OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 16 March 1999 *

'"Child," said Don Quixote then in a loud voice, "follow the thread of your story, and do not meander or go off on sidetracks"'. [1]

I — Introduction

1. This case raises the question whether the Court should abandon its traditional case-law and adopt an autonomous interpretation of the phrase 'place of performance of the obligation in question' in Article 5, point (1), of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [2] ('the Brussels Convention' or simply 'the Convention').

2. The Court's case-law, laid down more than 20 years ago in the *Tessili* judgment [3] and followed in the *Custom Made Commercial* judgment, [4] requires a court dealing with a matter relating to a contract to ascertain first of all the law applicable to the legal transaction in question and then to determine the place of performance according to that law. The method used in the *Tessili* judgment, the conflictualist logic of which is contrary to the spirit of the Convention and even to the rest of the Court's case-law on the subject, is not satisfactory. It has been severely criticised by many commentators and has been applied unequally and often incorrectly by the national courts. For all these reasons, at meetings taking place within the Council with a view to revising the Brussels Convention, the possibility of amending Article 5, point (1), or removing it altogether is being discussed.

3. The draftsmen of the Brussels Convention tried above all to facilitate what is customarily called the 'free movement of judgments'. With regard to jurisdictional competence, the aim was to lay down simple, uniform criteria for the whole of European territory, so that the process of unification can also be reflected in the field of the administration of justice. Therefore, it seems to me paradoxical that a matter which fundamentally requires simple, practical answers enabling European courts — preferably at first instance — to establish quickly whether they have international jurisdiction or not has been characterised, in both case-law and legal theory, by a high degree of theoretical thinking which has lost sight of the problems which have to be faced by the regular practitioners of judicial business.

4. I do not think that, so far as international jurisdiction is concerned — any

* Original language: Spanish.

1 — M. de Cervantes y Saavedra, *El ingenioso Hidalgo Don Quijote de la Mancha*, Part II, Chapter 26, publ. RBA, Barcelona 1994, p. 823.

2 — Published, in the consolidated version relevant here, in OJ 1990 C 189, p. 1.

3 — Case 12/76 [1976] ECR 1473.

4 — Case C-288/92 [1994] ECR I-2913.

more than in domestic jurisdiction — there are any particular reasons for this theoretical approach: priority should not be given to finding the interpretative solution which is the most perfect in theory, but to providing courts and litigants with working criteria.

II — The facts of the main proceedings

5. The facts given in the order for reference and the documents in the file accompanying it may be summarised as follows.

6. Two containers with almost 1 000 cases of bottles of wine were loaded in Le Havre, France, on board the vessel *Suhadiwarno Panjan*, flying the Indonesian flag, for shipment under a bill of lading to the port of Santos, in Brazil. The carrier was the German firm Pro Line Limited and Co., having its registered office in Hamburg. As it was found on arrival at the port of destination that some of the goods were missing and others were damaged, nine cargo insurers ('the insurers'), of which GIE Groupe Concorde was the leading insurer, indemnified the consignee for a total of FRF 666 279. The insurers were subrogated to the consignee's rights and on 22 September 1991 they brought an action for compensation before the Tribunal de Commerce de Terre et de Mer, Le Havre, against the master and the owner of the vessel, the carrier Pro Line and the Swedish company which insured the vessel for civil liability.

7. Pro Line and the Swedish insurer pleaded clauses conferring exclusive jurisdiction on the courts of Hamburg and Göteborg respectively. The Tribunal de Commerce accepted those pleas and declined jurisdiction by judgment of 3 January 1995. The insurers then appealed on the question of jurisdiction. The judgment was upheld, although on different grounds, by the Cour d'Appel, Rouen, by judgment of 24 May 1995. The Cour d'Appel found that, although the jurisdiction clauses were not valid as they did not fulfil the requirements of Article 17 of the Convention, it was still correct to decline the international jurisdiction of the French courts pursuant to Article 5, point (1), of the Convention because that provision provides that in matters relating to a contract, in addition to the general forum of the defendant's domicile, the court for the place of performance of the contract, which, according to the French court, was none other than the Brazilian port of Santos, has jurisdiction.

8. The insurers appealed on a point of law against that judgment, relying in particular on a breach of Article 5, point (1), of the

Brussels Convention, as interpreted by the Court of Justice since the *Tessili* judgment of 6 October 1976, cited above.

9. The Commercial, Financial and Economic Chamber of the Cour de Cassation (France) confirmed that the French courts had no jurisdiction to entertain the action in so far as it had been brought against the master of the vessel. However, the Cour de Cassation considered that jurisdiction to entertain the action in so far as it had been brought against the carrier raised a serious difficulty of interpretation of the Brussels Convention. Consequently, pursuant to Article 1 of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the European Communities of the Brussels Convention, judgment was stayed and the following question was referred to the Court of Justice:

'With a view to the application of [Article 5, point (1), of the Brussels Convention], must the place of performance of the obligation in question, within the meaning of that provision, be determined in accordance with the law which, in accordance with the rules on conflict of laws of the court seised, governs the obligation at issue, or should national courts determine the place of performance of the obligation by seeking to establish, having regard to the nature of the relationship creating the obligation and the circumstances of the case, the place where performance actually took place or should have taken place, without having to refer to the law which, under the rules on conflict of laws, governs the obligation at issue?'

III — The applicable provisions of the Brussels Convention

10. The first paragraph of Article 2 of the Brussels Convention lays down the following general rule of jurisdiction:

'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.'

11. The special jurisdictions include that of Article 5, point (1), the relevant part of which is worded as follows:

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

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

Consequently, point (1) of Article 5 creates an exceptional jurisdiction by virtue of

which the plaintiff may, provided the conditions prescribed in the provision are fulfilled, choose between two forums: that of the defendant's domicile or that of the place of performance of the contractual obligation, which thereby becomes a concurrent or optional jurisdiction.

IV — Brief summary of the case-law

12. Just as a reminder, I shall review briefly the Court's case-law on Article 5, point (1), of the Convention in so far as it is relevant to the present case.

13. The *Tessili* case produced the first judgment on the subject. On that occasion, the Court found that the place of performance of the seller's obligation to guarantee against hidden defects in goods was to be determined in accordance with the law applicable to the contract of sale according to the rules of conflict of laws of the court before which the matter was brought.

In another judgment, delivered on the same day in the *De Bloos* case, [5] the Court made it clear, with regard to the former wording of Article 5, that the contractual obligation to be taken into account was that on which the action was based. [6]

14. The Court allowed only one exception to the general rule laid down in the *Tessili* judgment. I refer to the obligations arising from a contract of employment. In *Ivenel* [7] the Court held that, among all the obligations arising under a contract of employment, the only obligation to be taken into account for the purposes of the application of Article 5, point (1), of the Convention, was the obligation which 'characterised' the contract. This obligation was to be deemed to have been performed in practice at the place where the worker supplied his services. [8] The Court refused to extend this interpretation to other situations. [9]

15. In *Custom Made*, cited above, in spite of the Opinion of Advocate General Lenz, who proposed that the court of the place having the closest connection with the dispute should have jurisdiction, the Court preferred to abide by its traditional method: the place of performance was to be determined pursuant to the substantive law governing the obligation in dispute, even where that law incorporated the 1964

5 — Case 14/76 [1976] ECR 1497.

6 — This judgment led to the amendment of certain language versions of the Brussels Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom. These versions now incorporate the wording used by the Court of Justice. Personally, I consider that it would have been preferable and more in conformity with the general scheme of Article 5 of the Convention to take account, for the purpose of defining the place of performance of a given obligation, only of the obligation characterising the legal relationship, or rather, for the same purpose, to disregard the 'non-characteristic' obligation, which is generally the obligation to pay a price.

7 — Case 133/81 [1982] ECR 1891.

8 — This 'judicial rectification' was also incorporated in the Brussels Convention, this time on the occasion of the 1989 Convention on Accession.

9 — See the judgment in Case 266/85 *Shenavai* [1987] ECR 239.

Uniform Law on the International Sale of Goods.

V — The observations submitted to the Court

(a) *The observations of the parties to the main proceedings*

16. Counsel for GIE Group Concorde and the other plaintiffs contend that, by referring the present question to the Court of Justice, the Cour de Cassation is in essence asking the Court to abandon its settled case-law and to give an autonomous interpretation to the phrase 'place of performance of the obligation'. As no circumstances have arisen which would support this new development of case-law, the plaintiffs in the main proceedings consider that the place of performance of contractual obligations must continue to be determined in accordance with the substantive law applicable under the rules of conflict of the court before which the matter is brought.

17. In their observations, the defendants Pro Line and the company insuring the vessel reach the same conclusion after stressing the considerable differences still existing in the various European legal systems with regard to the determination of the place of performance of a contractual obligation and the consequences which this has on ability to foresee the competent court in matters relating to a contract, desirable as that is.

(b) *The observations of the intervening governments*

18. The German Government supports an autonomous interpretation of 'the place of performance of the obligation'. As there are many different types of contract, the place of performance should be determined by reference to each type. Furthermore, according to the German Government, to maintain the necessary equilibrium between the parties, the place of performance of a contract should be determined in each case according to the particular obligation in question.

Thus, in the case of contracts for the sale or use of property in return for consideration, where the characteristic obligation is the basis of the action, the place of performance could be determined to be the place where the immovable property is situated or where the movable property is located, depending on the stipulations of the contract.

In contracts for services other than contracts of employment, the place of performance could be deemed to be the place

where the service in question is to be mainly carried out, where it forms the basis of the action.

On the other hand, where the action relates to the pecuniary consideration, the place of performance could be deemed to be the defendant's forum at the time when the contract was concluded.

19. The United Kingdom Government also advocates an independent definition of 'place of performance'. According to this Government, an independent definition would not only promote legal certainty and ensure the equality and uniformity of the rights and obligations arising under the Convention, but would also reduce, in accordance with the aims of the Convention, the potential for forum shopping. [10]

The United Kingdom adds that the practical application of an independent definition must be effected case by case. So far as the present case is concerned, as the action arises from the delivery of damaged goods on the basis of a contract of carriage, the place of performance of the obligation is the place at which it was agreed that those goods were to be delivered.

20. The French Government accepts, firstly, that it has been found that certain national courts have had difficulty in applying the principles of the *Tessili* judgment and that they have given rise to a certain lack of foreseeability with regard to the competent court in matters relating to a contract. However, as relationships creating obligations are not always governed by uniform legal rules, to permit the national court to designate the place of performance according to the *de facto* circumstances of each of those relationships would give rise to unforeseeability and, therefore, legal uncertainty. Consequently, the French Government considers that it is not desirable to accept the solution indirectly proposed by the Cour de Cassation, which would consist in giving 'place of performance' an independent definition.

21. The Italian Government agrees that Article 5, point (1), of the Convention has given rise to differing interpretations, and that is why the question whether it would be advisable to amend it, by the addition of a uniform point of connection, is now being studied. Therefore, it does not appear to be the right time to abandon the *Tessili* case-law. For the present, it would suffice to add the proviso that where, under Article 5, point (1), the defendant's forum has jurisdiction, it must be the same as the forum for the place of performance of the

10 — Choosing a forum according to the advantages which may arise from the substantive (and even procedural) law applied there.

obligation, understood uniformly as an autonomous concept by the court before which the matter is brought.

(c) *The Commission's observations*

22. According to the Commission, the Court's approach in *Tessili* was from the beginning an interim solution in so far as, at that time, it was not possible to arrive at a Community interpretation which would ensure the uniform application of Article 5, point (1), of the Brussels Convention. The Commission adds that this approach gives rise to certain practical and theoretical difficulties. The court before which the matter is brought must first establish, by reference to its own rules of conflict, the law applying to the obligation in question and must then determine the competent forum according to that law. However, this method departs from the general rule in private international law that the determination of the competent court is independent of the determination of the applicable law.

The Commission therefore proposes that the Court should interpret the term 'place of performance' independently. This is appropriate particularly in the case of contracts for carriage by sea, the specific characteristics of which make it difficult to apply the principles of the *Tessili* judgment effectively. After examining the existing possibilities of interpretation for determining the place for performance of the obligation to deliver goods without damage under a contract for the international carriage of goods by sea, the Commission favours 'the place where the goods have been or are to be delivered'.

VI — Discussion of the solution adopted in Tessili

23. The question on which the Cour de Cassation seeks a preliminary ruling does not appear in principle to require the attention of the full Court of Justice. The question relates to the interpretation of Article 5, point (1), of the Brussels Convention, namely the meaning of 'place of performance of the obligation in question' for the purposes of this European code of procedure. However, the Court has been giving rulings on this question since 1976, when it gave what was to become the first judgment delivered on the subject of the Brussels Convention. To ascertain whether it has jurisdiction, the court before which the matter is brought 'must determine in accordance with its own rules of conflict of laws what is the law applicable to the legal relationship in question and define in accordance with that law the place of performance of the contractual obligation in question'. [11] This case-law was followed recently, in the same terms, in *Custom Made* [12] on a reference for a preliminary

11 — See the *Tessili* judgment, cited in footnote 3, paragraph 13.

12 — See the *Custom Made* judgment, cited in footnote 4, paragraph 26.

ruling from the Bundesgerichtshof. The Court has been giving virtually the same answer for more than 20 years. [13]

24. It is true that, in relation to *Tessili*, the *Custom Made* case had a new element in so far as the law applicable to the legal relationship arose, not from the rules of conflict, but from a uniform law originating from a convention relating to international transactions, namely the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964. However, this reference is not valid in the present case. The Cour de Cassation does not indicate any particular feature of the present case which might justify a reply other than that already given by the Court in relation to the *Tessili* and *Custom Made* cases. Nor can it be said — at least, in my opinion — that the circumstances underlying the *Custom Made* judgment have changed appreciably. By referring once again the question of the interpretation of Article 5, point (1), of the Convention, the Cour de Cassation has exercised the right of the national courts, which has been recognised by the Court of Justice in relation to questions referred under Article 177 of the EC Treaty, to refer settled questions of interpretation to the Court again, if they consider it desirable to do so. [14]

25. The Brussels Convention lays down a general rule (*actor sequitur forum rei*), known in almost all legal systems, that the courts of the defendant's domicile have jurisdiction. [15] However, in addition to this true general forum, the Convention creates other bases of jurisdiction, some of which are special or optional while others are exclusive. The former include that which interests us here: the plaintiff may sue the defendant in the courts for 'the place of performance of the obligation in question'. Later on I shall set out the reason for this special forum. For the present it is sufficient to say that a plaintiff who wishes to assert in court a right arising from a contractual obligation has the option of bringing an action, at his convenience, before at least two courts: that of the defendant's domicile and that for the place of performance of the obligation.

26. The phrase 'place of performance of the obligation', seemingly so simple, soon gives rises to many questions. What is meant by 'matters relating to a contract'? What obligation is referred to? The obligation to deliver the goods or to carry out the service, for example, or the obligation to pay the price? How is the place of performance to be determined? In accordance with which law? The law of the court before which the matter is brought, or some other law?

27. Since its judgment in *Tessili*, the Court has given replies to all these questions.

13 — The only new departure, in relation to the performance of obligations arising from a contract of employment, was in answer to a specific criterion of special protection for a worker which was justified by a supposed oversight in the Convention. However, this particular case was incorporated in the actual text of the Convention when it was revised in 1989.

14 — See the judgment in Joined Cases 28/62 to 30/62 *Da Costa en Schaake and Others* [1963] ECR 31, particularly p. 38.

15 — The Court has acknowledged the general scope of this principle in many judgments. See, for example, the judgment in Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 14.

First, the word 'obligation' and the phrase 'in matters relating to a contract' must be construed independently,[16] that is to say, independently of the terms used by the national legal systems. Secondly, the national court must assess the obligation on which the claim is based and establish the law applying to that obligation in order, finally, to determine the place of performance designated by virtue of that law. If it is the same as the place designated by the court's own law, the court will have jurisdiction, otherwise it will not.

28. In theory, the *Tessili* principles appear technically flawless. In an ideal world, where legal rules are unambiguous and courts omniscient, the *Tessili* principles permit foreseeable, uniform answers which comply with the letter — and perhaps even the spirit — of the Convention. In practice, however, there is more than one disagreeable surprise in store. *Tessili* requires a court to carry out three rather painstaking tasks from the legal viewpoint. First, it must, taking account of the information in its possession, classify or characterise the contractual obligation in question. For this purpose, the court will establish whether the legal relationship is contractual and will classify the relationship creating an obligation in the generally accepted categories (contracts of sale or carriage, leases and loan agreements, etc.). Although this first task is perhaps the simplest, it is not always straightforward. For example, what is the nature of the relationship between an association and its members? Or again, what are the limits of a right to damages in contract as compared with a claim in tort? In any case, the court will have to examine initially in more detail the conditions of the claim.

29. Secondly, the court will have to ascertain whether the legal relationship in question is subject to uniform international rules, a task which the constant proliferation of international agreements sometimes makes more difficult, rather than easier. If there are no uniform international rules, the court must apply its own rules of private international law to discover which law is applicable or, as the case may be, the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, since the date when it came into force. This work may necessitate even more detailed study of aspects going to the substance of the case. Every legal practitioner knows the difficulties involved in referring to the rules of conflict of a given legal system, the magnitude of the difficulties being equalled only by the fascination with which they are studied by university professors.

30. Thirdly, once the applicable law has been identified, the court must determine, by reference to that law, the place of performance of the obligation in question. If no uniform rules in this connection are found, the court will have to seek them in its own law or in a foreign system. The difficulties arising in the latter case, which depend on the venue and on the applicable law in question, may be practically insurmountable. In any case, determining the place of performance of a particular type of obligation comes up against the general antipathy of most legal systems to theoretical definitions. With the possible excep-

16 — See also the judgments in Case 34/82 *Peters* [1983] ECR 987, paragraphs 9 and 10; Case 9/87 *Arcado* [1988] ECR 1539, paragraphs 10 and 11, and the *Handte* case, cited above, paragraph 10.

tion of obligations for the payment of a sum of money, national legal systems are usually content with a general reference to the will, express or implied, of the parties. This situation will compel the court to study the substance of the case in even greater depth. [17]

31. At best, all this effort will have served to confirm the jurisdiction of the court before which the matter has been brought or, at worst, to rule out the application of Article 5 or to confer jurisdiction upon the courts of another Member State which, if a new case is brought before them, will nevertheless have to go through the same procedure to verify their jurisdiction.

32. I now propose to apply to the present case the steps which I have just described.

VII — Application of the Tessili judgment to the present case

33. The plaintiffs in the main proceedings are insurance companies. They insured the carriage by sea of certain goods between the ports of Le Havre in France and Santos in Brazil. On arrival at the port of destination, it was found that some of the goods were damaged or missing and the insurance companies therefore indemnified the consignee. Having been subrogated to the latter's remedies and rights, the insurers had recourse to those responsible for carrying the goods (the master of the vessel, the shipping company which owns it, the carrier and the insurance company covering the civil liability of the vessel) by bringing before a court of first instance in Le Havre the action which has led to this reference to the Court of Justice.

34. Confronted with the question of its own jurisdiction, the court of Le Havre ought, according to the *Tessili* judgment, to have established, by means of autonomous interpretation, whether the matter before it related to a contract. It would appear that this question need not have detained the court for long. The action undoubtedly originates, at least indirectly, from a contract for the carriage of goods. In actual fact, this is true only with regard to the action against the carrier. So far as the other defendants are concerned, the basis of the action for indemnity probably lies in tort. In the latter case, [18] and in accordance with the case-law of the Court of Justice, the court of Le Havre ought to have refrained from applying Article 5, point (1), of the Convention in relation to the other defendants as the obligations in

17 — In flagrant contradiction to the purposes and spirit of the Convention, which 'requires an interpretation of Article 5 enabling the national court to rule on its own jurisdiction without being compelled to consider the substance of the case' (see the judgment in *Custom Made*, cited above, paragraph 20).

18 — A point which the Cour de Cassation took into account in finding that the French courts had no jurisdiction in relation at least to the master of the vessel (see paragraph 9 above).

question were not a 'matter relating to a contract'. [19]

35. After establishing that the action is contractual, the court of Le Havre should have ascertained the specific obligation on which the action was based, at least in relation to one of the defendants. As, according to the Court, 'in a case where the plaintiff asserts the right to be paid damages... the obligation referred to in Article 5, point (1), is still that which arises under the contract and the non-performance of which is relied upon to support such claims', [20] it is clear that the obligation which the national court ought to have considered decisive is the obligation to transport the goods delivered to the port of destination without damage.

36. Next, the court ought to have determined the law applicable. For this purpose, still according to the *Tessili* judgment, the court ought to have used its own rules of conflict. There are many different points of connection in the rules of conflict with regard to contracts. Let us imagine, for the sake of argument, that the possibilities which could have been considered were, in sequence, the law chosen by the parties, the national law common to the parties, the law of the place where the contract was concluded and, finally, the law of the place of performance. As there is no indication of the law chosen by the parties, who in any case do not appear to have the same nationality, and as there may be serious doubt as to the place where the contract was concluded — in so far as it is between a carrier and a consignee of goods to whom the bill of lading was to be delivered — the court will probably have to determine the law applicable to the contract by reference to... the place of its performance!

37. Now let us imagine that the court before which the matter is brought reaches the conclusion, by reference to the express or implied will of the parties or by applying an imperative or dispositive rule in the course of its conflictualist examination, [21] that the law applicable is that of Brazil. The court will then have to determine the place designated by Brazilian law as the place of performance of the obligation of carriage by sea. As it is unlikely that a French court of first instance will have sufficient knowledge of Brazilian law or adequate means of understanding it, the court will probably abandon such a complicated method and will apply a different solution which would take account, if possible, of the particular circumstances of the case.

38. If, perhaps, the French court has sufficient knowledge of Brazilian law, it will probably find that the law of that country, like every other legal system, prefers to refrain from theoretical definitions in matters of contract, leaving it to the parties to define the terms of the contract. If the information available to the court leads it

19 — See the judgment in Case C-51/97 *Réunion Européenne and Others* [1998] ECR I-6511, paragraph 20.

20 — See the *De Bloos* judgment, cited above, paragraph 14.

21 — Such as a national rule fixing the place of performance of an obligation for carriage by sea at the port of loading.

to conclude that the parties' intention was to agree that the place of performance was to be the destination port of the goods, the court must find that the port of Santos was designated.

39. As a place situated in Brazil is designated as the place of performance of the contractual obligation, the French court has no choice but to decline jurisdiction and to refrain from taking further cognisance of the action as regards the application of Article 5, point (1), of the Convention. The difficulty arises from the fact that the first paragraph of Article 5 provides, in so far as we are concerned, that 'a person domiciled *in a Contracting State* may, *in another Contracting State*, be sued...'. When a court finds that an action before it is based on an obligation which has been or must be fulfilled 'outside the territory of the Contracting States, it has no choice but to conclude that the place provided for in Article 5, point (1), of the Convention cannot serve as a basis for attributing jurisdiction to a court within that territory and that Article 5, point (1), cannot therefore be applicable'. [22]

40. Just for the sake of illustration, if the case had been brought in Spain, the court would have applied the law to which the parties to the legal transaction had expressly submitted, provided that it had a connection with the transaction in question; failing an express choice, the national law common to the parties; failing that, the law of the common habitual residence and, finally, the law of the place where the contract was concluded. [23] The particulars in the order for reference do not show which law would have been applied but, in all probability, to determine the law in question it would have been necessary to define terms such as 'habitual residence' in relation to companies and their establishments, or 'place of conclusion of the contract' in relation to 'contracts concluded at a distance'.

41. However, from the information available I think I may conclude that the French court ought to have referred to the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations in order to determine the *lex causae*. So far as the French Republic is concerned, the Convention came into force on 1 April 1991, while the action was brought before the court of Le Havre on 22 September 1991 (see paragraph 6 above). Therefore the solution would have been somewhat simpler and, of course, uniform throughout the Contracting States. However, it could not in itself have eliminated the risk of diverging interpretations. The reason is that Article 4(1) of the Convention provides that, where the applicable law has not been chosen by the parties, the contract is to be governed by the law of the country with which it is most closely connected. With regard to the present case, Article 4(4) provides that 'if the country in which, at

22 — See the judgment in Case 32/88 *Six Constructions* [1989] ECR 341, paragraph 20.

23 — Article 10, point 5, paragraph 1, of the Spanish Civil Code. It is clearly difficult to specify the place of conclusion of the contract where the offer and the acceptance are made in two different places. In Spanish law, under the last indent of Article 1262 of the Civil Code, this difficulty is resolved by the presumption that the contract was concluded at the place where the offer was made. This means that, in the present case, assuming that the offer is deemed to have been made at the carrier's registered office, German law could apply.

the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country'. This does not appear to be the case, so that the only criterion for choosing the applicable law is simply 'most closely connected' of Article 4(1).

42. If the contract was concluded in France and the damage was attributable to a mistake in loading or stowing, it could be argued that the contractual obligation was most closely connected with France and therefore French law is applicable. If, on the other hand, we consider that, from the viewpoint of the obligation in question, the actual work of unloading or the State where the goods were located is of greater importance, Brazil will be the designated country and Brazilian law will apply. With regard to characteristic obligations, reference to the *lex causae* merely displaces the moment of uncertainty, and with it the subsequent risk of fragmenting jurisdiction, to a later stage of reasoning, without eliminating uncertainty altogether.

43. However, once the proper law of the contract has been identified, the difficulties of determining the place of performance according to that law remain, and also the problems arising from the unsuitability of reference to the *lex causae* for resolving questions of jurisdiction. I shall revert to this point later.

VIII — The criticism of the Tessili judgment

44. The criticism of the case-law laid down in *Tessili* and *Custom Made* has concentrated essentially on two aspects: the practical difficulty of applying that case-law and the undesirable consequences of seeking the applicable substantive law in order to determine a question of jurisdiction. The fact that the courts of the plaintiff's domicile are more and more often imposed as a general forum for matters relating to contracts must be mentioned as one of these undesirable effects.

(a) *The difficulties of applying the Tessili case-law*

45. As I have said, the *Tessili* case-law imposes a three-fold task on the court before which the matter is brought: independently classifying the obligation on which the claim is based; determining the law applicable to that obligation in accordance with the court's own rules of conflict; and ascertaining the place of performance of the obligation in accordance with that law.

46. I think I have shown sufficiently, using the present case as an example, that the

Tessili method is extremely laborious, particularly when considered in relation to its only purpose, which is to determine whether the court before which the matter is brought has jurisdiction. [24] This complexity has not only led to much criticism from commentators but also — and this is more serious — caused considerable disaffection on the part of the national courts. In a word, *Tessili* is not followed. [25] And in cases where it is actually followed, this is often because the law applicable to the obligation in question is the law of the place in which the case is heard, [26] namely, the law which the court knows best or, as the case may, uniform international law.

47. I should add that, in my view, the correct application of the *Tessili* judgment requires the court not only to go through the stages of reasoning described above in its internal legal system, but also to explain them and state grounds. A court which, in its decision, merely indicates a place of performance of the obligation in question for the purpose of Article 5, point (1), which is the same as that to which correct application of the *Tessili* judgment would have led has not applied that case-law.

48. Where a court does not apply the conflictualist method, it usually proceeds on the basis of the circumstances of the particular case to determine the place of performance. [27] Finally, there have been cases of open 'rebellion' against the *Tessili* judgment, among which must be mentioned, because of its special features, that of the Cour de Cassation, the court which has referred the present question. [28]

49. However, perhaps the most discouraging aspect of the painstaking exercise required of the national court is that, in practice, the result it will obtain will be either the defendant's domicile, in which case it would have been sufficient to apply the general forum provided for by Article 2 of the Convention, or the plaintiff's domicile, which contradicts not only most European procedural traditions, but also the system of the Brussels Convention itself, *while there is still no guarantee that either of those places is most closely connected*

24 — If, having completed its examination, the court finds that it has jurisdiction, it may still set aside the conclusions it reached for the purpose of jurisdiction when it comes to consider the substance of the case because 'the interpretation of the said words and concepts [of civil, commercial and procedural law] for the purpose of the Convention does not prejudge the question of the substantive rule applicable to the particular case' (*Tessili*, cited above in footnote 3, paragraph 11). On the other hand, as I have already said, if it declines jurisdiction, its reasoning will be of no use to the next court before which the matter is brought.

25 — On the resistance to applying it, see G. Droz, 'Delendum est forum contractus? (vingt ans après les arrêts De Bloos et Tessili interprétant l'article 5, point 1, de la convention de Bruxelles du 27 septembre 1968)', *Recueil Dalloz*, 1997, p. 351.

26 — See, for example, the judgment of the French Cour de Cassation (First Civil Chamber) of 6 February 1996, *San Carlo Gruppo Alimentare SPA* v *SBC Vito*, cited in *Revue Critique de Droit International Privé*, 1996, p. 504.

27 — See H. Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano*, No 173, p. 129.

28 — Whereas the Civil Chamber faithfully applied the *Tessili* method in a judgment of 25 February 1997 (*Société Bateg Delta* v *Société Ward Groupe and Others*, *Recueil Dalloz*, 1997, Jurisprudence, p. 562), a few days later, the same Chamber upheld an order for enforcement on the ground that the previous court had correctly determined the place of performance 'by reference to the nature of the relationship creating the obligation and the circumstances of the case') (*SA Comptoir Commercial d'Orient* v *Société Medtrafina*, judgment of 11 March 1997, ibid.). Again a few days later, the Commercial Chamber of the same court set aside an appeal court judgment on the ground that it stated no legal basis because it did not indicate the applicable law (*Ernesto Stoppani SPA* v *SARL Stoppani France*, judgment of 18 March 1997, ibid.). I am perplexed and uneasy because of the legal uncertainty caused by these inconsistent decisions.

with the case — the criterion which is the specific justification for Article 5, point (1), as we shall see. This occurs particularly in relation to obligations to pay a price.

(b) *Reference to the lex causae to resolve questions of jurisdiction is inappropriate*

50. The second main criticism of the Court's method of interpreting Article 5(1) deplores the fact that criteria which have their *raison d'être* in substantive law are transposed into the field of jurisdictional competence, in that elements specific to rules of conduct are transferred to the field of conceptual rules or rules which create rights, such as rules of competence. [29] Such transposition also destroys the theoretical purity which was supposed to be found in the *Tessili* method.

51. Specifically, the criticism is in essence directed at the introduction of a general jurisdiction in contractual matters which coincides with the domicile of the plaintiff, or rather the seller.

52. There can be no doubt that the most frequent type of contract in international commercial relations is the contract of sale. Furthermore, most disputes relate to the payment of the agreed price. As regards the place where payment is to be made, traditionally there have been two trends in Europe: the place of the debtor's domicile (Germany, Belgium, Spain, France) and that of the creditor's domicile (Denmark, Greece, Ireland, Italy, Netherlands, United Kingdom). The first option has been continuously eroded in favour of the second. Thus, Article 59(1), first sentence, of the 1964 Uniform Law on the International Sale of Goods provided that the place of performance of the obligation to pay the selling price is the place where the seller is established or, in the absence of an establishment, the place of his customary residence. Article 57 of the United Nations Convention on Contracts for the International Sale of Goods, which came into force on 1 January 1988, is, if possible, in even more general terms with regard to the obligation to make payment at the seller's domicile.

53. In the order for reference which gave rise to the *Custom Made* case, the Bundes-

29 — Kelsen observed that terms such as 'competence', 'power', 'capacity' or 'attributability' refer to the same concept or, at least, to concepts which are very close to each other because in all four cases a legal rule *authorises* (*ermächtigt*) in a wide sense certain conduct and, in doing so, transforms it into legally relevant conduct (H. Kelsen, *Reine Rechtslehre*, Vienna, 1960, p. 150 et seq.). Alf Ross (A. Ross, *On Law and Justice*, London, 1958, p. 52 et seq.) and Lars Lindahl (L. Lindahl, *Position and Change. A Study in Law and Logic*, Boston, 1977, p. 194 et seq.) describe rules of competence as conceptual rules or rules which create rights, as opposed to rules of conduct. Rules of competence define a concept (e.g. 'legislature' or 'court') and make possible an activity (enacting legislation or giving judgments) which, if they were not covered by such rules, would not exist because they are not natural activities. The rules of competence determine which types of conduct are deemed to be legislative or judicial acts and who may carry out such acts, whereas rules of conduct govern the substance of those activities.
The situation is similar with regard to powers conferred on individuals, although private law prefers the term 'capacity'. Rules of competence define what is meant by 'contract', 'will' or 'promise' and make the activities in question legally relevant, whereas rules of conduct lay down the limits and describe the characteristics of such activities (see E. Bulygin, 'Sobre las normas de competencia', *Análisis lógico y derecho*, Madrid, 1991, p. 485 et seq.).

gerichtshof rightly questioned whether the place of performance should be determined according to the *lex causae* 'even in a matter governed by the Uniform Law on Sales, which would lead to generalising the *forum actoris* in actions for payment of the price of the goods'. [30]

54. When replying in the affirmative, the Court of Justice facilitated the research work of the national court which could, for that purpose, refer to a uniform international law. At the same time, this increased the likelihood of a uniform reply. Unfortunately, it also aggravated the pernicious tendency to use substantive-law criteria for resolving procedural problems, such as those relating to jurisdiction.

55. Nevertheless, it must be said that, in principle, there is nothing pernicious in the fact — which, on the contrary, is perfectly logical — that, so far as contractual obligations are concerned, the place of performance should be the same as the domicile of one of the parties, even if it is that of the seller. In most contracts it is customary for the respective obligations to be performed at the domicile of one of the parties. What is not legitimate [31] is to distort the function of substantive law itself, which in this case consists in sharing out the contractual risks between the different parties, in order to establish competent courts conforming with those same criteria for sharing risks. This occurs where the increasingly general acceptance, in the international field, of the seller's domicile as the place of performance of the payment obligation opens the door, by virtue of the *Tessili* and *De Bloos* case-law, to a vast *forum actoris* in relation to pecuniary obligations, having no connection whatever with the place where the characteristic consideration of the contract was to be given. The defendant, who will generally claim that what he has received does not conform with what was agreed, will be obliged to put his case before a court perhaps a very long way from his domicile. For its part, the court before which the case is brought must find that it has jurisdiction even if it has to use long and costly letters rogatory to obtain essential evidence, that is to say, to verify the defendant's allegations of contractual non-conformity.

56. In his Opinion in the *Custom Made* case, Advocate General Lenz devoted the greater part of his criticism of the Court's case-law to this problem. After observing that, according to the intention of the draftsmen of the Convention, the concept of 'place of performance' was to enable a court closely connected with the facts to be designated, Mr Lenz observed that 'the rules of the *lex causae* relating to the place of performance may... embody elements which serve solely to apportion the risk... and do not provide reliable indications about the economic *objective* of the seller's obligations'. [32] It follows that this rule is not appropriate for designating a court closely connected with the facts of the case.

30 — Order for reference of 26 March 1992 (paragraph V, point 3(d) *in fine*).

31 — See G. Droz, op. cit., note 25, p. 355 *in fine*.

32 — [1994] ECR I-2933, paragraph 80.

Consequently, for Mr Lenz, the main defect of the method consisting in determining the *forum contractus* by reference to the substantive law applicable by virtue of the rules of conflict is not so much an alleged general 'antipathy' to the jurisdiction of the defendant's domicile — which he does not find to exist — as the fact that this method is useless for attaining the specific objective of Article 5, point (1), namely the creation of a special forum in contractual matters with physical proximity to the facts.

57. Although the criticism which I have just set out is entirely justified, it must be recognised that it arises from the *De Bloos* judgment and the isolation of bilateral obligations which it establishes, rather than from the *Tessili* method. As I indicated above, the controversy concerning the correct classification of the obligation for the purpose of Article 5(1) is outside the scope of these proceedings. Even though in the present case the plaintiffs in the main proceedings claim a sum of money, there is no doubt that they are acting by virtue of subrogation to the consignee of the goods and therefore they have brought an action based on the characteristic obligation of the contract, namely the obligation to carry the goods and to deliver them in good condition to the consignee. [33]

58. I should like to add, however, that determining the place of performance by reference to the *lex causae* contributes greatly to complicating the practical application of the *Tessili* principles. As I said previously, the main concern of substantive law — in the matter of contractual obligations — is in general to share out the responsibilities or, in other words, the risk, between the contracting parties. It follows that civil or commercial legislation rarely lays down what is meant by the place of performance of an obligation, in the absence of express agreement between the parties. The law usually defines the moment at which the risk passes from one contracting party to the other. Normally that is the only indication offered by substantive law to the court to enable it to define what could be meant by 'place of performance'. [34] I doubt seriously whether it is legitimate to define the place of performance of an obligation by reference to the rules on sharing out contractual responsibilities. What happens if it is agreed that the goods are to be carried at

33 — However, I cannot help thinking that it is somewhat artificial to allow, on the one hand, the isolation of bilateral obligations for the purpose of applying the *forum contractus* and, on the other, for the same purpose, to regard the obligation to compensate for damage as equivalent to an obligation which has not been performed or not performed correctly. See P. Gothot and D. Holleaux, *Revue Critique de Droit International Privé*, 1977, p. 769.

34 — For example, if, in the main proceedings in this case, Spanish law were applicable, the court which has to give a decision on jurisdictional competence would only have, as regards carriage by sea recorded in a bill of lading, the provisions of the Law of 22 December 1949 (BOE No 358, 24 December). Article 5, point 3, of the Law, which incorporates the Brussels Convention of 25 August 1924, provides that the carrier is to 'carry out suitably and carefully the loading, stowing, preservation, transport, supervision and discharge of the goods which he carries'. In Spanish law there do not appear to be any clearer indications of what must be regarded theoretically as the place of performance of the obligation for the international carriage of goods by sea under a bill of lading. However, in accordance with Article 24 of the same Law, and for the purpose of applying it, the court must first satisfy itself that the goods are carried only between nations which have ratified the 1924 Brussels Convention. If that is not the case, the court must refer to the rules on carriage by sea in the Commercial Code, the provisions of which throw even less light, if that were possible, on the existence of a place of performance of an obligation such as that in question here. If the court finds that there are no mandatory rules on the subject, it will have to fall back on the general principle of the autonomy of intention in matters of contract, as laid down in Article 1255 of the Civil Code, in order to conclude that the place of performance of the obligation is none other than that designated by the parties. If this is read in conjunction with the provisions on the sharing of the risks, it appears that the place in question is the same as the destination of the goods. All in all, we are not very much wiser!

the consignee's risk? Does this mean that, by shifting to the port of loading the moment of the passing of the risk, the place where the obligation is to be performed is also moved? Or, where the law provides that, in certain circumstances, the carrier is not liable for damage arising from the fact that the vessel is not seaworthy,[35] does this mean that, for the purpose of an action for breach of contract, a carrier who pleads the statutory defence may claim that the place where he put goods on board the defective ship should be regarded as the place of performance of his obligation, on the ground that that is where his responsibility ceased in the case in question?

The rules on the sharing of commercial risks are of no use at all for designating the competent court.

IX — The objectives of Article 5, point (1), of the Convention

59. Any attempt to interpret Article 5, point (1), of the Brussels Convention must begin by determining the purpose of what is called the *forum contractus*. What is the purpose of Article 5, point (1), in the framework of the Brussels Convention? Why is it capable of creating a special jurisdiction at the place of performance of a contractual obligation and not, for example, at the place where the contract was concluded?

(a) *The general objectives of the Brussels Convention*

60. Article 5, point (1), forms part of the Convention which was adopted by the Member States on the basis of Article 220 of the EC Treaty, which provides that 'the Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'. The scope of the Brussels Convention is clearly much wider than the specific objective laid down by Article 220. However, I wish to emphasise the aim of 'simplification' which it mentions.

The preamble to the Convention states that the 'simplification of formalities' referred

35 — Article 8(1) of the Spanish Law of 22 December 1949.

to by Article 220 [36] and the 'legal protection' of persons established in the European Community [37] are among the objectives of the Convention.

61. The corollary of the second objective of 'legal certainty' [38] which imbues the whole of the Convention is to provide parties to actions with foreseeable decisions.

62. In the *Mulox* judgment, the Court described the objectives of uniform application of the Convention, which include 'unification of the rules on jurisdiction of the courts of the Contracting States, so as to avoid... the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community, by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued'. [39]

36 — The object of which, as interpreted by the Court, is to 'eliminate obstacles to legal relations and to settle disputes within the sphere of intra-Community relations' (*Tessili* judgment, cited above, paragraph 9).

37 — An important component of which is 'to ensure uniformity in all the Member States' (Case 189/87 *Kalfelis* [1988] ECR 5565, paragraph 17). Indeed, 'the principle of legal certainty in the Community legal system and the objectives of the Brussels Convention in accordance with Article 220 of the Treaty, which is its origin, require in all Member States a uniform application of the legal concepts and legal classifications developed by the Court in the context of the Convention' (Joined Cases 9/77 and 10/77 *Bavaria and Germanair* [1977] ECR 1517, paragraph 4).

38 — See the judgments in Case 38/81 *Effer* v *Kantner* [1982] ECR 825, paragraph 6, and in the *Handte* case, cited above, paragraph 11.

39 — Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 11. In paragraph 45 of his Opinion in the *Custom Made* case, Advocate General Lenz lists those objectives with reference to their sources in the Convention and in the Court's case-law ([1994] ECR I-2925).

(b) *The specific objectives of Article 5, point (1), of the Convention*

63. The main aims of the Brussels Convention as a whole are reflected most clearly in what is conventionally called its general forum, that is to say, the defendant's domicile. That forum meets, appropriately and at one and the same time, the aims of uniformity, foreseeability, avoiding a multiplicity of jurisdictions, ease of designation and legal protection. However, the Convention provides for a limited number of special jurisdictions, the justification for which varies from case to case. Thus, in proceedings concerning immovable property, Article 16 provides that the courts of the State in which the property is situated are to have exclusive jurisdiction by reason of the advantages for the administration of justice arising from the proximity of those courts to the subject-matter of the dispute. [40] Similarly, with regard to insurance, the insured may choose to bring an action before the court of his domicile in order to have greater legal protection. Consequently, there is no doubt that the adoption of a special, optional forum in contractual matters must also have an equally specific justification.

64. Article 5, point (1), is generally said to have two main objectives: the proximity of the court with jurisdiction to the subject-

40 — See P. Jenard, Official Report on the Original Version of the Brussels Convention (OJ 1979 C 59, p. 122 et seq., 'the Jenard Report').

matter of the dispute and procedural balance between the parties.

65. The justification of proximity to the subject-matter has been recognised since the Jenard Report. [41] In principle, there is no doubt that the fact that the court is close to the place where the obligation in question was to be performed appears likely, in most cases, to facilitate the administration of evidence. That is usually the place where the goods are located or where the obligation is to be fulfilled. It is also the place where witnesses can most easily be reached and where expert reports can be obtained at less cost, by avoiding slow and costly letters rogatory. In fact, however, this is true only with regard to the place where the characteristic obligation of the contract is to be fulfilled. That is why I said previously that I am in favour of rectifying the *De Bloos* case-law so that a merely pecuniary obligation, that is to say, one not characteristic of the contract, would no longer be taken into account for the purpose of Article 5, point (1). Even if the plaintiff claims that the agreed price has not been paid, the place of performance of the obligation *in kind* serves best to designate a court with proximity to the dispute because, firstly, the defendant generally pleads in his defence that the plaintiff has not fulfilled or has only party fulfilled his obligation and, secondly, proof of payment is normally in documentary form: that is why it is to a greater extent independent of a specific place in proximity to which a basis of jurisdiction should be established. In any case, I repeat that these considerations, although important, have no direct bearing on the outcome of the main proceedings, which concern, as we know, the performance of the characteristic obligation of the contract.

66. The Court has accepted this justification in its case-law on more than one occasion. [42]

67. Personally, I think it is more correct to speak of 'connection with the contract' rather than 'proximity to the subject-matter', in so far as the links between the competent court and the contract may be based on mere declarations of intention rather than facts proper. This usually applies in the case of total non-performance of the obligation due. In that case, the place where the obligation was to be performed can be determined only on the basis of hypothetical factors.

From this viewpoint, the criterion of connection derives further legitimacy, apart

41 — Jenard Report, cited above, p. 153.

42 — The Court has recognised that 'a particularly close relationship between a dispute and the court which may be most conveniently called upon to take cognisance of the matter' is desirable (*Tessili* judgment, cited above, paragraph 13).

from considerations of the proper administration of justice, from the general principle of the autonomy of the contracting parties' intention.

68. Certain commentators add that the creation of the *forum solutionis* enables the advantages and risks connected with determining the competent court to be shared fairly between the plaintiff and the defendant. [43] In this way, Article 5, point (1), is said to act as a counterweight to the general rule of the forum of the defendant's domicile.

69. Some of these writers use this supposed purpose of the abovementioned provision to support a broad interpretation of it. [44] They contend that Article 5 of the Convention, read in conjunction with Article 2, is based on the idea that, in certain particular cases, the plaintiff's interest must take precedence over the protection of the defendant and therefore that he should be given an option with regard to jurisdiction. To be effective, this right of option must not be construed restrictively, otherwise Article 5, point (1), and Article 2 could be fused into one and the same provision, the former being left with no effect at all. [45]

43 — See F. Schack, *Der Erfüllungsort im deutschen, ausländischen und internationalen Privat- und Zivilprozeßrecht*, Frankfurt, 1985, paragraphs 144 et seq., 207 and 218.

44 — See A. Huet, 'La ubicación del artículo 5 en el sistema del Convenio. La competencia en materia contractual', in *Competencia judicial y ejecución de sentencias en Europa*, Madrid, 1993, pp. 75 and 76.

45 — Statistics compiled by Mr. G. Droz show that, of the 48 cases determined in relation to Article 5, point (1), 24 were found to fall within the jurisdiction of the court for the defendant's domicile. In other words, in half of the cases the general forum of Article 2 of the Convention was chosen (statistics published in *Revue Critique de Droit International Privé*, 1987, pp. 802 and 803).

70. Personally, I think that this last argument, although original, has insufficient support in the legal traditions of the Member States to be regarded as authentic. Furthermore, I do not think this justification is necessary or useful. It is true that in practice Article 5, point (1), by conferring jurisdiction in many cases on the courts of the plaintiff's domicile, may to some extent counterbalance the general forum. However, this is due more to the simple fact that, generally, obligations have to be performed where at least one of the parties resides, rather than to a supposed intention to achieve a balance between the parties to a contract so far as jurisdiction is concerned.

(c) *First provisional conclusion*

71. At this stage of the discussion, I think it useful to set out a first provisional conclusion regarding the general and particular objectives which, in my opinion, are pursued by the establishment of the *forum contractus* in the framework of the Brussels Convention.

It follows from what has been said that the proper interpretation of Article 5, point (1), must lead to designating as the competent court that which is situated at a place having a close connection with the contractual obligation in question, a place

which is determined by reference to the general requirements of foreseeability, of avoiding a multiplicity of jurisdictions, of uniform criteria and of ease of designation.

X — The possible methods of interpretation

72. As I have already said, the first judgment given by the Court under the Protocol of 3 June 1971 related precisely to Article 5, point (1), of the Brussels Convention. The issue then was to determine the place of performance of the seller's obligation to deliver goods in conformity with the contract. The defendant company in the main proceedings, Dunlop AG, even then set out in its written observations the two main possibilities open to the Court: on the one hand, a uniform interpretation based on elements of comparative law and, on the other, a conflictualist interpretation dependent on the substantive law applicable in each case. With regard to the latter possibility, counsel for Dunlop even then pointed out the danger in treating the place of performance of the obligation as that of the seller's domicile and finally proposed as the place of performance the place where the obligation was actually to be carried out, namely the place indicated by the circumstances of the case, by reference to the relationship creating the obligation in question. [46]

73. More than 20 years have elapsed and, although Article 5, point (1), has been the subject of more judicial controversy and has been given more attention by commentators than any other provision of the Brussels Convention, the possible solutions are in substance still the same, namely:

(a) uniform interpretation in the framework of the Convention, which is in itself independent of the interpretations prevailing in the Member States, even if it is based on them, and which is now commonly called 'autonomous interpretation';

(b) the conflictualist method, generally used by the Court, which consists in determining the place of performance of the obligation by reference to the substantive law applicable to the particular case according to the rules of conflict of the court before which the matter is brought;

(c) the designation of the place of performance by reference to the particular circumstances of the case and the nature of the relationship creating the obligation in question; this is the solution which the Cour de Cassation appears to suggest. [47]

46 — As regards the obligation to guarantee goods against hidden defects, Dunlop argued that the place of performance should be that where the defective goods are located because that is where any defects may be examined easily and, if necessary, the goods can be repaired ([1976] ECR 1477).

47 — I am clearly discarding any interpretation of 'place of performance' which is necessarily based on the substantive *lex fori*, because it would inevitably give rise to the dispersion of jurisdictions.

74. These three categories, as described above, must be understood as means of analysis rather than true, completely defined scientific options. The third variant is really only a sub-category of the first. This makes it necessary first of all to choose between, on the one hand, recourse to the *lex causae* and, on the other, autonomous interpretation. When this choice has been made, it is necessary to find the criterion of interpretation which best satisfies the general and particular requirements of the *forum executionis*, which I have listed above. In other words, I think it prudent to distinguish between methods and criteria of interpretation and to examine them one after the other.

(a) *Autonomous interpretation*

75. 'An autonomous interpretation of the terms used in the Convention is preferable in principle because it helps to secure the uniform application of the Convention and thus contributes to the realisation of its underlying purpose, which is to unify the jurisdiction rules of the Contracting States. Such unification is inevitably impeded if the meaning of the terms used in the Convention varies according to the applicable law.' I fully concur with the views of Advocate General Jacobs expressed in the *Mulox* case. [48]

48 — *Mulox IBC* judgment, cited above. Opinion published in [1993] ECR I-4091.

76. Autonomous interpretation fulfils one of the fundamental purposes of the Brussels Convention: to attain a high degree of uniformity within Europe with regard to the treatment of questions of international jurisdiction.

77. Autonomous interpretation also facilitates to a large extent the application of the Convention by avoiding constant recourse to the law applicable to the legal relationship in question. As I have already stressed with regard to the *locus solutionis*, the need to construe the terms used in the Convention by recourse to the *lex causae* means that the mere designation of the competent court raises difficulties associated with the substance of the case, which are aggravated by the special features of the technique of conflict of laws (classification, preliminary question, public policy and other concepts).

78. It is not surprising that the Court has preferred autonomous interpretation in almost all cases. Thus, it has interpreted independently not only the phrase 'matters relating to a contract', [49] but also, among others, 'civil and commercial matters', [50] 'matters relating to tort, delict or quasi-delict' [51] and 'maintenance creditor'. [52] It seems to have abandoned this method only in very rare cases, namely those in which the Convention itself calls for recourse to national law (for example, in relation to the term 'domicile') and, precisely, Article 5, point (1), but even with regard to the latter,

49 — See paragraph 27 of this Opinion.

50 — Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541.

51 — *Kalfelis* judgment, cited above.

52 — Judgment in Case C-295/95 *Farrell* [1997] I-1683.

only in relation to the definition of 'place of performance'. [53]

79. Autonomous interpretation therefore meets the aims of uniform criteria and ease of designation. In the following paragraphs I wish to make the point that, in relation to the other aims of the Convention, the technique of the *Tessili* judgment offers no advantages.

(b) *The conflictualist method*

80. The supporters of the conflictualist method stress mainly the limitations inherent in the autonomous interpretation of the terms of an international convention. [54] They also maintain that there is nothing to indicate that the jurisdiction of the court of the plaintiff's domicile is incompatible with the special forum of the place of performance of the obligation. [55] Moreover, they consider that the possibility that the place determined by reference to the *lex causae* may have no connection with the subject-matter in question is a risk inherent in all cases of special jurisdiction. The assumption that the connection exists justifies the creation of the special forum of the place of performance of the obligation. Nevertheless, when applying this special jurisdiction rule, a court may be guided only by the formal criteria adopted by the Convention. [56]

81. The Court itself justifies its preference for recourse to the *lex causae* by invoking legal certainty and foreseeability. [57]

82. In my opinion, recourse to the *lex causae* provides at most only a certain degree of theoretical peace of mind. There is something attractive in the apparent mathematical logic of the *Tessili* method, in its theoretical formulation. In reality, the conflictualist solution offers *no advantage whatsoever* over autonomous interpretation, but it certainly has numerous disadvantages.

83. In default of agreement between the parties, [58] the term 'place of performance' in Article 5, point (1), could be interpreted independently by treating it as the same as

53 — P. Byrne, *The EEC Convention on Jurisdiction and the Enforcement of Judgments*, Dublin, 1990, pp. 29 and 44.

54 — The draftsmen of the Brussels Convention themselves seem to have been aware of these limitations because in Articles 6(4) and 22(2) they incorporated references to national law. In favour of the conflictualist method, see also H. Gaudemet-Tallon, *Revue Critique de Droit International Privé*, 1994, p. 698 et seq., and H. Tagaras, 'Chronique convention de Bruxelles', *Cahiers de Droit Européen*, 1995, p. 222.

55 — At the time when the Brussels Convention was drawn up, pecuniary obligations had to be fulfilled at the creditor's domicile in several Member States and at the same time under an international agreement in force in part of the territory of the Community (Hague Convention of 1 July 1964 and the annex thereto).

56 — See H. Tagaras, op. cit., p. 255.

57 — See the *Custom Made* judgment, cited above, paragraph 14 et seq.

58 — As contracts are governed by the general principle of the autonomy of the parties, I consider that, if there is agreement on the place of performance, it must operate for the application of Article 5(1). Any abuse to which this may lead must be treated in accordance with the provisions concerning fraudulent evasion of the law.

'the place with which the contract is most closely connected'. This possibility is categorically rejected, in spite of its undeniable simplicity, because it would compel the court to examine the substance of the case in detail and, because of the uncertainty as to the result of the assessment of the facts which the court would have to make, would open the door to diverging judgments and, ultimately, to the multiplication of bases of jurisdiction. On the other hand, according to the conflictualists, supported on this point by the Court's settled case - law, recourse must be had to the *lex causae*. In other words, the court before which the matter is brought must first find the law applicable to the legal relationship in question. For this purpose it must, since it came into force, use the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, Article 4(1) of which provides that 'to the extent that the law applicable has not been chosen... the contract shall be governed by the law of the country with which it is most closely connected'. This is followed by a number of provisions which require the court to examine the substance of the case in more and more detail (raising of presumptions and exceptions to them, nature and subject-matter of the contract, determining the 'characteristic obligation'). The conflictualist method merely postpones to a later stage of the court's examination the inevitable assessment of the substance of the case. Moreover, I fail to see why the criterion of the closest connection provided for by the 1980 Rome Convention should permit solutions more uniform than those based on the criterion of the place of performance, which is itself also relatively indeterminate.

84. The difference between the two methods is that, whereas a court which would prefer autonomous interpretation already has a reply, with the potential errors and omissions inevitable in law, which is not an exact science, a court which chooses the conflictualist approach must still determine the place of performance of the obligation in question, in accordance with the law which it finds applicable. If the *lex fori*, which the court knows best, is applicable, the task will be easier. If, on the other hand, foreign law, perhaps of some distant country, is applicable,[59] the exercise will become appreciably more complicated. If it is a question of the characteristic obligation of the contract, as in the present case, whichever law is consulted will probably reply that the place of performance is the place chosen by the parties and, in default of agreement on the point, it must be designated in the light of the circumstances of the relationship creating the obligation in question, that is to say, by means of an assessment of the facts. Consequently we find ourselves back where we started.

To sum up, the method set out in the *Tessili* judgment guarantees no more legal certainty than an autonomous interpretation and it complicates unnecessarily the task of the court before which the matter is brought.

85. In addition, there is no guarantee that the *Tessili* method will designate a court

59 — Before the 1980 Rome Convention came into force, a Spanish court dealing with an action for breach of contract brought by a Nigerian national residing in the frontier town of Irun against a compatriot domiciled two streets further down, in Hendaye (France) had to determine, in accordance with the *Tessili* case-law and by virtue of Article 10(5) of the Spanish Civil Code, the place of performance of the obligation in question according to Nigerian law.

closer to the facts or more closely connected with the obligation in question than the court which would be designated by recourse to an autonomous interpretation.

(c) *Second provisional conclusion*

86. Accordingly, I arrive at the second provisional conclusion of my analysis. The autonomous method has undoubted advantages by comparison with conflictualist interpretation, particularly with regard to the uniformity of criteria and the ease of designating the competent courts under Article 5, point (1). Regarding the aims of foreseeability, avoidance of a multiplicity of jurisdictions, and proximity or connection, the *Tessili* method merely succeeds in postponing recourse to a connecting element which necessitates examination of the facts of the case. However, because of its technical complexity, the conflictualist method encourages mistakes when it is applied and even when it is not applied, with the legal uncertainty which that entails.

XI — The criterion for interpretation proposed by Advocate General Lenz

87. Among the different criteria available for the purpose of autonomous interpretation, I think it would be helpful to study the proposal put forward by Mr Lenz in the *Custom Made* case.

Mr Lenz began his original analysis by observing that a forum designated as having jurisdiction on the basis of a concept of substantive law can be justified only on procedural grounds, namely a ground such as physical proximity to the relationship at issue. Therefore, according to Mr Lenz, it is necessary to distinguish clearly between the sharing of the economic risks, which is effected by substantive law, and the procedural grounds which are the subject of Article 5. It is dangerous to confuse the two concepts: under the Uniform Law on the International Sale of Goods (and particularly Article 59(1)), that is to say, the substantive law applicable by virtue of the *Tessili* judgment, the result would be to create, in the framework of Article 5, point (1), a true general jurisdiction of the defendant's domicile.

I share the concern expressed by Mr Lenz, although I still consider that the practical difficulties of applying it and the inevitable risk of divergence and legal uncertainty which it involves are the main defect of the conflictualist method.

88. Mr Lenz proposed that as, in disputes concerning the payment of the price — as opposed to those where the conclusion of the contract itself is disputed — the ques-

tion in most cases is whether the seller duly fulfilled his obligations, the competent court under Article 5, point (1), is that which is best able to assess whether that is so.

89. As Mr Lenz himself admits, his proposal differs only very slightly from the *De Bloos* judgment, in so far as 'contractual obligation' must be taken to mean only the obligation 'which is far the more likely to result in the determination of a court physically proximate to the relationship than the obligation at issue'.[60] According to Mr Lenz, the *Tessili* case-law would continue to apply, albeit not for the purposes of determining the place of performance of the obligation at issue, but the place of performance of the counter-obligation of the other party (paragraph 78). However, the Advocate General then 'qualifies' that statement: 'As I used such elements when I examined the rules on the place of performance of the obligation to make payment as a reason for diverging from the substantive law of the contract, on the ground that those rules could not serve to determine a court which was physically proximate to the relationship at issue, it would seem illogical to use another method when considering the rules on the place of performance of the seller's obligation to deliver the goods'. And Mr Lenz concludes by proposing a completely independent interpretation of the place of performance in that case: '... in the case of disputes about the payment of the price arising on account of alleged defective performance of the counter-obligation... the courts for the place at which the goods were intended to be supplied is, as a general rule, nearer to the facts than the court for the place from which they were sent. This is true irrespective as to which of those two places is the "place of performance" under the substantive law' (paragraph 80). And the Advocate General proposes that this same court be designated as the competent court for the purpose of Article 5, point (1), of the Convention.

90. To sum up, the conclusion reached by Advocate General Lenz implies a certain rectification of the *De Bloos* judgment (by introducing the concept of the characteristic obligation under a different name) and, in practice, the abandonment of the *Tessili* case-law in favour of an independent interpretation, according to which the *forum contractus* would be the place closest to the subject-matter.

91. Although I am in favour of the approach taken by my eminent colleague, I differ as to the *minimum theoretical criterion for the independent interpretation* preferred by Mr Lenz, that is to say, proximity to the subject-matter. Such proximity or, if you will, the connection with the contract, as objectives of the provision, are the foreseeable result of independent determination, and not the criterion for interpretation.

92. Mr Lenz ends by proposing that the Court's reply should be that the place of

60 — [1994] ECR I-2933, paragraph 77.

performance, within the meaning of Article 5, point (1), of the Convention, of the obligations arising from a contract for manufacture and supply is the place at which the goods are intended to be supplied. [61]

XII — The proposed solution: designation of the place of performance by reference to the particular circumstances of the case and the relationship creating the obligation in question

(a) *Should the case-law be changed?*

93. This point leads me to what is perhaps the main criticism (or the main apprehension) of independent interpretation in this sense, which consists in saying that it would compel the Court to determine, case by case, the place of performance of each of the innumerable types of contract. [62]

94. In my opinion, it is an illusion to think that it is possible to make an exhaustive list of every kind of contractual obligation, present and future, and to attribute theoretically a specific place of performance to each of them. Autonomy of intention does not lend itself to classification. Furthermore, without greater precision in the text of the Convention, this exercise would compel the national courts to request a preliminary ruling from the Court of Justice whenever they are confronted by a new type of obligation (the possibilities are endless), thus defeating the Convention's aim of simplification. Any criterion for interpretation must be simple and unambiguous.

95. The difficulties created by the case-law laid down in the *Tessili* judgment suggest that the Court of Justice should take a new approach in its case-law. Although the interpretation proposed by the *Tessili* judgment has prevailed for 20 years and although it was solemnly followed in the *Custom Made* judgment, it has not gained acceptance by the national courts, which follow it very unequally and, above all, very imperfectly. The fact is that the correct application of the *Tessili* technique is a matter of fiendish difficulty. [63]

96. The referring of a question by the French Cour de Cassation, which is familiar with the position adopted by Community case-law, must be understood as a desperate call for the aim of uniformity that the Court must pursue to be attained in the form of interpretive criteria, of more or less great scientific exactitude, but which meet

61 — [1994] ECR I-2947, paragraph 1 of the conclusion.

62 — This is nevertheless proposed by the governments of Germany and the United Kingdom.

63 — It should be remembered that, when the representatives of the intervening governments were questioned at the hearing about the result to which application of the *Tessili* method would have led in their respective national systems of law, none of them was able to give a satisfactory answer — and they must be presumed to be experts in the matter. Consequently, how could the Tribunal de Commerce, which does not even consist of professional judges, be expected to give an answer?

the requirements of and the resources available to a lower court in the Community, without seriously affecting the other aims of the Convention.

97. I think the time has come for the wisdom and prudence of the Court of Justice to prevail once again. There must be a change of case-law to interpret Article 5, point (1), of the Brussels Convention in accordance with the requirements of social reality.

98. The temptation to wait for the necessary change to come from the negotiations concerning the amendment of the Brussels Convention now taking place within the Council should be resisted.[64] Firstly, because such conduct would be incompatible with the characteristics of the judicial function: behind any particular case there are individual parties who, after years of litigation, are entitled to a reply in law, irrespective of the vicissitudes of some political negotiations. Secondly, because experience shows that the outcome of such negotiations is always uncertain, as is also the date by which a conclusion must be reached. Finally, since the question is one of procedural technique, no one is better placed than the national court to find a solution which most skilfully combines the interests of the proper administration of justice and sufficient protection for individuals.

(b) *The new criterion of interpretation*

99. The third method of interpretation which I mentioned above is, as I have said, a variant of the first or, rather, a concrete autonomous interpretation as opposed to what could be called a theoretical autonomous interpretation. Whereas in this last version there would be a theoretical definition of the place of performance of each of the characteristic contractual obligations, in the version which I now put forward the theoretical aspect would be confined to setting out a very simple criterion for interpretation, leaving the national court to apply it to the particular case.

100. According to this proposal,[65] the court before which the matter is brought must determine 'the place of performance of the obligation' by reference to the particular circumstances of the case and taking account of the nature of the relationship creating the obligation in question.

101. I cannot deny that this approach obliges the court to assess the facts of the case, but any solution, as I explained

64 — For a summary of the proposed amendments, see K. Hertz, *Jurisdiction in Contract and Tort under the Brussels Convention*, Copenhagen, 1998, p. 159 et seq.

65 — Which is in no way revolutionary because it is as old as the Brussels Convention itself.

above, requires some examination of the factual aspects of the action. What is more, I consider that a certain assessment of the factual aspects is not only inevitable, but legitimate. The concept of 'place of performance' of a contractual obligation has its *raison d'être* in factual criteria, [66] like the concept of 'the place where the harmful event occurred'. However, the Court has not had the slightest difficulty in giving an independent interpretation to the latter concept. [67] Obviously, when assessing these circumstances in relation to the nature of the obligation in question, different courts may arrive at different conclusions, but is the location of the 'harmful event' always unequivocal?

102. It is a characteristic of administration of human justice that, when certain factual conditions are attached to a rule, it may happen that different courts reach different conclusions. That, however, is inevitable and the legal system must tolerate it. What is more difficult to accept, from the viewpoint of the proper administration of justice — which, after all, is the object of the whole Convention — is that, merely in order to ascertain whether the court before which the matter was brought has international jurisdiction, four sets of legal proceedings and more than seven years' litigation have been necessary. [68]

103. Save with regard to obligations for the payment of a sum of money, reference to the circumstances of the case in relation to the nature of the obligation in question should enable the place or places of performance of an obligation to be determined with sufficient reliability in most cases.

I admit that this assertion does not apply to mere payment obligations. After all, it is easy to see that it is the existence of different rules in Europe regarding the place where such obligations must be fulfilled which has led to the use of the conflictualist method. It is all the fault of *De Bloos*! From the very beginning, the answer should have been to take account only of the characteristic obligation of the contract for the purpose of Article 5, point (1). Then it would have been possible, in the overwhelming majority of cases, to designate a place of performance for procedural purposes close to the essential elements of the contract. However, in order to avoid this reasonable construction of the text of the Convention, which would have been entirely appropriate to its aims, a

66 — See E. Jayme, 'Ein Klägergerichtsstand für den Verkäufer — Der EuGH verfehlt den Sinn des EuGVÜ', *IPrax*, 1995, p. 13 et seq., in particular p. 14.

67 — See F. Pocar, 'Las competencias especiales del artículo 5 del Convenio en materia delictual y en materia de explotación de un establecimiento secundario', *Competencia judicial y ejecución de sentencias en Europa*, op. cit., p. 119 et seq.

68 — In breach of Article 6(1) of the European Convention on Human Rights, which provides that everyone is entitled to a hearing 'within a reasonable time'.

method was introduced for obligations of all kinds which it is very difficult to apply.

Therefore I consider that, for the purpose of the *forum contractus*, the court must presume that the place of performance of an obligation is the place where the obligation which characterises the legal relationship in question was performed or was to be performed.

104. The solution proposed by Mr Lenz in the *Custom Made* case took an autonomous approach. However, in my opinion, proximity to the subject-matter (to which I prefer the 'connection with the dispute', as I explained) cannot in itself be the criterion for determining the *forum executionis*, but the main justification for creating that special jurisdiction. The draftsmen of the Convention considered it appropriate to provide for the possibility of bringing an action before the court of the place of performance of the contractual obligation in question *because*, among other things, that forum would in practice be close to the subject-matter. If the intention had been that, in matters relating to a contract, the court closest to the subject-matter should always have jurisdiction, why not have said so? [69]

105. Although the connection with the dispute cannot be a criterion of interpretation in itself, for the national court it must offer correction or guidance if there is doubt, which could not otherwise be removed, as to the place of performance of the obligation. These situations arise more and more frequently in relation to certain obligations to deliver movable goods. However, I am sure that, in the overwhelming majority of disputes, an examination of the circumstances of the case in relation to the nature of the obligation in question is sufficient to designate a place of performance which corresponds, with reasonable reliability, to the aims of the Convention. [70]

106. Consequently, I think that the criterion of 'proximity' should play only a secondary part in interpreting the Convention's criterion of 'place'. My choice is based not only on arguments supported by the authority of the text of the Convention, however important they may be, but it also has a deeper justification. Firstly, the concept of 'proximity to the subject-matter' seems to me relatively more imprecise than 'place of performance' (defined merely by reference to the circumstances of the case and the legal relationship in question), with the increased risk of multiplication of potential jurisdictions. [71] Secondly, I consider that any provision, including procedural provisions, in contractual matters should be interpreted so as to take best into account the actual source of the

69 — See E. Tichadou, 'Conventions internationales unifiant le droit matériel et détermination du lieu d'exécution au sens de l'article 5, point 1, de la Convention de Bruxelles', *Revue Trimestrielle de Droit Européen*, 1995, p. 87, in particular paragraph 17.

70 — The criterion of 'connection with the dispute' may, in case of doubt, also make it possible to situate mere payment obligations until the separation of obligations laid down by the *De Bloos* case-law is abandoned.

71 — 'The use of criteria other than that of the place of performance, where that confers jurisdiction on a court which has no connection with the dispute, might jeopardise the possibility of foreseeing which court will have jurisdiction and for that reason be incompatible with the aim of the Convention' (see the *Custom Made* judgment, cited above, paragraph 18).

relationship creating the obligation: the intention of the parties. When the court attempts to determine the place of performance of an obligation, clearly it must first and foremost establish what exactly was or could have been the will of the parties, without whose consensus the obligation would not exist. If the court can establish from the circumstances of the case the place of performance intended expressly or implicitly by the parties, taking into account the nature of the legal relationship in question, the *forum contractus* designated in this way will have the legitimacy of having been intended, albeit indirectly, by the parties, and will also be justified by its foreseeable proximity to the subject-matter. In other words, the defendant may be sued in the court for the place of performance of the contractual obligation because, in a certain way, he will have consented, by the expression of his will — which it will be the court's task to ascertain — to the creation of that special basis of jurisdiction. Clearly, the court which is competent by reason of the purely objective circumstance that it is close to the subject-matter will not have such legitimacy.

107. If the court of first instance had applied this criterion to the present case, and on the basis of the information available to the Court of Justice, it seems that, taking account of the circumstances of the case and the fact that the obligation in question is to carry goods without damaging them, the court of first instance could easily have found that, in relation to parties actually bound by a contract of carriage, the place of performance of that obligation was the place designated as such by the parties. Without the need for long digressions concerning the law applicable to the legal transaction in question, it seems clear from the facts of the main proceedings that the port of destination is that specified by the bill of lading, which is Santos, in Brazil. On that ground, it must be deemed to be the place of performance. Where the courts of a State which is not a party to the Convention are designated, the special jurisdiction of Article 5 lapses. In the absence of other concurrent bases of jurisdiction, the French court must decline jurisdiction. I should point out, however, that this question must be examined by the national court and not by the Court of Justice.

108. To sum up, the forum designated by the place of performance of a contractual obligation by reference to the circumstances of the case, taking account of the relationship creating the obligation in question, combines the advantages of autonomous interpretation with those which follow from a simple, unequivocal criterion for all contracts. It does not in itself entail any greater dispersion of jurisdiction than that occasioned by the *Tessili* technique itself, and it observes scrupulously the letter and the spirit of the Convention. Any doubts which may arise in determining it must be resolved in conformity with the criterion of the connection which the dispute has with a specific place, as that is the specific purpose of the *forum contractus* created by the Convention.

XIII — Conclusion

109. For the reasons which I have given above, I propose that the Court reply as follows to the question from the national court:

Article 5, point (1), of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that the *place of performance* of a contractual obligation means the place designated by reference to the circumstances of the case, taking account of the nature of the legal relationship in question, it being understood that it is presumed that that place is the same as the place where the obligation characterising the legal relationship in question was or is to be performed. If more than one place is designated, that having the closest connection with the dispute must be chosen.