177 or from the aim of the procedure introduced by that article that the authors of the

7 — Judgment in Case 166/84 *Thomasdünger GmbH* v *Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001, paragraph 11.

8 — Judgment of 18 October 1990, cited above, paragraphs 26 to 43.

9 — Judgment of 8 November 1990, cited above, paragraphs 15 to 25.

10 — Council Directive of 25 February 1964.

11 — More or less analogous to the facts underlying the *Tomatis and Fulchiron* judgment, cited above.

12 — *Dzodzi* judgment, cited above, paragraph 37; *Gmurzynska-Bscher* judgment, cited above, paragraph 24.

Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation purely internal to that State'. [13]

The same reasoning, moreover, has prompted the Court to declare itself competent to give a preliminary ruling on a provision of Community law to which reference was made not by a provision of national law but by a contractual provision. That was in order to determine the limit to the financial liability of one of the parties to the contract. [14]

14. An account should also be specifically given of the *Fournier* judgment [15] in which the Court ruled on the interpretation of the concept of the 'territory in which the vehicle is normally based' contained in a Community directive, [16] though it was common ground that it was not the directive which was being applied in that case but an agreement between national insurers' bureaux, which reproduces verbatim certain provisions of the directive including those concerning the concept in question. [17] However, the national court requested the Court to interpret that concept in order to establish which of the insurers' bureaux involved was obliged to pay compensation, a question entirely outside the scope of the directive.

Without examining its competence to give a ruling in a case of that kind [18] and although it pointed out that 'the terms used in the agreement must not necessarily be interpreted as having the same meaning as those used in the directive', the Court nevertheless provided the national court with the interpretation requested. Owing to the fact that the scope of the directive and that of the agreement are not identical the Court was however careful to point out that it was in the final analysis 'for the national court which alone is competent to interpret the agreement between national bureaux to give to the terms of that agreement the meaning which it considers most appropriate, without being bound by the meaning to be conferred on the same term appearing in the directive' (paragraph 23).

13 — *Dzodzi* judgment, cited above, paragraph 36; *Gmurzynska-Bscher* judgment, cited above, paragraph 25.

14 — *Federconsorzi* judgment, cited above, paragraphs 7 to 10.

15 — Judgment of 12 November 1992 in Case C-73/89 *Fournier* [1992] ECR I-5621.

16 — More specifically in Article 1(4) of Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (OJ, English Special Edition 1972 (II), p. 360), as amended by Council Directive 84/5/EEC of 30 December 1983 (OJ 1984 L 8, p. 17).

17 — An unusual feature to be noted is that under Article 2(d) of the supplementary agreement to the agreement in question any dispute regarding the term 'normally based' is to be submitted to a court of three arbitrators.

18 — I would recall that on a previous occasion when called upon to rule directly on a provision of the agreement in question, the Court declined jurisdiction on the ground that such agreement cannot be 'considered an act of a Community institution, since no Community institution or agency took part in its conclusion' (judgment of 6 October 1987 in Case 152/83 *Demouche* v *Fonds de Garantie Automobile* [1987] ECR 3833, paragraph 19).

15. In brief, in the cases examined it was sufficient for the questions raised by the national court to concern in some way the interpretation of Community law for the Court to declare itself competent to give a ruling. This it has done in full awareness of the fact that its interpretation may be only of contingent *future* usefulness to the Community legal order [19] and may possibly even lack usefulness for the national court itself. [20]

16. The case before the Court is not specifically envisaged in the case-law referred to. In the first place, this is a reference not under Article 177 of the EEC Treaty but under the 1971 Protocol on the Interpretation of the Brussels Convention. Secondly, the majority of cases recalled above concerned a *renvoi* by national law to Community law, whereas in the case before the Court we are confronted with an almost verbatim reproduction of the Convention provisions.

It must be determined whether these two factors are such as to place the issues in a different light and thus, as maintained by the United Kingdom, the French Government, and by the Commission, to militate in favour of a different solution.

17. Having regard to the criteria and the reasoning underlying the case-law recalled above, I consider that the reply must be in the negative. Above all, the difference between the two preliminary-ruling procedures under the 1971 Protocol and Article 177 of the EEC Treaty respectively appears to be formal rather than substantive, not to say artificial. It is difficult to see why there should be a different solution according to whether the subject-matter is outside the scope of the Convention, as in the case before the Court, or outside the scope of Community law, as in *Dzodzi*. In both cases, in fact, the logical requirements and the legal basis for the request for a preliminary ruling are the same: to provide the national court with the interpretation it seeks in order to ensure the uniform interpretation and application of Community law, or of the Convention, as the case may be, where that is necessary in order to enable a judgment applying the provision (of Community law *strictu senso* or of the Convention) to be given.

I do not think any particular importance needs to be attached to the fact that the case before us does not involve a simple *renvoi* to Community law, but a reproduction of certain Convention provisions. What is important, in fact, is not the content of the provi-

19 — *Dzodzi* judgment, cited above, paragraph 37. Moreover, in that judgment, the Court did not fail to point out that consideration of 'the limits which the national legislature may have placed on the application of Community law to purely internal situations, to which it is applicable only through the operation of the national legislation, is a matter for domestic law and hence falls within the exclusive jurisdiction of the courts of the Member State' (paragraph 42). See also in similar terms the *Federconsorzi* judgment, cited above, paragraph 10.

20 — *Fournier* judgment, cited above, paragraph 23.

sion or its literal wording, but whether it is a provision either of Community law or another provision (be it internal, contractual or contained in a Convention). Moreover, as was seen in regard to the *Fournier* case already referred to, the Court did not identify any difference between the situation where there is a *renvoi* to the content of a Community provision and the situation where a Community provision is reproduced verbatim.

18. Having said that, I would say straightaway that I do not intend to propose that the Court should extend the *Dzodzi* solution to the case before us, but rather that it should adopt precisely the opposite solution. The arguments which follow, although centred on the facts of the case before the Court, substantively also apply to the preliminary-ruling procedure under Article 177.

I thus turn to the reasons, each one decisive in itself, which lead me to consider that the Court should not reply to the question submitted by the national court.

19. In the first place the Convention is not intended to be applied to conflicts as to territorial jurisdiction between the courts of the same contracting State; it was so stipulated. The Convention, as has already been emphasized, is applicable only to international conflicts of jurisdiction, an expression designating in the specialized literature, as has been noted, conflicts of jurisdiction between the courts of different countries.

In the present case the relevant provision of the Convention does not apply as such but is the model on which the national provision applicable to this case was formulated. In any event there are two provisions — the national one and the provision of the Convention on which it was based — and these are absolutely distinct. They are not only distinct as to their origin and the context in which they apply, but also the factual situations which they govern are different. Yet, the Court's competence to rule on the interpretation of the Convention under the 1971 Protocol can only be based on the scope of the Convention. It should generally be clear that when the Convention does not apply, the Court does not have jurisdiction. [21]

21 — Similarly, but in relation to the request for an interpretation of Community provisions to which reference was made by national law in order to govern a purely internal situation, the Opinion of Advocate General Darmon in relation to the *Dzodzi* case already cited is of great interest. Of particular importance is the illuminating and incisive consideration, drawn of course from the fundamental elements of general legal theory, that '*there is no Community law outside its field of application*: what is important therefore for its proper application is its unity within the scope *ratione personae* and *ratione materiae* which it itself determines. The fact that the concepts which it uses within the limits of its scope may be employed on a unilateral basis in order to deal with a given aspect of a piece of national legislation cannot extend the field of application of Community law and, with it, the competence of the Court of Justice' (paragraph 11 of the Opinion).

20. Not only does the Court not have jurisdiction but it would make no sense if it did. In fact the machinery for 'centralized' interpretation by the Community judicature is conditioned, as is well known, by the need for uniform rules on conflict and the mutual recognition of judgments in all the Community Member States which are parties to the Convention. In its turn uniformity is the corollary of the requirement that judgments should move freely within the common market in line with its characteristic fundamental freedoms. In both cases the sole objective pursued is that of integration.

What is important is that a conflict between the courts of Heidelberg and the courts of Naples should be settled in the same manner as a conflict between the courts of Trier and the courts of Venice, inasmuch as within the Community it is useful and necessary that analogous conflicts should be resolved in an analogous manner. However, where that requirement does not have to be satisfied there is no longer any need for, or even utility in, a uniform and centralized interpretation. In resolving a conflict of territorial jurisdiction between the courts of Heidelberg and the courts of Trier there is no requirement to find the same solution as that which resolves the conflict between the courts of Naples and those of Venice. It follows that in such a case since the Brussels Convention does not apply there is no longer any room for the interpretative competence of the Community judicature. That would still hold true, even were the German or Italian conflict rule formulated in the same terms as the relevant provision of the Convention since there is no requirement that a provision based on a model must necessarily be interpreted in the same manner as its model. The 'scheme' of the Convention taken as a whole is indifferent to purely internal situations such as a conflict of territorial jurisdiction between the courts of the same country.

21. I am not thereby denying that in order to resolve the different situation of conflicts of territorial jurisdiction, the best solution may not be inspired by that adopted at international or Community level for conflicts of international jurisdiction. Indeed that may frequently occur in countries with a judicial system structured differently in the various geographical regions or administrative areas. But none of that requires the provision based on a model to receive the same interpretation as the model provision has in its own system. On the contrary, when a legislature takes as its model a provision already existing in another legal order it certainly cannot expect its 'own' provision at all costs to receive in its 'own' country the same interpretation as is given in the State of origin of the model provision (consider for example the Napoleonic Code), to the point where the courts of the State of origin are requested to ensure its interpretation.

Finally, it seems to me perfectly normal that in the legal systems of different countries

there should be different rules as to conflicts of territorial jurisdiction. Just as it is normal that, where different countries have adopted the same legislative solution by means of a provision of the same tenor, each of those countries may arrive at a different interpretation of the same provision.

22. The Court's case-law corroborates these arguments. On several occasions [22] the Court has reaffirmed that provisions of the EC Treaty must and thus may be interpreted differently in the case of provisions of agreements having the same content, even to the letter, entered into with non-member States.

Moreover, it is significant that that approach was reaffirmed specifically in regard to facts analogous to those before the Court. In the *Fournier* judgment, cited above, [23] it will be recalled that in providing the interpretation of a provision of a directive reproduced in a private agreement between the insurers' bureaux of the Member States, the Court in fact was careful to state that 'the terms used by the agreement must not necessarily be interpreted as having the same meaning as those used by the directive'.

23. The second reason why I am inclined to conclude that the Court does not have jurisdiction is that the request for interpretation of Article 5 of the Convention not only does not satisfy the conditions mentioned in Article 3 of the 1971 Protocol, inasmuch as it is not necessary for the judgment to be given in the main proceedings, but also would not be binding.

That is already clear from a reading of the relevant national provision itself which as summarized expressly provides for the possibility of adopting modifications intended to produce divergence between any provision of Schedule 4 and the corresponding provisions of the Convention, as affected by any interpretation provided by the Court of Justice. Furthermore, there is no obligation on the national court to resolve the dispute with the interpretation provided to it by the Community judicature. Moreover, even if a national provision could make provision for binding effect it would be as if it did not exist, inasmuch as it would not be a requirement which the national legislature could or

22 — See judgment of 9 February 1982 in Case 270/80 *Polydor* [1980] ECR 329; and the judgment in Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641, paragraph 30. See also Opinion 1/91 of 14 December 1991 [1991] ECR I-6084), in which the Court confirmed that 'the fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives' (paragraph 14).

23 — See paragraph 22.

would be obliged to sanction. In fact, the binding effect can stem only from a provision of the Protocol or of the Convention which, in terms of this case, is non-existent.

24. It is, then, worthy of note that on one occasion the Court of Justice affirmed that its interpretation was not binding when the provision forming the subject-matter of its interpretation was not as such applicable to the dispute before the national court. In the *Fournier* case, mentioned above, the Court in fact provided the national court with the interpretation sought by it and which the parties had submitted to arbitration pursuant to their agreement; at the same time, the Court acknowledged that such interpretation could be non-binding on the national court, since the same terms in the directive and in the agreement were capable of not having the same meaning and that, finally, it was 'for the national court which alone is competent to interpret the agreement between national bureaux to give to the terms of that agreement the meaning which it considers most appropriate, *without being bound by the meaning to be given to the same expression appearing in the directive*'. [24] To that extent, the Court thus recognized that its ruling under Article 177 could be non-binding.

The fact that the Court in that case gave the interpretation requested, though recognizing that it was not binding on the national court, cannot but raise serious doubts. In fact indeed, it is contrary to the very logic of the preliminary-ruling machinery to acknowledge that the interpretation of the Convention or of Community law requested and given is not binding on the national court. That is all the more so since less than a year earlier in a statement concerning questions of principle the Court rightly pointed out in that regard that 'it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without any binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a Court whose judgments are binding'. [25]

25. Moreover, to accept that the Court may provide an interpretation of a provision for future reference ('to forestall future differences of interpretation' [26]), though not necessary for the solution of the dispute before the national court and not binding on it, seems to me to be in open contradiction with

24 — *Fournier* judgment, cited above, paragraph 23, emphasis added.

25 — Opinion 1/91 of 14 December 1991 (ECR I-6084, paragraph 61).

26 — *Dzodzi* judgment, cited above, paragraph 37.

the Court's well-settled case-law on hypothetical or analogous questions. [27] The cooperation between the national court and the Community judicature and the preliminary-ruling machinery may not be availed of for purposes other than that of giving judgment in a specific case. Technical assistance, or in other words a legal advisory role, are manifestly outside the system adopted by the 1971 Protocol, just as they are outside the machinery of Article 177 of the Treaty.

In the latter connection I regard as unfounded the statement by the Court that it does not appear either from the wording of Article 177 or from the aims pursued thereby that the authors of the Treaty intended to exclude from the jurisdiction of the Court the interpretation of a Community provision when it is not applicable to the case in question, [28] that is to say when the question clearly falls outside the scope of Community law. The situations not expressly excluded are in fact numerous: they cannot on that ground be deemed to be included; and that is all the more so in the Community system which, I hardly need recall, is based on the principle of the assignment of powers.

26. Finally, when the various provisions inspired by Community law or by the Convention itself are borne in mind — and these are no longer exceptional — there is no denying the risks that would be created by a ruling differing from that which is here canvassed. Specifically in relation to the subject-matter before the Court, suffice it to cite the Lugano Convention [29] entered into between the Member States of EFTA and the Member States of the Community: the majority of the articles of that Convention are in fact reproduced verbatim from the provisions of the Brussels Convention. It should not therefore be thought that the Community judicature has automatically acquired jurisdiction to interpret the provisions of the Convention when a court of a Member State submits questions in the matter, and the conflict of jurisdiction is between the Community judicature and the court of an EFTA country. [30] For an example taken from Community law *strictu senso*, Article 85 of the Treaty may be cited. It was taken as the model, for example, for the Italian legislation on competition, is reproduced, *mutatis mutandis*, as Article 2,

27 — I refer in particular to the judgments in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673 and Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraphs 31 to 33; and to the order of 16 May 1994 in Case C-428/93 *Monin Automobiles II* [1994] ECR I-1707, paragraphs 13 to 16. Moreover, it should also be emphasized that 'in order to forestall future differences of interpretation' it would of course be more useful to provide the national court with the interpretation requested in a hypothetical situation of the type to be found in the judgment in *Foglia* v *Novello* [1980] ECR 745 rather than in the cases such as those before the Court now. That is essentially because the first situation involves cases which are definitely governed by Community law and which, to the extent to which they are contrived and perhaps precisely because they are contrived, are capable of occurring in the future, whereas the second situation concerns purely internal situations which therefore do not present any 'real' link with Community law (see V. Rodière, 'Sur les effets directifs du droit (social) communautaire', in *RTDE*, 1991, p. 565, particularly at pp. 569 et seq.

28 — *Dzodzi* judgment, cited above, paragraph 36; *Gmurzynska-Bscher* judgment, cited above, paragraph 25.

29 — OJ 1988 L 319, p. 1.

30 — See Kohler, 'Ein internationales Zivilverfahrensrecht für Gesamteuropa', in *Jayme* (Ed.), Heidelberg, 1992, pp. 24 et seq.

and contains an express reference to the principles of the Community case-law. [31] I do not believe that the Italian court could ask the Community judicature for an interpretation of Article 85 of the Treaty in order to apply the corresponding national provision; and I am even more certain that in any event it would not receive the reply from the Court that it was seeking.

27. The considerations hitherto developed lead me therefore to propose that the Court should not provide the national court with the answers it seeks. Since the Convention is not applicable, neither is the Protocol, with the result that there is no legal basis for the Court's jurisdiction.

It is clear, moreover, that the view I have formed covers not only a reference under the 1971 Protocol but also the case of a reference under Article 177 of the Treaty. In even clearer terms, I suggest that the Court should — substantively, and however detailed its reply — reconsider its *Dzodzi* judgment which I am unable to endorse, above all because in terms of general legal theory it flies in the face of the logic of the preliminary-ruling procedure, [32] actually resulting — let us admit it — in a misuse of procedure; [33] but also, to put it in more restrained but equally obvious terms, it is in contradiction with the Court's most recent case-law on the preliminary-ruling procedure. [34]

28. In conclusion, for all the reasons I have stated, I am of the opinion that the Court should declare that it does not have jurisdiction to rule on the questions referred to it for a preliminary ruling by the Court of Appeal. Moreover, I consider, having regard to the foregoing, that it would be otiose to embark on an examination of the substance of the case.

31 — Law No 287 of 10 October 1990 laying down provisions for the protection of competition and the market (*Official Gazette of the Italian Republic* of 13 October 1990, No 240). Article 1(4) of the law in question in fact provides that 'the interpretation of the provisions contained in this chapter shall be effected on the basis of the principles of the Community legal order in relation to the law on competition'.

32 — See to that effect the Opinion of Advocate General Mancini in the *Thomasdünger* case, already cited above, at p. 3002.

33 — In that connection it has also been maintained that by declaring that it had jurisdiction in the *Dzodzi* case, the Court forgot 'that it only has powers assigned to it' and therefore that 'it exceeded its powers in considering that a power could be assigned to it by national legislation, which in both cases is incorrect' (Denis Martin, 'Du bon usage de l'article 177', in *Revue de jurisprudence de Liege*, Mons and Brussels, 1991, 1991, pp. 189 et seq.).

34 — I refer to the latest developments in the matter, in particular to those judgments in which the Court has held references for a preliminary ruling submitted to it to be inadmissible, inasmuch as the national factual and legislative context was not sufficiently clear and definite: judgment of 26 January 1993 in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393, paragraph 6); order of 19 March 1993 in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4); order of 26 April 1993 in Case C-386/92 *Monin Automobiles I* [1993] ECR I-2049, paragraph 6); and the order of 9 August 1994 in Case C-378/93 *La Pyramide* [1994] ECR I-3999, paragraph 14). The restrictive conditions thus imposed by the Court as regards the admissibility of references for a preliminary ruling in situations undeniably governed by Community law highlight only too clearly the contradiction with the case-law under consideration. In particular it may legitimately be wondered how the refusal to provide the national court with replies to the questions asked owing to the absence of a clearly defined legislative and factual framework permitting a helpful reply to be given to the concrete case is reconcilable with its declared jurisdiction in regard to requests for interpretation in relation to cases not governed by Community law, whereas in the latter case the Court is precluded from knowledge of the national context which in any case would be of no use to it: by definition its interpretation, therefore, cannot but be abstract, that is to say detached from the actual case underlying it specifically because it concerns a purely internal situation.

29. In the light of the foregoing considerations, I therefore propose that the Court should give the following answer to the questions submitted by the national court:

'The provisions of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters are not applicable in order to resolve conflicts of territorial jurisdiction between the courts of a single Member State. It follows that the Protocol of 3 June 1971 on the interpretation of that Convention is not applicable and that the questions raised under Article 3 of that Protocol are outside the Court's jurisdiction.'