OPINION OF MR ADVOCATE GENERAL GULMANN
delivered on 20 February 1992 *

Mr President,
Members of the Court,

The Cour d'Appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence) has again referred to the Court for a preliminary ruling a question on the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Brussels Convention') in the case pending before that court between Mario Reichert and others on the one hand and Dresdner Bank on the other. The first such reference was the subject of the judgment of the Court of Justice in Case C-115/88 *Mario Reichert and Others* v *Dresdner Bank.* [1]

The Court will remember that the background to the case pending before the Court d'Appel is as follows:

The German couple, Mr and Mrs Reichert, residing in Germany, donated to their son, also resident in Germany, at a time when they are stated to have had a considerable debt to the Dresdner Bank, the legal ownership of a flat in France. They reserved to themselves the right of use of the property.

The Dresdner Bank challenged the donation by bringing an action before the Tribunal de Grande Instance de Grasse (Regional Court, Grasse) within whose judicial district the property is situated. The bank relied on Article 1167 of the French Civil Code according to which creditors 'may challenge in their own name transactions entered into by their debtors in fraud of their rights'. In French law such an action is known as an '*action paulienne*'.

The Dresdner Bank claimed that the Tribunal de Grande Instance de Grasse had jurisdiction under Articles 16(1) and 5(3) of the Brussels Convention. The Grasse court held that Article 16(1) of the Brussels Convention on jurisdiction with regard to immovable property was applicable. It was therefore not called upon to give a ruling as to whether Article 5(3) of the Convention was applicable. An appeal against that judgment was entered before the Cour d'Appel d'Aix-en-Provence, which originally referred to the Court of Justice for a preliminary ruling a question on the interpretation of Article 16(1).

That question was answered by the Court in the judgment in Case C-115/88 (hereinafter referred to as 'the *Reichert I* judgment'), in which the Court ruled as follows:

'An action whereby a creditor seeks to have a disposition of a right *in rem* in immovable property rendered ineffective as against him on the ground that it was made in fraud of

* Original language: Danish.
1 — [1990] ECR I-27.

his rights by his debtor does not come within the scope of Article 16(1) of the Convention.'

Before the Court had delivered its judgment, the Dresdner Bank — no doubt in the light of the observations submitted in the *Reichert I* case — had requested the Cour d'Appel d'Aix-en-Provence to refer a further question to the Court of Justice for a preliminary ruling. The Cour d'Appel agreed to that request and has referred the following question to the Court:

'If Article 16(1) of the Brussels Convention of 27 September 1968 does not apply, is an action under Article 1167 of the French Civil Code, by which a creditor seeks to obtain the revocation in regard to him of a transfer of rights in rem in immovable property by his debtor in a way which he regards as in fraud of his rights, covered by the rules on jurisdiction in Article 5(3), Article 24 or Article 16(5) of the said convention if regard is had to the tortious, delictual or quasi-delictual nature of the alleged fraud or to the existence of protective measures which the decision on the substance of the case is intended to make it possible to enforce against the property which is the subject of the rights in rem transferred by the debtor?'

Whereas the interpretation of Article 16(1) of the Brussels Convention caused several Member States to submit observations in the *Reichert I* case, only the Dresdner Bank and the Commission have submitted observations on the question referred to the Court in this case.

Before I proceed to answer the question about the interpretation of the three relevant provisions of the Brussels Convention I shall make some brief remarks, partly about the problems facing the Dresdner Bank in pursuing its application to have the transaction set aside and partly about the specific rules for such an action, known in French law as an *'action paulienne' (actio pauliana).*

The grounds on which the Dresdner Bank bases its action

The Dresdner Bank's basic idea was that the most appropriate procedure for having the donation set aside and thus of improving its chances of collecting its debt from Mr and Mrs Reichert was to take proceedings in the judicial district in which the couple's French property was situated. In this connection the bank assumed that it would be French law, that is, the *action paulienne,* which would form the basis of the decision on the substance of the case and that there would be no difficulty in obtaining enforcement of a judgment in the bank's favour in the judicial district in which the property was situated.

The bank claims that there would be problems for it if it were compelled to bring the action before a court in the State of the defendants' domicile, that is, before a German court. It states, probably correctly, that there is some doubt about the content of the German rules on the choice of legislation applicable in this situation. According to the Dresdner Bank's information it is most likely that such rules would mean

either that German law would be regarded as applicable or that a German court would require that the conditions of both German and French law for the revocation of the transaction must be met because it concerned a property situated in France. It is less likely that the German rules on the choice of legislation would result in French law being taken as the basis. It seems to emerge from this case that a German court's rules for setting a transaction aside are different from the French rules and that it may be more difficult to secure such an outcome under German than under French rules.

The Dresdner Bank also claims that there may be a risk that a French court will refuse on the basis of French public policy to recognize and enforce a German judgment of revocation relating to a property situated in France.

More generally, the Dresdner Bank also refers to the importance of the fact that the transaction to be set aside concerns immovable property, claiming *inter alia* that such property comes exclusively under the legislation of the State in which it is situated.

The bank's view is that in the necessary interpretation of the rules of the Brussels Convention the Court should take these considerations into account.

I cannot deny that I have a certain sympathy for the bank's wish for help in solving the problems it has had in obtaining a decision that Mr and Mrs Reichert's donation to their son may be revoked on the ground that it was made in order to restrict their creditors' opportunities of obtaining satisfaction. I also understand to a certain extent that at first sight there are arguments for regarding an application for revocation of the donation of a property situated in France as being most appropriately determined by a French court according to French law. But the arguments in favour of such an outcome are primarily relevant to an interpretation of Article 16(1) of the Brussels Convention. In the *Reichert I* case the Court ruled, correctly in my view, that the arguments were not sufficient to make it possible to interpret Article 16(1) in the sense desired by the Dresdner Bank. It is doubtful whether the fact that the action concerns immovable property is by itself significant as regards the rules on jurisdiction which are relevant in this case.

Although it is no doubt an important general consideration with regard to the interpretation of the rules of jurisdiction in the Convention that they should ascribe jurisdiction to the courts which will best be in a position to determine both legally and factually the issues involved, and though any views which may exist in the legal systems concerned on the rules relating to the choice of legislation may still be relevant, it should also be said that no significance can be attached, for the interpretation of the provisions of the Brussels

Convention, to the fact that in this case there may be differences between German and French rules on revocation.

It is important that the revocation takes effect only on behalf of the creditor who has brought the action, that it is valid only for the satisfaction of the creditor's claim and that the transferee may bar the action by meeting the creditor's claim.

The 'action paulienne' in French law

Moreover for the purposes of this case it is important to mention the following points:

As I have said, the Dresdner Bank bases its action on Article 1167 of the French Code Civil, according to which creditors 'may challenge in their own name transactions entered into by their debtors in fraud of their rights'. The question in this case is therefore whether one or more of the articles of the Brussels Convention mentioned in the question referred to the Court cover an action for revocation such as the *action paulienne* under French law. That action was discussed in detail in the *Reichert I* case.[2] The doubt which apparently still exists in French law on this specific action is hardly of decisive importance for the Court's decision. In the *Reichert I* case the Court emphasized the following characteristics of the action:

— the action is based on allegedly deliberate illegal conduct on the part of the debtor, but by its nature must be directed against the third person who has acquired rights over the property concerned, or both against him and the debtor;

— in the case of a donation between the debtor and a third person, the creditor is not required to show that the transferee has acted in bad faith, but must do so if the transaction is not a donation;

'The *action paulienne* ... is based on the creditor's personal claim against the debtor and seeks to protect whatever security he may have over the debtor's estate. If successful, its effect is to render the transaction whereby the debtor has effected a disposition in fraud of the creditor's rights ineffective as against the creditor alone ...'

— the creditor must show that he had a claim on the debtor before the transaction, but it is not necessary for the claim to have fallen due;

— the action is not dependent on the nature of the property which has been transferred.

2 — See the Commission's written observations of 28 June 1988 (points 10 and 12) and the French Government's observations of 1 July 1988 (point 8).

Finally it should perhaps be mentioned that it will probably be neither right nor appropriate to take the view that the revocatory action is based on the law of contract. That is true even if the creditor's claim against the debtor has, as in this case, a contractual basis and even if the transaction at issue is a conveyance of property.

Interpretation of Article 16(5) of the Brussels Convention

Article 16(5) provides that:

'The following courts shall have exclusive jurisdiction, regardless of domicile:

...

(5) in proceedings concerned with the enforcement of judgments, the courts of the Contracting State in which the judgment has been or is to be enforced.'

The Dresdner Bank claims that that provision must not be restrictively interpreted and that it may cover a revocatory action such as the *action paulienne* because the purpose of the action to set the transaction aside is to prepare for enforcement of the creditor's claim to the property in question.

That interpretation cannot be accepted. Neither the wording of the provision, the preparatory documents nor the points of view adopted academic writers may be regarded as supporting such a wide interpretation.[3] The Court has emphasized on several occasions, and most recently in the *Reichert I* judgment, that:

'... Article 16 must not be given a wider interpretation than is required by its objective, since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of any of them ...' (paragraph 9).

In the preparatory documents relating to this article, according to the Jenard Report,[4] it is stated that 'proceedings concerned with the enforcement of judgments' is to be understood as meaning:

'... those proceedings which can arise from "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments"'.

Clearly it should be accepted that courts in the State in which the judgment has been or is to be enforced have exclusive jurisdiction under Article 16(5) of the Convention only in cases directly connected with the enforcement of judicial decisions already taken or with other enforceable instruments. An action for the revocation of a transaction, such as the *action paulienne* does not concern the enforcement of a judgment already delivered or any other enforceable instrument, nor is it an action arising in connection therewith. The object of an *action paulienne* is, as the Commission states, to obtain a material alteration of the

3 — The Court has taken a decision on the interpretation of Article 16(5) in only one judgment (Case 220/84 AS- Autoteile Servicev Malhé [1985] ECR 2267), which is of no relevance to this case.

4 — Mr P. Jenard's Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979 C 59, pp. 1 to 65).

legal relationship between the creditor and the transferee.

Interpretation of Article 24 of the Brussels Convention

Article 24, the last of the provisions of the Brussels Convention with regard to jurisdiction, which is to be found in Section 9 of Title II on provisional and protective measures, provides as follows:

'For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.'

It may be seen both from the position of the article and from its wording, as well as from the preparatory documents, that it has a limited purpose, namely to preserve the opportunity for each Member State to continue to apply its existing rules of jurisdiction as regards the adoption of provisional measures such as, for example, attachment or injunction. That may be the case irrespective of whether the court having jurisdiction as to the substance of the matter under the provisions of the Convention is that of another Member State. [5]

The measures referred to in Article 24 are only such as will ensure provisional legal protection of certain claims and are dependent on the result of a subsequent judgment as to the substance of the matter. [6]

It is clear, in my view, that Article 24 does not apply to an action, such as the *action paulienne*, to set a transaction aside. The subject-matter of such an action is a claim that a transaction should be regarded as having no legal effect in relation to one of the transferor's creditors. It is not a question, as the Commission has stressed, of a remedy ensuring the maintenance of a given factual or legal situation so as to protect the rights which it is claimed should be recognized by a subsequent judgment as to the substance of the matter.

This interpretation of Article 24 must be accepted even though it appears from the Jenard Report that 'as regards the measures which may be taken, reference should be made to the internal law of the country concerned', and even though, from certain points of view, it may perhaps be reasonable to emphasize the protective nature of a revocatory action such as the *action paulienne*. [7] Article 24, according to its

5 — In that connection the Jenard Report states as follows:
Article 24 provides that application may be made to the courts of a Contracting State for such provisional measures, including protective measures, as may be available under the internal law of that State, irrespective of which court has jurisdiction as to the substance of the case. A corresponding provision will be found in nearly all the enforcement conventions.
In each State, application may therefore be made to the competent courts for provisional or protective measures to be imposed or suspended, or for rulings on the validity of such measures, without regard to the rules of jurisdiction laid down in the Convention.
As regards the measures which may be taken, reference should be made to the internal law of the country concerned.

6 — In this connection see the judgments in Case 143/78 De Cavel v De Cavel [1979] ECR 1055 and in Case 25/81 C. H. W. v G. J. H. [1982] ECR 1189, interpreting Article 24, where, in paragraphs 9 and 12 respectively, the Court emphasizes that that provision relates to cases in which a court of another Contacting State has, under the Convention, jurisdiction as to the substance of the matter.

7 — It is irrelevant, for example, in relation to Article 24, that certain French writers, as mentioned by the Commission in the Reichert I case, accept that the action paulienne is a protective remedy since it is a preparation for subsequent possibilities of enforcement by preventing the alienation of assets which may be involved. Nor can importance be attached in this respect to the fact that in paragraph 12 of the Reichert I judgment the Court stated that the creditor's action seeks to protect whatever security he may have over the debtor's estate (emphasis added) or that the Cour d'Appel d'Aix-en-Provence, in its reference for a preliminary ruling, asked the Court to take into consideration the existence of protective measures which the decision on the substance of the case is intended to make it possible to enforce against the property which is the subject of the rights in rem transferred by the debtor.

wording and purpose, covers only such remedies as are provisional in the proper sense of the word because in all circumstances they pre-suppose a subsequent judgment as to the substance of the matter.

Interpretation of Article 5(3) of the Brussels Convention

Article 5(3) reads as follows:

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

...

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.'

It is not an easy matter to determine whether an action such as the *action paulienne* for the setting aside of a transaction is covered by Article 5(3).

The Court's case-law makes a useful contribution to an interpretation, but in my view nothing which may clearly be regarded as providing a certain answer to the question. Nor can the wording of the provision be considered to provide a clear answer, in particular because there are considerable differences between the various linguistic versions, all of which are authentic. The preparatory documents contain certain aids to interpretation, but nothing decisive, and the question is dealt with only to a limited extent in academic writings which, moreover, express divergent views.[8] In this case therefore there are, in my view, especially compelling grounds for interpreting the provision on the basis of its context and purpose.

To begin with it may be appropriate to mention that it appears in any event from the case-law of the Court that Article 5(3) should be interpreted autonomously and that, like the other provisions of the article, it should be restrictively interpreted.

The Court decided in the judgment in Case 189/87 *Kalfelis* v *Schröder*[9] that 'the concept of "matters relating to tort, delict or quasi-delict" must be regarded as an autonomous concept' (paragraph 16) since

'... having regard to the objectives and general scheme of the Convention, it is important that, 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, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned' (paragraph 15).[10]

8 — Schlosser does not regard the action as covered by Article 5(3), IPRax 1/91, pp. 29 and 30. Tagaras expresses the contrary view in Cahiers de droit européen, 1990, pp. 658 and 687.

9 — [1988] ECR 5565.

10 — I refer, for a further statement of the reason for which Article 5(3) should be interpreted independently, to Mr Advocate General Darmon's Opinion in that case, referring to Mr Advocate General Warner's Opinion in Case 814/79 Rüffer [1980] ECR 3807 at p. 3834 et seq..

In the same judgment the Court stated that

'... the "special jurisdictions" enumerated in Article 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively' (paragraph 19).

Article 5(3) raises two independent but related questions: first the legal description of the type of case covered by special jurisdiction, and secondly the determination of the 'place where the harmful event occurred'. That is the first of the questions to be answered in this case.

As I have already said, the preparatory documents relating to the provision contain little information on Article 5(3), which is dealt with in conjunction with Article 5(4) on the court having jurisdiction 'as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings ...'. In the Jenard Report the two courts are referred to as 'forum delicti commissi'. The report states that the jurisdiction of the court of the place where the harmful event occurred is recognized by the national laws of the majority of the Member States and that such jurisdiction is incorporated in a number of bilateral conventions. It states that:

'The fact that this jurisdiction is recognized under most of the legal systems, and incorporated in the majority of the bilateral conventions was a ground for including it in the Convention, especially in view of the high number of road accidents'.

The wording of the provision gives rise to problems of interpretation, *inter alia* because the various linguistic versions, each of which is authentic, differ to some extent from one another.

I think it may be appropriate to quote the provision in the various versions. Article 5 begins as follows:

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

and paragraph (3) then provides:

'wenn eine unerlaubte Handlung oder eine Handlung, die einer unerlaubten Handlung gleichgestellt ist, oder wenn Ansprüche aus einer solchen Handlung den Gegenstand des Verfahrens bilden, vor dem Gericht des Ortes, an dem das schädigende Ereignis eingetreten ist;'

'en matière délictuelle ou quasi délictuelle, devant le tribunal du lieu où le fait dommageable s'est produit;'

'in materia di delitti o quasi-delitti, davanti al giudice del luogo in cui l'evento dannoso è avvenuto;'

'ten aanzien van verbintenissen uit onrechtmatige daad: voor het gerecht van de plaats

waar het schadebrengende feit zich heeft voorgedaan;'

'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;'

'in ábhair a bhaineann le tort, míghníomh nó samhail mhíghnímh, sna cúirteanna don áit inar tharla an teagmhas diobhálach;'

'i sager om erstatning uden for kontrakt, ved retten på det sted, hvor skadetilfffjelsen er foregået;'

'ως προς ενοχές εξ αδικοπραξίας ή οιονεί αδικοπραξίας ενώπιον του δικαστηρίου του τόπου όπου συνέβη το ζημιογόνο γεγονός; '

'en materia delictual o cuasidelictual, ante el tribunal del lugar donde se hubiere producido el hecho dañoso;'

'em materia excontratual, perante o tribunal do lugar onde ocorreu o facto danoso;'.

The Court has consistently held that a provision is not to be interpreted in isolation on the basis of its wording in the language of the case but that in order to obtain a uniform interpretation it is necessary to interpret it in the light of its wording in all the language versions.

In his Opinions in Case 21/76 *Bier* v *Mines de Potasse d'Alsace*[11] and Case 814/79 *Netherlands* v *Rüffer*[12] Mr Advocate General Warner had occasion to scrutinize the various language versions of the provision. In the latter case he stated, *inter alia*:

'As, however, emerges from Professor André Tunc's Introduction to Volume XI of the *International Encyclopedia of Comparative Law*, the volume on "Torts", no-one has ever succeeded, even in the context of any national legal system, in formulating an accurate description of tort that did not beg one or more questions. Like the proverbial elephant, tort is easier to recognize than to define.'

Mr Advocate General Darmon quoted Mr Advocate General Warner in point 20 of his Opinion in the *Kalfelis* case, and moreover in point 21 he drew attention to the fact that academic writers considered that a very prudent approach should be adopted in defining the sphere of application of Article 5(3).[13] He therefore drew the conclusion that 'in the present

11 — [1976] ECR 1735.

12 — [1980] ECR 3807 at p. 3834 et seq..

13 — In footnote 22 of his Opinion he quoted the following observation of Gothot and Holleaux in La Convention de Bruxelles du 27 septembre 1968, ed. Jupiter, 1985, pp. 47 and 48, No 86: ... 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.

case . . . no abstract standard should be formulated . . . '.

I can only agree with that view. An attempt to give an abstract and general definition of the scope of Article 5(3) is risky.

There is an extensive field in which Article 5(3) may undoubtedly be used and where its application will give rise to no problems (apart from those which may be involved in the determination of the place where the harmful event occurred). That field is represented by the typical actions for damages in which a claimant has suffered economic loss by a tortfeasor's conduct giving rise to liability and in which it is clear that there is no contractual link between the parties in relation to the damage. But the provision gives rise in any event to difficulties of demarcation in two respects.

On the one hand there may be difficulties in distinguishing the actions covered by the jurisdiction in matters relating to a contract, falling under Article 5(1), from those falling under Article 5(3). Certainly there are difficulties in the legal systems of all Member States in the demarcation between matters of contract and matters of tort, delict or quasi-delict as regards liability for damages and such difficulties are undeniably accentuated in the application of the Brussels Convention, not least because there may be differences in the legal description of one and the same legal concept between the legal systems of the Member States before whose courts a case may in certain circumstances be brought. [14]

On the other hand there may be difficulties in distinguishing actions which may be regarded as actions for compensation covered by either Article 5(1) or 5(3) from those which cannot be regarded as actions for compensation in matters either of contract or of tort, delict or quasi-delict. In such cases the result of the demarcation may be that there is no special jurisdiction for the action in question, which can therefore be brought only before the court of the State in which the defendant is domiciled. This case concerns a problem of that kind.

The various language versions of Article 5(3) have in any case two features in common. One is that there must have been 'wrongful' conduct, and the other that that conduct must have caused a 'harmful event'.

If that is correct, it may also be seen that the scope of Article 5(3) is potentially very wide. The Court also stated in the judgment in *Mines de Potasse d'Alsace* that

'. . . by its comprehensive form of words, Article 5(3) of the Convention covers a wide diversity of kinds of liability' (paragraph 18).

14 — There may for example be Member States under whose legal systems an action for compensation by a patient against his doctor for injury arising from treatment may be regarded as an action in tort, delict or quasi-delict, or other Member States in which such an action is regarded as relating to contract.

The position therefore presumably is, as was also mentioned by the Dresdner Bank and the Commission in the *Reichert I* case, that according to the wording of Article 5(3) there is hardly anything to prevent an *action paulienne* from being regarded as an action drawing the conclusions from a wrongful act which has led to a harmful event. That presumably was what the Cour d'Appel d'Aix-en-Provence was referring to in suggesting in the reference for a preliminary ruling that the answer to the question should have regard

'to the tortious, delictual or quasi-delictual nature of the alleged fraud . . . '.

If the case-law of the Court is examined for aids to interpretation in order to solve the demarcation problem at issue here, the judgment in the *Kalfelis* case is probably the only one which is directly relevant. The Court stated:

'In order to ensure uniformity in all the Member States, it must be recognized that the concept of "matters relating to tort, delict and quasi-delict" covers all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1)' (paragraph 17). [15]

15 — In the original version of the judgment that paragraph was worded as follows: Um eine einheitliche Lösung in allen Mitgliedstaaten zu gewährleisten, ist davon auszugehen, daß sich der Begriff unerlaubte Handlung auf alle Klagen bezieht, mit denen eine Schadenshaftung des Beklagten geltend gemacht wird, und die nicht an einen Vertrag im Sinne von Artikel 5 Nr. 1 anknüpfen.

The Court therefore attached importance to the concept of 'liability' which in the original German version of the judgment is referred to as 'Schadenshaftung'. [16] It is presumably reasonable to state that an action such as the *action paulienne* to set aside a transaction cannot be directly regarded as an action which seeks to establish 'Schadenshaftung' or 'liability' of a defendant. [17]

However, it should be pointed out that in the *Kalfelis* judgment the Court dealt with a problem of interpretation other than that relevant in this case. In the *Kalfelis* judgment the Court considered whether

'in the case of an action based concurrently on tortious or delictual liability, breach of contract and unjust enrichment, . . . the court having jurisdiction by virtue of Article 5(3) may adjudicate on the action in so far

16 — In the French translation of the judgment the concept is expressed as la responsabilité, and in the English translation as the liability.

17 — In this connection Schlosser writes in a commentary on the Reichert I judgment in IPRax 1/91, p. 30: The definition given by the Court in the Kalfelis judgment of unerlaubte Handlungen — actions which seek to establish the liability of a defendant — does not in any event relate to setting a transaction aside (Gläubigeranfechtung). But it is doubtful whether the Court intended to exclude the possibility that the jurisdiction with regard to the unerlaubte Handlung might be used in actions other than actions for damages. However, the position seems to be that in all countries rules for setting a transaction aside are regarded as special rules as compared with those relating to unerlaubte Handlungen. The definition given by the Court of unerlaubte Handlungen may presumably be extended only so as to include actions designed to prevent the occurrence of damage. The definition cannot be extended so as to cover all actions concerning Handlungen unconnected with a breach of contract without giving the jurisdiction in matters of tort, delict or quasi-delict a disproportionately wide scope.

as it is not based on tort or delict' (paragraph 14).

Thus it was not contested that in the main action the claim for compensation related to matters both of contract and of tort, delict or quasi-delict and paragraph 17 of the Court's judgment, previously cited, therefore hardly had the purpose of laying down a 'definition' of the sphere of application of Article 5(3) involving a decisive position with regard to the question at issue in this case. I think, in any event, that it would not be right to take the view that the problem of demarcation at issue here can be solved exclusively on the basis of the *Kalfelis* judgment.

In my view the question should be examined in the light of the purpose and context of Article 5(3).

In any event the case-law of the Court contains two factors of essential importance in this respect.

In the first place the Court, as I have already said, has declared that the rules as to jurisdiction in Article 5, including paragraph (3), must be restrictively interpreted as being derogations from the general rule contained in Article 2 of the Brussels Convention regarding the court of the State of the defendant's domicile. On the other hand the Court declared in the judgment in *Mines de Potasse d'Alsace* that:

'That provision [Article 5(3)] must be interpreted in the context of the scheme of conferment of jurisdiction which forms the subject-matter of Title II of the Convention.

That scheme is based on a general rule, laid down by Article 2, that the courts of the State in which the defendant is domiciled shall have jurisdiction.

However, Article 5 makes provision in a number of cases for a special jurisdiction, which the plaintiff may opt to choose.

This freedom of choice was introduced having regard to the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings' (paragraphs 8 to 11).

The Court amplified these views in its judgment in Case C-220/88 *Dumez France and Tracoba*,[18] in which it stated:

'... those cases of special jurisdiction [including those of Article 5(3)], the choice of which is a matter for the plaintiff, are based on the existence of a particularly close connecting factor between the dispute and

18 — [1990] ECR I-49.

courts other than those of the State of the defendant's domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

In order to meet that objective, which is of fundamental importance in a convention which has essentially to promote the recognition and enforcement of judgments in States other than those in which they were delivered, it is necessary to avoid the multiplication of courts of competent jurisdiction which would heighten the risk of irreconcilable decisions, this being the reason for which recognition or an order for enforcement is withheld by virtue of Article 27(3) of the Convention' (paragraphs 17 and 18).

When it is considered that:

— the wording of Article 5(3) does not preclude the possibility that an action such as the *action paulienne* for the setting aside of a transaction may be covered by that provision, whereas the judgment in the *Kalfelis* case may presumably be regarded as evidence of a contrary interpretation;

— the provision is to be interpreted restrictively; and

— in accordance with the case-law of the Court there must be a close connecting factor between the dispute at issue and the court having jurisdiction,

it is essential, for the interpretation of Article 5(3) in respect of an action such as the *action paulienne* for the setting aside of a transaction, that it should be possible to adduce reasons which in general will make it appropriate for the applicant to be given the opportunity to bring an action before a court other than that of the State of the defendant's domicile.

As the basis for the justification of the rule of jurisdiction laid down in Article 5(3) may be regarded as the fact that the court for the place where the harmful event occurred will typically be the court in which the 'claim for damages' may be best and most easily dealt with,[19] it should be considered whether the court for the place where the harmful event occurred in an action such as the *action paulienne* to set a transaction aside has certain special advantages for handling and settling such an action in comparison with the court of the State of the defendant's domicile. In my view it does not. 'The place where the harmful event occurred' has hardly any special significance in determining the factual and legal circumstances relevant for settling such an action. In a case such as this the place where the harmful event occurred may well be either the place where the instrument of conveyance was drawn up or the place where the property conveyed is situated. But neither of these places seems to be of special significance in deciding whether the conditions for setting the transaction aside are met. The most essential such conditions are those concerning the existence of the debt owed to the creditor and the debtor's intention

19 — Cf. also the reference in the Jenard Report to the fact that the background for this special rule of jurisdiction was inter alia the frequency of traffic accidents.

knowingly to restrict the creditor's opportunities for enforcement. [20]

In my view there is no special ground for thinking that there is a general need for alternative jurisdictions in actions such as the *action paulienne* for setting transactions aside. Such cases may be dealt with by the court of the State of the defendant's domicile without any special procedural difficulties. In this case that would result in no difficulties since both the transferor and the transferee of the immovable property are domiciled within the same judicial district. Even if they were not, it would be possible for the applicant to bring proceedings against both the transferor and the transferee before the same court (cf. Article 6(1) of the Brussels Convention as interpreted in the *Kalfelis* judgment).

20 — As previously mentioned, certain arguments may be adduced to the effect that it is appropriate for proceedings for the setting aside of a transaction involving real property to be instituted before the court in whose judicial district the property is situated. But those are primarily reasons which may justify jurisdiction relating to rights in rem under Article 16(1). Since the Court was unable to decide in favour of such jurisdiction in the Reichert I case, such grounds cannot be regarded as sufficiently compelling to establish jurisdiction under Article 5(3). In this connection it is particularly relevant to refer to paragraph 13 of the judgment, as follows:
Finally, although in certain Member States the rules governing the public registration of rights in immovable property require public notice to be given of legal actions seeking to have transactions affecting such rights avoided or declared ineffective as against third parties and of judgments given in such actions, that fact alone is not enough to justify conferring exclusive jurisdiction on the courts of the Contracting State in which the property affected by those rights is situated. Such rules of national law are based on the need to afford legal protection to the interests of third parties, and such protection can be ensured, if need be, by public notice in the form and at the place prescribed by the law of the Contracting State in which the property is situated.
Moreover it is important that an action such as the action paulienne for the setting aside of a transaction may involve both real and personal property. It is difficult at first sight to imagine that Article 5(3) may be differently interpreted according to whether the revocatory action concerns real or personal property. In my view it is clear that it would be inappropriate to accept that such proceedings involving personal property may be instituted according to the rules on jurisdiction contained in Article 5(3), in any case if one were to accept that the harmful event took place where the personal property happened to be at the time of transfer or the time of institution of proceedings, or both.

In my view the fact cannot be disregarded that the result which I propose has the advantage that the number of courts which may possibly be concerned is limited and that it avoids the need to decide where the harmful event took place in this case. As we know, the Court declared in the judgment in *Mines de Potasse d'Alsace* that the expression 'the place where the harmful event occurred' must be understood as being intended

'to cover both the place where the damage occurred and the place of the event giving rise to it' (paragraph 24). [21]

If Article 5(3) were applicable in a case such as this, it would presumably follow from the judgment in *Mines de Potasse d'Alsace* that the applicant could in any case choose to bring proceedings

— either before the court of the place where the instrument of conveyance was executed (the place where the tort, delict or quasi-delict was committed — in this case the Tribunal de Grande Instance de Sarreguemines, Department of the Moselle); or

21 — The Court clarified that interpretation in the judgment in Dumez France where it declared that... the rule on jurisdiction laid down in Article 5(3) ... cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets (paragraph 22).

— the court for the place where the damage occurred (the place where it took effect — in this case the Tribunal de Grande Instance de Grasse in whose jurisdiction the property is situated). [22]

However, there are no grounds for going further into these questions since for the reasons I have already mentioned I am able to suggest that the Court should answer the question referred to it to the effect that Article 5(3) does not apply to an action such as the *action paulienne* for setting a transaction aside.

The Commission has come to the same conclusion, though it appears to restrict it to covering situations in which the revocation concerns transfers by donation. The Commission has stressed that the legal position in an action to set a transaction aside is more complicated than in a general action for damages since in the former case the legal position necessarily involves three interested parties — creditor, debtor and the transferee of the property transferred. The Commission particularly attaches importance to the fact that a donation may also be set aside as against a purchaser in good faith, so that in such cases there can be no question of a wrongful act as postulated in Article 5(3). From a narrow point of view the Commission's arguments may be regarded as correct, but their weak point is that they lead to the application of Article 5(3) being dependent on whether the contested transfer is or is not a donation. In my view it would be inappropriate to interpret Article 5(3) in such a way that its application depends on a distinction which does not appear relevant in relation to the considerations forming the background to the rule of jurisdiction under Article 5(3).

Conclusion

I shall accordingly propose that the Court should reply to the question referred to it by the Cour d'Appel d'Aix-en-Provence as follows:

'An action such as the *action paulienne* for the setting aside of a transaction does not fall within the scope of Article 5(3), Article 16(5) or Article 24 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.'

22 — I shall not discuss the question whether an acceptance of jurisdiction under Article 5(3) in an action to set a transaction aside could also lead to an acceptance of the jurisdiction of the court of the State of the applicant's domicile. I shall simply point out that the judgment in Dumez France shows the Court's aversion to solutions which lead to such a result, at any rate in cases in which there is no damage to persons or property.