OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 15 SEPTEMBER 1976 [1]

Mr President,
Members of the Court,

I. This is the first case to be referred to you under the Protocol of 3 June 1971 on the interpretation of the Convention on Jurisdiction of 27 September 1968, a text which has been in force in the relations between the six original Member States of the European Economic Community since 1 September 1975.

The facts which have given rise to this action may be summarized as follows:

On 29 April 1971 the German company Dunlop AG of Hanau ordered on the basis of samples a certain number of women's ski-suits from the Italian company Industrie Tessili of Como. The Italian company made up the articles in question and despatched them on 31 July 1971 by a carrier designated by the German company. They were received by that company on 18 August 1971. At the same time as it sent the goods the Italian company made out an invoice which was received by the German Company on 3 August 1971.

When a dispute arose between the parties to the transaction over the conformity of the goods with the specifications in the order, the German company brought an action against its supplier before the Landgericht Hanau. We do not know exactly what the company is seeking: it is either the termination of the transaction or the payment of damages. Be that as it may, its cause of action lies in the defective performance by the Italian company of its contractual obligation. That company has appeared before the German court, but only in order to contest its jurisdiction.

That court found that the parties had during their negotiations validly chosen it to be the tribunal with jurisdiction to entertain any disputes which might arise out of their transaction and in a judgment on a preliminary issue it dismissed the objection of lack of jurisdiction.

The Italian company then appealed from this decision to the Oberlandesgericht Frankfurt. That court is inclined to take the view that the parties have concluded no valid agreement on a choice of forum in the sense of Article 17 of the Convention. As the respondent has not sued the appellant in a court of the State in which the appellant is domiciled (according to the general provision contained in Article 2 of the Convention) and as no exclusive jurisdiction *ratione materiae* vests in an Italian court rather than in a court of the Federal Republic of Germany, the Oberlandesgericht Frankfurt considers that the Landgericht Hanau may only have jurisdiction if it is 'the court for the place where the obligations has been or is to be performed' within the meaning that you will give to this phrase. It is quite unnecessary to emphasize the importance of the reply that you are called upon to give, since it may be assumed that actions arising out of contractual obligations will form a large proportion of the disputes to which the Convention will apply.

II. The problem of the conflict of jurisdiction is not new in the six original Member States of the EEC. The Convention was concluded between these six States precisely in order to try to determine 'the international jurisdiction of their courts'. The preamble sets out the guiding principle of its

1 — Translated from the French.

authors, that is, the desire 'to strengthen in the Community the legal protection of persons therein established'.

In contractual matters the competent court — and the law applicable to the contract — may be determined according to rigid rules or according to more flexible provisions. To limit ourselves to the private law of the six original Member States, conflicts of jurisdiction in this field are resolved in various ways:

certain legislations refer both to the place where the contract or obligation was concluded or came into being and the place for their performance (Belgium, Italy);

other legislations give jurisdiction in actions concerning sales of a commercial character either to the court for the place where the promise was made and the goods delivered by the seller or to the court for the place where payment was to be made by the buyer (France, Luxembourg);

others accept in all cases only the jurisdiction of the court for the place of performance (Federal Republic of Germany);

finally, others pay no attention to any criterion of connexion with the conclusion or performance of a contract (The Netherlands).

The law laid down by conventions also provides many different solutions to this problem and it is for this reason that Article 55 of the Convention stipulates that 'for the States which are parties to it' it shall 'supersede' a whole series of bilateral agreements which it lists.

Whatever the arguments which motivated their choice — a desire to avoid 'splitting' the jurisdiction between the court for the place where the contract was concluded (in actions concerning its formation and effects) and the court for the place of performance (in actions concerning performance), or the advisability of granting jurisdiction to the court of the State in which it will be necessary to seek to enforce a judgment concerning delivery and in which the goods to be delivered are situated — the preparatory work, commentaries by legal writers and text of the Convention show clearly that its authors have opted in all cases for the criterion of the 'place where the obligation has been or is to be performed' ('lieu où l'obligation a été ou doit être exécutée'). They considered performance to be the ingredient which best distinguished the transaction as a whole and that it was therefore necessary to retain the criterion attaching it to a particular locality. Article 5 (1) therefore refers to the 'place where the obligation has been or is to be performed'. Similarly, in matters relating to quasi-delict, the criterion adopted is the 'place where the harmful event occurred', a fact which is giving rise to certain problems with which you will soon be required to deal.

III. Although the substantive nature of the provision contained in Article 5 (1) is of particular importance, as is emphasized by the use of the singular noun ('the obligation'), the apparent simplicity and unicity of this criterion must not be allowed to create an illusion. First of all, this criterion must be adopted in the light of the possible multiplicity of the places of performance; it often happens that a single contract must be performed in several countries. In particular, however, this criterion varies according to the particular type of obligation in question. It is thus appropriate, first, to define the legal relationship or the contract out of which the main action has arisen. In this respect — without in any way prejudicing the power of the national court to classify the facts submitted to it — I consider that this dispute has arisen out of an 'international sale of goods' within the meaning of the Uniform Law on this matter annexed to The Hague Convention of 1 July 1964, that is, out of

a 'forward sale' or of a 'contract for the supply of goods to be manufactured or produced', since the seller has to provide all the materials necessary for such manufacture or production or, at least, since the buyer is not required to provide an essential part of the materials which are necessary. These classifications are those of the Hague Convention of 15 June 1955 on the law relating to the international sale of goods and The Hague Convention of 1 July 1964 on the same subject. When the events which gave rise to this case occured the latter text was not in force between Italy and the Federal Republic of Germany but it has been in force subsequently.

Secondly, in the case of a bilateral contract, a distinction must be made according to whether the facts are considered from the point of view of one contracting party or the other, for example, as regards a sale — a description which seems to me to cover the transaction involved in this instance — according to whether we consider the facts from the point of view of the seller or the buyer. The authors of the Convention themselves made this distinction in matters relating to instalment sales and loans (Articles 14 and 15).

Furthermore, this distinction between the obligations of the seller and the obligations of the buyer is taken up again in the Uniform Law on the International Sales of Goods which the authors of the Convention certainly had in their minds. In a transaction of this type the seller undertakes:

1 — to effect delivery,
2 — to hand over any documents relating thereto,
3 — to transfer the property in the goods.

For his part, the buyer undertakes:

1 — to pay the price for the goods,
2 — to take delivery of the goods.

The aims of the parties are, on the one hand, to sell and to deliver the product and, on the other, to pay the price and to take delivery of the goods. The place where the obligation is to be performed is the place in which the service which *characterizes* the transaction must be provided.

Of these three obligations on the seller, the one whose performance characterizes or typifies the contract of sale from the point of view of the buyer is the taking of delivery or handing over of the goods and thus if the buyer brings an action the competent court will be determined by reference to the place of delivery.

IV. Is it, however, necessary to 'divide' or 'split' still further the place of performance of the obligation and to look for the place in which a debt resulting from the termination of a contract of sale by reason of the wrongful conduct of the seller *is to be paid* and the place where the article sold must be returned, if such is the subject of the action before the court dealing with the substance of the case. This is the real question before the Oberlandesgericht Frankfurt. As the contractual obligation has been performed and as the dispute concerns the defective nature of that performance, the court asks whether the phrase 'the obligation is to be performed' may refer to the substitute obligation into which the breach of the main obligation may be resolved.

According to one argument, although it is correct that a failure to perform or, on the other hand, the proper performance, of the obligation which is, from the point of view of the seller, the essential feature of the contract of sale, will be established in the place of delivery, acceptance of delivery and approval of the goods, it may be that hidden defects in the article sold only appear later in a different place from the original place of delivery. It is in the former that the terms, conditions for performance (arrangements for examining the goods) or consequences of the breach (termination on grounds of breach, the raising of the issue of the

seller's liability, etc.) must be 'brought before the courts'. Therefore, any obligation on the seller which is brought before the courts for this reason by using one of the many means of redress available under national law (termination of the contract, damages, duty to provide a guarantee, etc.) may and must be performed in a place different from that in which the original, essential obligation (delivery in the case of a sale) was performed. This may be either the place where the goods are to be found, or the place where the sum owed by the buyer is to be recovered, according to whether it must be collected (as is the case in France, Belgium and the Federal Republic of Germany) or is payable at the address of the payee (as is the case in Italy and the Netherlands).

Thus, the problem which arises in the present case is to discover whether the obligation referred to in Article 5 (1) is the original obligation or its substitute, represented according to customs or national laws, by an action for specific performance, in whole or in part, of the contract or for its termination or by an action for the payment of damages for failure to perform or insufficient performance.

If taken to its logical conclusion, this argument amounts to maintaining that if a contract contains several obligations to be performed by the defendant the plaintiff could *choose* the competent court from among all those which are, to a greater or lesser degree, concerned with any one of the obligations under the contract, even if that obligation were not itself in dispute. This explains why Article 5 (1) refers to the place where the obligation has been or *is to be* performed.

I do not consider that it is possible to go so far. The Italian version of Article 5 (1) assumes that the obligation in question must at least be in dispute, since it refers to it as 'dedotta in giudizio'. More particularly, such an argument would not be compatible with the intentions of the authors of the Convention. Of course, the rules established by that text are intended essentially to resolve conflicts of jurisdiction; they are not principally rules of substantive law. However, I consider one of the assumptions of the system set up by the Convention to be that although distinctions may be made according to the type of contract and the parties to it, taken as a whole a contract constitutes a legal and economic entity and all questions connected with the performance of the essential obligation of the contract must fall within the jurisdiction of the court for the place of performance of that obligation. Any disputes which have arisen or which may arise in connexion with the 'particular legal relationship' (Article 17) constituted by the obligation to deliver must be brought before the court for the place where delivery must take place. Any contract draws its dominant feature from *one* of the obligations which result from it, even if such obligations may differ according to the circumstances. The expectations of the parties are turned towards the performance of *that* particular obligation and it is in the place of performance that the failure to perform will normally be found and the consequences of such failure drawn.

The contrary argument would amount to perfectionism and would bring us back to the criterion of the place in which the goods are to be found *(lex rei sitae)* or to that of the *forum conveniens.*

An approach which would without further qualification adopt the court of the place which has the closest links with the performance of the obligation, or which appears to be the most appropriate for such performance – 'the court with the closest connexion' (by analogy with Article 4 of the draft of the Convention on the law applying to contractual and non-contractual obligations) – would be too vague and general and would make it impossible to advance the basic values in the matter of

contract, namely legal certainty and the possibility of foreseeing the law which will be applied.

It has been stated by authoritative commentators (Droz, Compétence Judiciaire et Effets des Jugements dans le Marché Commun, 1972, p. 128), that 'the Convention rejects the theory of the *forum conveniens;* serious difficulties of a practical nature may arise in determining the connexion between the case and the designated court'. The same author states further (pp. 45-46) that 'These rules of jurisdiction (in Articles 5 and 6) form a whole and are self subsistent ... It must be accepted in principle that the silence of the Treaty as to a ground of jurisdiction means that such a ground must be excluded: this will apply for example, not only to the forum of the place where the contract was made, but also to the forum ascertained by reference to connexion with the contract, a principle which the Treaty has not accepted as a ground for direct jurisdiction'.

As Mr Bourel observes (Les Conflits de Lois en Matière d'Obligations Extracontractuelles, 1961, p. 145), 'if the obligations which result from the contract are determined by the will of the parties, those which result from a breach of the contract are created by law and are thus covered by the territorial rule, in the same way as obligations arising in matters of tort'. The result of this is that, by reason of the disparity in the territorial rules, the obligations which result from a breach of contract may vary considerably according to whether the rules are optional, subject to the law chosen independently by the parties, or constitute mandatory provisions, covered by the law governing performance of the contract. Such a result would jeopardize the aim of grouping and 'concentrating' the disputes in the court hearing the *original* application which was in the minds of the authors of the Convention when they drafted Article 6 (third-party proceedings, counterclaim).

In fact, unlike the authors of the Benelux Treaty on jurisdiction of 1961, which has not yet come into force, the authors of the Convention adopted the criterion of the place of performance of the obligation rather than the place where it came into being. Article 4 of the Treaty provides that:

'Any dispute which arises in matters concerning personal rights and obligations and rights and obligations relating to recoverable property and in civil or commercial matters, may be brought by the plaintiff before the court of the place in which the obligation came into being, or in which it has been or is to be performed.'

Article 1 (2) of the Protocol states:

'The Grand duchy of Luxembourg shall not be obliged to recognize judgments given in matters of contract by a Belgian or a Netherlands court or to declare them enforceable where the jurisdiction of such court was based on the place where the obligation came into being or where it was performed, if, when the action was brought, the defendant was domiciled in Luxembourg or, if he was not domiciled in one of the three countries, had his residence there.

If the authors of the Convention have not simply referred to the 'place of performance of the contract', this is because the Convention applies both to commercial and civil matters. In employing the phrase 'the place where the obligation *is to be performed*', they are referring to the original and principal obligation which forms the essential feature of the contract.

It would only be useful to resort — and then only on a subsidiary basis — to the criterion that jurisdiction shall vest in the court of the place which has the *closest links* with the performance of the obligation if the act which forms the essence of the transaction cannot be defined. This is, however, not the case as regards the sale of goods.

V. I consider that the view that these are actions which concern the obligation which constitutes the essential feature of the contract in question and disputes engendered by that obligation which have arisen or which may arise in connexion with a particular legal relationship (Article 17 (1)) is confirmed by the Convention relating to a uniform law on the international sale of goods to which I have already referred.

According to this Convention, having regard to legal remedies open to the buyer, the obligations on the seller may be divided into two types.

First, there are obligations as regards the date and place of delivery. The buyer's remedies for the seller's failure to perform the obligations arising out of that relationship are (Article 24):
— either to require performance of the contract, or
— to declare the contract avoided.

In either case he may also claim damages, the amount of which varies according to which whether or not the contract is avoided.

Secondly, there are obligations as regards the conformity of the goods.

Where the seller has handed over goods which do not conform to the terms of the contract and where performance of the contract has nevertheless begun to take place, the seller *is regarded as having failed to fulfil his obligation to deliver the goods* (Article 33).

The buyer's remedies for the seller's failure to perform the obligations arising out of that relationship are (Article 41):
— to require performance of the contract by the seller, or
— to declare the contract avoided, or
— to reduce the price.

The buyer may also obtain damages, the amount of which varies according to whether or not the contract is avoided.

Therefore, whether the seller is at fault as regards the terms and conditions of delivery of the goods or as regards their conformity, he is regarded as having failed to perform his obligation to deliver the goods.

I do not regard it as relevant whether the obligation to deliver has been *performed* (in which case the buyer claims a reduction in price or the avoidance of the contract, plus damages for lack of conformity) or *is to be performed* (in which case the buyer seeks the performance of the contract, plus damages): in either case the place referred to in Article 5 (1) of the Convention is the place where delivery is taken.

VI. The reservation set out in Article I of the Protocol annexed to the Convention provides further confirmation for the interpretation which I am putting forward.

The first paragraph of Article I of the Protocol provides that the rule concerning jurisdiction contained in Article 5 (1) shall not apply to persons domiciled in Luxembourg.

In the Grand Duchy of Luxembourg economic relationships are characterized by the fact that many contracts concluded by persons domiciled there are international in nature. In this type of contract it is normally the buyer who is resident in the Grand Duchy; the seller has his place of business abroad — in particular in Belgium — and generally stipulates that an fob clause be put in the contract.

According to the specialists (Jenard, Rapport sur la Convention, Supplement to the Bulletin of the EC, November 1972, English version, p. 109), this reservation 'is justified by the particular nature of the economic relationships between Belgium and Luxembourg, in consequence of which the *greater part* of the contractual obligations between

persons residing in the two countries are performed or are to be performed in Belgium'. Therefore *in most cases* a buyer-plaintiff domiciled in Luxembourg could not bring before the Luxembourg courts actions which concern a seller-defendant domiciled in Belgium (under Article 2 (1)) but may, on the other hand, be sued in the Belgian courts. As Alphonse Huss has said (Le Contrat Economique International 1975, p. 226) this could give rise to the fear that 'the domestic tribunals would be largely divested of jurisdiction whilst, too often, plaintiffs would be obliged to take proceedings abroad'. For this reason, not only has the criterion of the place where the contract is concluded, which confers a marked advantage on the more powerful of the contracting parties, been set aside by virtue of the basic option contained in the Convention (Article 2 (1)), but even the criterion of the place of performance only applies if it has been expressly and specifically accepted (Article 17 of the Convention and second paragraph of Article I of the Protocol).

This same specialist has also stated that 'the direct usefulness of this exceptional provision is weakened by the third paragraph of Article 28 of the Convention, which rules out any review of jurisdiction by the court recognizing and enforcing the judgment and does not allow the recourse to the plea founded on public policy. Thus, where the foreign court fails to observe the safeguard clauses in the Protocol, the party concerned may find himself obliged to defend his rights before a court which has no jurisdiction'.

Whatever the practical use of this reservation and its justification from the point of view of the freedom of establishment of lawyers may be, these comments constitute an authentic interpretation of the Convention by its authors themselves and are of great value in replying to the question before us.

The phrase 'the place where the obligation has been or is to be performed' must be given a wide interpretation: as regards the sale of goods it covers 'the greater part' of the seller's contractual obligations, in particular, those connected with the delivery of the goods.

VII. As regards the actual ascertainment of the place where the seller's obligations with regard to delivery have been or are to be performed and, therefore, the ascertainment of the place of delivery, the reply will vary according to the terms of the contract or, in the absence of such terms, according to the particular circumstances of the case. In this respect the clauses of the contract concerning delivery will be decisive: it may be the place where the seller's principal place of business (fob sale) or on the other hand a place in the State in which the buyer is domiciled (cif sale). It is for the court trying the substance of the case to determine such place and, by interpreting the contract or by classifying the facts in the light of its own law (such a reference to the internal law and private international law of each Contracting State is provided for, for example, as regards the recognition of judgments (Article 27 (4)) or the determination of domicile and seats of companies (Articles 52 and 53) to rule whether performance has taken place or was to take place within its area of jurisdiction.

It is not impossible for this place to be found in the buyer's State and not, as the seller maintains, at its own registered office. Conversely, if the place where the goods have been or were to be handed over to the buyer or to the person responsible for receiving them on his behalf were situated in the seller's State, jurisdiction would vest in a court in that State. It is thus possible that if the plaintiff had addressed itself directly to a court of the State in which the seller is domiciled (Article 2) that court would have decided that delivery took place in the buyer's State and that it was incompetent to entertain the action.

There will not necessarily be any correlation between the law applicable and the court before which the action is brought, that is, between the legislative power and the judicial power.

In short, this provision of the Convention may well be of no help to a buyer who would like to sue a seller-defendant outside his State. But it is only suppletive in nature: it is in no way intended to allow the plaintiff to avoid the rule in Article 2 *in all cases* and to institute proceedings against the defendant outside the jurisdiction of the court of his domicile (Article 6 (2)). The plaintiff *may* avail himself of this provision only if the place of performance of the obligation is to be found in the Contracting State in which he himself is domiciled.

In fact, assuming that the legal relationship is international in nature and at the place of performance of the obligation may be regarded as situated in a State other than that in which the defendant is domiciled, the aim of Article 5 (1) is to determine *the* court which, *in that State,* has jurisdiction. Its aim is not to depart in all cases from the rule laid down in Article 2 (1).

At the present stage of European development, it is difficult to go any further as long as no uniform rules governing the conflict *of laws* have been adopted as regards contractual obligations. The intention of the authors of the Convention was not to adopt uniform legislation but 'to ensure that these provisions are applied as effectively and as uniformly as possible' (Joint Declaration of 3 June 1971 attached to the Protocol on the interpretation of the Convention) and 'to prevent differences of interpretation of the Convention from impairing its unifying effect' (Joint Declaration of 27 September 1968 attached to the Convention). As Georges Droz has said (Clunet 1973, p. 23), 'It will no longer be a case of truth on this side of the Pyrenees, error beyond; in future, in France or the Netherlands, it will be a case of two truths'. However, to arrive at a uniform interpretation of the concept of the place of performance would be an important step, even if reference were still made on a subsidiary level to the national law of the court seised of the matter. If the Convention did not exist it would first be necessary to decide on the criterion which determines jurisdiction. As we have already seen, one might hesitate before making this decision, at least between the place where the contractual obligation came into being and the place of its performance. Had the Convention retained these two grounds of jurisdiction, the court before which an action was brought would still have had to resort to its national law in order to attach each ground to a particular area. Thus, in relation to the situation existing earlier the Convention represents clear progress and constitutes a middle course between the principle that, as far as possible, all questions concerning a contract must be submitted to a single court (and to a single ideal law) and the opposing principle that a contract must be divided into various separate parts.

I am therefore of the opinion that you should rule that:

in the relationships between the High Contracting Parties to the Convention of 27 September 1968 and subject to the provisions of the first paragraph of Article 2 and to Article 17 of the Convention and to Article I of the Protocol annexed to the Convention, any disputes relating to the performance of the obligation which constitutes the essential feature of the contract in question

may, under Article 5 (1), be brought before the court for the place where that obligation has been or was to be performed. In the case of sales and as regards the seller, this obligation concerns the delivery of the goods. It is for the court before which the action was first brought to determine where the place of performance of this obligation is situated.