OPINION OF ADVOCATE GENERAL JACOBS

delivered on 18 October 2001 [1]

1. This case concerns the determination of the forum, in accordance with Article 5(1) of the Brussels Convention, [2] for proceedings relating to a contract of employment. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) raises the question with regard to such a contract between a Scottish company and a German national resident in Germany, who was employed for at least part of the time between 1987 and 1993 on board ships or drilling rigs operating on or over the Netherlands continental shelf and then for several months on board a floating crane in Danish territorial waters.

The Brussels Convention

2. As the main proceedings were commenced in 1994, the relevant version of the Brussels Convention is that amended by the Convention on the accession of Spain and Portugal, signed at Donostia — San Sebastián on 26 May 1989. [3]

3. In accordance with Article 1, the Brussels Convention applies in civil and commercial matters whatever the nature of the court or tribunal. As regards jurisdiction, the general principle laid down in Article 2 is that persons domiciled in a Contracting State, whatever their nationality, are to be sued in the courts of that State. Under Article 3, persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of the title relating to jurisdiction. Of those provisions, Article 5 is relevant to the present case.

1 — Original language: English.

2 — Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended text — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1); hereinafter 'the Brussels Convention'.

3 — Cited in note 2, hereinafter 'the 1989 accession convention'. That convention was ratified by the Netherlands on 11 January 1990 and by the United Kingdom on 13 September 1991, thus taking effect between the two States on 1 December 1991 (see Article 32(2) of the convention).

4. It provides, *inter alia*:

'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; [prior to the 1989 accession convention, Article 5(1) went no further than this point] in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated;

...' [4]

5. Prior to 1989, Article 60 had declared that the Brussels Convention was to apply to 'the European territories of the Contracting States', with further detailed provisions concerning its application or possible application to various other dependent territories. That article was however deleted by Article 21 of the 1989 accession convention [5] and since then there has been no specific territorial provision.

Netherlands legislation

6. The Netherlands Law of 1992 relating to employment in extraction industries in the North Sea (Wet arbeid mijnbouw Noordzee, 'the WAMN') [6] entered into force on 1 February 1993.

7. Article 2 of that Law provides that the Netherlands law on employment contracts, including such rules of private international law as are relevant thereto, is to apply to contracts for the employment of workers on board any 'mining installation' (*mijnbouwinstallatie*) on or over the Netherlands continental shelf. The Hoge Raad explains that the term 'mining installation' includes drilling vessels and all fixed

4 — The principles of the convention are not new. Already in the 16th century, Sir James Balfour of Pittendreich wrote in his *Practicks*: 'Na man may be Judge in ony cause, bot gif defendar be within his jurisdiction, be resson of dwelling within the same or in respect of contract of obligation made thair; or be resson of tresspas committit within the boundis thairof, or in respect of the thing that is askit and clamit quhilk is and lyis within his jurisdictioun; because the persewar sould follow the defendar's jurisdictioun, and persew him befoir his awin competent Judge' ('Of jugeis', c. 15, p. 284 in the printed editions).

5 — For a commentary on the significance of that deletion, see the report on the 1989 accession convention, by Mr de Almeida Cruz, Mr Desantes Real and Mr Jenard, OJ 1990 C 189, p. 35, paragraphs 33 to 38. See also the report on the 1978 accession convention by Dr Schlosser, OJ 1979 C 59, p. 77, paragraphs 251 to 254, and the report on the 1988 Lugano Convention by Mr Jenard and Mr Möller, OJ 1990 C 189, p. 57, paragraphs 91 to 97.

6 — Wet van 2 november 1992, houdende bepalingen inzake arbeid verricht in verband met de mijnbouw op de Noordzee, *Staatsblad* 1992, 592.

or (immobilised) floating facilities for the conduct of exploration operations or the extraction of minerals, and that 'continental shelf' is to be understood as defined in the 1958 Geneva Convention on the Continental Shelf, [7] that is to say essentially 'the submarine areas adjacent to the coast but outside the area of the territorial sea to a depth of 200 metres'. (That convention was signed on 29 April 1958 and entered into force on 10 June 1964; the later United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, [8] which contains a slightly different definition, did not enter into force until 16 November 1994 and was not ratified by the Netherlands until 28 June 1996.) Article 2 of the WAMN also provides that for the purposes of private international law work performed by such workers is deemed to be performed in the Netherlands.

8. Article 10(1) of the WAMN gives jurisdiction over disputes concerning such employment contracts to the Kantonrechter te Alkmaar (Alkmaar Cantonal Court). However, the Hoge Raad notes that the explanatory memorandum to that article indicates that it cannot derogate from the rules laid down in the Brussels Convention and therefore 'where an employer is established in another Member State of the European Communities an employee will be unable to rely on Article 10 and will have to bring his action in that Member State'. [9]

The proceedings

9. Mr Weber is a German national who was employed as a cook by Universal Ogden Services Ltd ('Ogden') between July 1987 and December 1993. He was resident in Germany both during the period of that employment and when he brought the main proceedings in 1994. Ogden (although apparently a subsidiary of a much larger multinational) is a Scottish company established in Aberdeen.

10. Some factual details of Mr Weber's employment are still in dispute before the national courts but it seems to be common ground that until 21 September 1993 at least part of his work for Ogden was carried out on board vessels or installations covered (or subsequently to be covered) by the WAMN within the Netherlands continental shelf area. From 21 September to 30 December 1993 he was employed by Ogden on a floating crane operating in Danish territorial waters.

11. On 29 June 1994 Mr Weber brought proceedings against Ogden relating to the contract of employment [10] before the Kantonrechter te Alkmaar, on the basis of Article 10 of the WAMN. The Kantonrechter accepted jurisdiction but, on appeal

7 — United Nations Treaty Series No 7302, Vol. 499, pp. 312-321 (hereinafter 'the Continental Shelf Convention').

8 — OJ 1998 L 179, p. 3 (hereinafter 'the Law of the Sea Convention').

9 — It is not clear to me on what basis that conclusion was reached, particularly if the author of the memorandum had in mind the post-1989 text of Article 5(1) of the Brussels Convention.

10 — From Advocate General Strikwerda's opinion delivered to the Hoge Raad it appears that Mr Weber's complaint is that he was not called on to work again after an illness following his last period of employment.

by Ogden, the Rechtbank (District Court) overruled that decision, essentially on the basis that only employment after the WAMN entered into force on 1 February 1993 could be taken into account and that Mr Weber's intermittent periods of work in the Netherlands continental shelf area after that date were outweighed by his subsequent employment for a more or less unbroken period of three months in Danish territorial waters. Mr Weber then appealed in cassation to the Hoge Raad.

12. The Hoge Raad, noting that the lower courts were wrong to reach a decision without reference to the Brussels Convention, considers that the issue cannot be resolved without an interpretation of Article 5(1) of that convention and has sought a preliminary ruling on the following questions:

(a) Must work carried out on the Netherlands section of the continental shelf under the North Sea by an employee as defined in the WAMN be regarded as or treated as equivalent to work carried out in the Netherlands for purposes of the application of Article 5(1) of the Brussels Convention?

(b) If so, in order to answer the question whether the employee must be regarded as having carried out his work 'habitually' in the Netherlands, must account be takenof the entire period of his employment or is only his most recent period of employment relevant?

(c) In answering Question (b) must a distinction be drawn between the period before the WAMN entered into force — when Netherlands law had not yet designated a court with territorial jurisdiction to deal with a case such as the present — and the period after the WAMN entered into force?

13. Written observations have been submitted by the parties to the main proceedings, the Netherlands and United Kingdom Governments and the Commission. A hearing has not been held.

Analysis

14. The Hoge Raad's questions raise two issues. The first concerns the court for the place where an employee habitually carries out his work — which, as will be seen, relates to the territorial jurisdiction of the courts of the Contracting States — and the second concerns the identification of that place, with particular regard to the meaning of the term 'habitually'. The temporal

aspects of the entry into force of a national statute conferring jurisdiction on a particular court are also raised in relation to the second issue.

Territorial jurisdiction of the courts of the Contracting States

15. The issue is whether for the purposes of the Brussels Convention a court of a Contracting State may be regarded as the 'court for' a place situated outside that State's land territory or territorial waters but on or above its continental shelf. All those who have submitted observations, apart from Ogden, take the view that it may be so regarded.

16. When considering the question, it should be borne in mind, first, that, although the present case concerns the place of performance of a contract of employment, there are other references in the convention to the courts for a place, and the issue may thus be of wider relevance and, second, that the answer in no way affects Mr Weber's basic right under Article 2 of the convention to sue Ogden in the courts of the country where it is domiciled, namely Scotland.

17. In addition to the Brussels Convention itself, reference has been made to the Continental Shelf Convention, [11] the Vienna Convention on the Law of Treaties [12] and the Law of the Sea Convention. [13]

18. It seems to me that the actual terms of the Law of the Sea Convention, on which the United Kingdom Government and the Commission place some reliance, cannot be taken into account here since that convention did not come into force until after the main proceedings were commenced and was not ratified by the Netherlands until two years later. However, since its provisions are not dissimilar to those of the Continental Shelf Convention, the arguments put forward may be transposable to the latter.

19. Those arguments concern the sovereignty over the continental shelf accorded to the coastal State under international law.

20. On the one hand, the Continental Shelf Convention provides that the coastal State 'exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources' (Article 2(1)), that such rights 'do not depend ... on any express proclamation' (Article 2(3)) and that the coastal State 'is

11 — Cited above in note 7.

12 — Vienna Convention on the law of treaties (with annex), concluded at Vienna on 23 May 1969, United Nations Treaty Series No 18232, Vol. 1155, p. 331 (hereinafter 'the Vienna Convention').

13 — Cited above in note 8.

entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources' (Article 5(2)), such installations and devices being 'under the jurisdiction of the coastal State' (Article 5(4)).

21. Moreover, the Truman Proclamation of 28 September 1945 [14] had already asserted that 'the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it'. And in 1969, describing that document as the 'starting-point of the positive law on the subject', the International Court of Justice held in its *North Sea Continental Shelf* judgment [15] that the continental shelf over which the coastal State may exercise rights 'constitutes a natural prolongation of its land territory into and under the sea' and that those rights exist '*ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it'.

22. On the other hand, the rights in question are clearly limited to the purposes of exploration and exploitation of natural resources and 'do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters' (Article 3 of the Continental Shelf Convention). Moreover, installations and devices on the continental shelf do not possess the status of islands, have no territorial sea of their own and do not affect the delimitation of the territorial sea of the coastal State (Article 5(4)). From that, Ogden concludes that the sovereignty is limited and does not in fact make the continental shelf, or any installations and devices thereon, part of the 'territory' of the coastal State. Since treaties apply in principle to the entire 'territory' of each party (Article 29 of the Vienna Convention) and the Brussels Convention demonstrates no different intention, the continental shelf must be excluded from its scope.

23. Whilst those considerations regarding territory are not without relevance, it would in my view be mistaken to regard the issue as that of the 'territorial scope' of the Brussels Convention.

24. The scope of the Brussels Convention is defined in Article 1 purely in terms of the matters to which it applies. As regards jurisdiction, it applies by virtue of Article 2 whenever a person domiciled in a Contracting State is sued in a court of a Contracting State, as is the case here. To that extent, the convention has no specific 'territorial scope', notwithstanding the presence of Article 60 in its pre-1989 versions. That provision concerned solely the question of application to certain territories related in various ways to the Con-

14 — Presidential Proclamation No 2667, *Policy of the United States with respect to the natural resources of the subsoil and seabed of the continental shelf*, (1945) 13 US Department of State Bulletin 485.

15 — *North Sea Continental Shelf Cases* 1969 ICJR 3.

tracting States. As regards jurisdiction, that was a matter of determining whether the courts for those territories were to be regarded as courts of a Contracting State and persons domiciled there as domiciled in a Contracting State.[16] Article 60 had no bearing on the determination of the courts for a particular place or of the territorial jurisdiction of any court.

25. That determination must in my view remain in the first instance a matter for national law, provided that no rule of public international law is contravened.

26. It is true that the Court seeks, wherever possible, to give the terms used in the Brussels Convention an autonomous interpretation rather than one referring to national law.[17] However, that option is not always the most appropriate and is not always adopted by the Court.[18] Indeed, the convention itself contains references to national law — as in Articles 52 and 53, concerning the determination of domicile. It is true, also, that for the purposes of Article 5(1) the place of performance of a contract of employment falls to be determined by reference to uniform criteria established on the basis of the scheme and objectives of the convention.[19] However, the issue for the moment is not the identification of the place of performance of a contract (which is the subject of the Hoge Raad's second question and with which I shall deal below) but the identification of the courts for a particular place.

27. As regards the land territory of a Contracting State, there can be no dispute. It is not the business of the Brussels Convention to determine the territorial jurisdiction of individual courts. It is entirely a matter of internal law to decide whether, within a particular State, the courts for a particular place are those of, say, England, Scotland or Northern Ireland, or of one rather than another of the German *Länder* or the Spanish provinces, or within those areas which local court has territorial competence.[20] Moreover, it seems clear from the report on the 1989 accession convention[21] that, despite the deletion of Article 60, there was still an intention to allow Contracting States to extend the Brussels Convention to other territories for which they are responsible, in accordance with the rules of public international law.

16 — It may be noted that those matters remain relevant, even though the decision was taken in 1989 to delete Article 60: see the reports cited above in note 5.

17 — See, for example, Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraphs 10 and 11 of the judgment, Case C-383/95 *Rutten* [1997] ECR I-57, paragraphs 12 and 13, or Case C-440/97 *GIE Groupe Concorde* [1999] ECR I-6307, paragraph 11.

18 — See, for example, *GIE Groupe Concorde*, paragraphs 12 and 13, together with the case-law cited there.

19 — See *Mulox*, paragraph 16 of the judgment.

20 — However, although the territory over which a court has jurisdiction must be determined by national law, the relationship between that territory and a particular set of proceedings may none the less be governed by the convention even in the absence of any international element; see the report by Mr Jenard on the original version of the Brussels Convention, OJ 1979 C 59, p. 3, Chapter IV.B, Section 2, Articles 5 and 6.

21 — Cited above in note 5, paragraphs 33 to 38; see in particular the reference in paragraph 37(b)(2) to the possibility that the Netherlands could declare the Brussels Convention to apply to the Netherlands Antilles.

28. As regards the Netherlands section of the continental shelf, it appears that Netherlands law, as expressed in the WAMN, considers the Kantonrechter te Alkmaar to be the first instance court for the area in question, as regards employment disputes arising out of work on mining installations located there. Since the Continental Shelf Convention gives the coastal State sovereign rights over the continental shelf for mining purposes and considers mining installations and devices there to be under its jurisdiction, that appears to be entirely in conformity with public international law.

29. That position is not affected by the limited nature of the rights of the coastal State or by the legal status of the superjacent waters as high seas. The jurisdiction in question here lies clearly within the realm of the rights accorded by the Continental Shelf Convention since before the signature of the Brussels Convention. Thus, when the Brussels Convention entered into force, the continental shelf was already, as regards mining activities and installations, under Netherlands jurisdiction. It is difficult to conceive how disputes, including employment disputes, arising out of those activities, could have been excluded from that jurisdiction, even if no specific court was designated to hear them.

30. The situation might on the other hand be different in the case, for example, of a vessel flying the flag of another State and sailing on the high seas over the continental shelf. Under the Convention on the High Seas, [22] the flag State 'must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag' (Article 5(1)) and such ships are 'subject to its exclusive jurisdiction on the high seas' (Article 6(1)). [23] And the analysis would certainly be different if national law were to designate a particular court for a place on the high seas over which neither the State in question nor any other had any rights under international law. Other international conventions, however, may accord specific jurisdiction to the courts of the coastal State. [24]

31. The court for the Netherlands continental shelf area will thus not necessarily be the Kantonrechter te Alkmaar, or indeed any other Netherlands court, in all circumstances — nor, moreover, is there any indication that Netherlands law would consider it to be so. However, the designation of that court as competent in matters arising out of contracts relating to employment on mining installations in that area is entirely consistent with public international law.

22 — Also signed, like the Continental Shelf Convention, at Geneva on 29 April 1958 (United Nations Treaty Series No 6465, Vol. 450, p. 82), and also since superseded by the Law of the Sea Convention, which contains largely similar provisions.

23 — It appears possible that Mr Weber's work was at least in part on board ships flying the flag of the Netherlands, which might provide a different basis for the jurisdiction of the Netherlands courts, independently of the area in which the ships sailed. However, that possible issue falls outside the scope of the Hoge Raad's question.

24 — See, for example, Article IX of the International Convention on Civil Liability for Oil Pollution Damage (CLC), signed in Brussels on 29 November 1969.

32. There is thus in my view no reason to consider that for the purposes of the Brussels Convention the Kantonrechter te Alkmaar is not the court for the place of performance of a contract of employment, where that place is a mining installation in the Netherlands continental shelf area of the North Sea and where Netherlands law gives that court jurisdiction to settle disputes relating to such matters.

Place where an employee habitually carries out his work

33. It appears that Mr Weber was employed by Ogden between 1987 and 1993 on board various vessels and installations, some inside and some outside the Netherlands continental shelf area. There is no clear indication in the documents before the Court as to the relative periods involved, a matter which indeed appears still to be in dispute in the national proceedings. From the facts found by the Rechtbank te Alkmaar for the period from 1 February to 21 September 1993 it seems that his work within the area in question was intermittent at least during that period.[25] From 21 September to 30 December 1993, he worked on board a floating crane in Danish territorial waters.

34. The Hoge Raad wishes to know whether, when deciding where Mr Weber habitually carried out his work for the purposes of Article 5(1) of the Brussels Convention, it should take account of the whole period of employment or only of the last period.

35. The question of the determination of the place of performance of a contract of employment where the employee carries out work in different jurisdictions has been considered by the Court in three cases: *Six Constructions*,[26] *Mulox* and *Rutten*.[27] Although both *Six Constructions* and *Mulox* concerned an earlier version of the Brussels Convention, in which there was no specific rule relating to employment contracts, it is clear from *Rutten*[28] that those judgments and the earlier case-law on which they were based remain relevant to the interpretation of the post-1989 version.

36. In *Six Constructions*, the work took the form of assignments carried out in various countries none of which was a party to the Brussels Convention. Although the employee regularly returned to Belgium, where he had been recruited, it was only to report to his employer's branch there. The Court held that since the place of perform-

25 — He appears to have worked there for some 79 days out of 223, in 10 separate turns of duty. There is no indication as to whether the remaining 144 days were accounted for by rest periods, by work outside the Netherlands continental shelf area or by both.

26 — Case 32/88 *Six Constructions* v *Humbert* [1989] ECR 341.

27 — Both cited in note 17 above.

28 — See paragraphs 19 to 21 of the judgment.

ance of the contract was not in any of the Contracting States Article 5(1) of the convention could not apply and jurisdiction should be determined by the defendant's domicile in accordance with Article 2.

37. In both *Mulox* and *Rutten*, however, the employee had an office in one of the Contracting States, from which he made business trips, accounting for a significant proportion of his time, to other countries, some of which were Contracting States. The place of performance of the contract was defined by the Court in *Mulox* as 'the place where or from which the employee principally discharges his obligations towards his employer' and in *Rutten* as 'the place where he has established the effective centre of his working activities'.

38. At first sight, the way in which the Hoge Raad's question is expressed might seem surprising. It might appear self-evident that, when determining where an activity *habitually* takes place, the duration of that activity must be taken into account.

39. However, apart from the question of the entry into force of the WAMN, which is the subject-matter of the third question and which I shall consider below, the formulation may have been prompted in part by the statement in *Mulox* [29] that 'it is open to the national court to take account of the fact that, when the dispute before it arose, the employee was carrying out his work solely in the territory of that Contracting State. In the absence of other determining factors, that place must be deemed, for the purposes of Article 5(1) of the Convention, to be the place of performance of the obligation on which a claim relating to a contract of employment is based.'

40. In any event, the question of the habitual place of work is not an easy one to resolve in the present circumstances, whatever the terms in which it is posed, and in order to provide the most helpful guidance it is preferable to examine the issue on a fairly broad basis.

41. The details of Mr Weber's employment have not been definitively ascertained but it would seem that his situation is in one respect closer to that of the employee in *Six Constructions* than in either *Mulox* or *Rutten*. In particular, he does not appear to have had a professional base from which he operated but to have performed his work on the various vessels or installations to which he was sent from time to time, spending the remainder of his time no doubt at his own discretion. It is thus not easy to resolve the present case on the basis of the rulings in the two latter cases. On the other hand, in *Six Constructions* the Court

29 — In paragraph 25 of the judgment.

dealt with the question on the basis that the contract was performed wholly outside the territory of the Contracting States, so that no 'courts for the place of performance' could be identified within those States. Here, at least two possible sets of such courts — Netherlands and Danish — can be identified. However, certain principles expressed by the Court in all three cases may be helpful in indicating the correct approach.

42. As a preliminary consideration, it will be recalled that the place of performance of a contract of employment is to be determined by reference to uniform criteria laid down by the Court on the basis of the scheme and objectives of the Brussels Convention, [30] although the facts to be examined in the light of those criteria are naturally a matter for the national court alone. In laying down such uniform criteria, the Court has had regard to a number of considerations, set out most comprehensively in *Rutten*. [31]

43. First, the rule in Article 5(1) of the Brussels Convention is justified by the existence of a particularly close relationship between a dispute and the court which can most conveniently be called upon to take cognisance of it; in the case of employment contracts, the courts for the place where the work is carried out are the best suited.

44. Second, regard must be had to the concern to afford proper protection to the employee, the weaker party to the contract. Such protection is best assured if disputes fall within the jurisdiction of the courts for the place where he discharges his obligations, where it is (likely to be) least expensive for him to commence or defend himself in court proceedings.

45. Third, where work is performed in more than one Contracting State, it is important to avoid any multiplication of courts having jurisdiction; Article 5(1) therefore cannot confer concurrent jurisdiction on the courts of each of the Contracting States involved.

46. Thus, the Court concluded in *Rutten*, [32] it is necessary to determine the place with which the dispute has the most significant link, while taking due account of the concern to afford proper protection to the employee as the weaker party to the contract.

47. I would add, though (and here I diverge to some extent from the views expressed by the Netherlands and United Kingdom Governments), that the latter concern cannot go as far as to allow the employee a discretion in choosing his forum or to imply that the

30 — *Mulox*, paragraph 16 of the judgment.

31 — At paragraphs 15 to 17 of the judgment; see also the case-law cited there.

32 — At paragraph 22 of the judgment.

forum should be determined on the basis of what is most convenient for him. On the contrary, the need to have uniform criteria, which ensure legal certainty, and to avoid any multiplicity of jurisdiction means that the concern must be more abstract, and not linked to the circumstances of the individual employee. Similarly, the necessary link between the dispute and the court hearing it will not always mean that a court of the country whose law is applicable to the contract will have jurisdiction, desirable though such a result undoubtedly is. [33]

48. Clearly, it will be very difficult for the national court to reach a conclusion in this case without ascertaining more closely where Mr Weber in fact carried out his work over the period of his employment and in particular what periods of work were spent in the various territorial waters or continental shelf areas (or even perhaps in areas over which no State can claim jurisdiction, in which case the flag of the vessel or vessels on which he worked might be relevant).

49. On the basis of those facts, it may become apparent that, for the period between 1987 and 1993 taken as a whole, the greatest part of his work was performed in an area (or in circumstances) over which one Contracting State has jurisdiction. If that is so, in my view a very strong presumption arises that that is the State in which the work was habitually carried out during that period, even if there may have been no individual habitual place of work there. [34]

50. That presumption might conceivably be rebutted in a situation closer to that in *Mulox* and *Rutten* — if, say, Mr Weber had had a professional base at which he worked, from which he went or was sent on various turns of duty elsewhere and to which he returned. Such an 'effective centre of his working activities' might possibly outweigh even a majority of the employee's working time spent in another Contracting State, but all the circumstances would have to be taken into account, including not only the time spent but also the nature and importance of the work done in each place. In the present case, though, there seems to be no indication of any factor that might counteract a clear majority of working time spent within the jurisdiction of the courts of a single Contracting State.

51. If however the national court were to find that, overall, the periods of time spent in the various jurisdictions were all roughly comparable in duration and importance, then in my view the second alternative set

33 — See, in this regard, my Opinions in *Mulox*, at paragraphs 27 and 28, and *Rutten*, at paragraphs 30 and 31; see also Case 133/81 *Ivenel* v *Schwab* [1982] ECR 1891, paragraph 15 of the judgment.

34 — Cf. *Rutten*, paragraph 25 of the judgment, where it was stressed that the employee carried out almost two thirds of his work in one Contracting State.

out in Article 5(1) with regard to employment contracts must come into play. It will be recalled that the place of performance of an individual contract of employment is 'that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated'. Those alternatives are necessarily, it seems to me, mutually exclusive; [35] the convention envisages that in some circumstances the place of habitual employment cannot be determined and that in those cases proceedings must be brought either in accordance with Article 2 or, but only if the employee is the plaintiff, in the courts for the relevant place of business. [36] That final possibility is not, however, available if a place of habitual employment can be established.

52. The matter should not be viewed as simply a question of mathematics. A more difficult situation would arise if it were to transpire that Mr Weber carried out less than half his work, in terms of duration, within a single jurisdiction, but that the remainder, the majority, was of a totally fragmented and dispersed nature, in terms of both duration and place of employment. Thus there might be a significant proportion of his work within one area, far outstripping any work he did in any other area but accounting none the less for under half his time.

53. In such a case (which is for the moment purely hypothetical), it seems to me that the national court would have to look more closely at all the surrounding circumstances. If the proportion in question constituted the employee's basic work, for example, and was all carried out at the same place, whereas all the other assignments were of an ancillary or fleeting nature, then there might be justification for regarding that place as the one where the work was habitually carried out. If, on the other hand, all the employee's assignments were of an equally transient and unstable nature and it was mere chance that led to a significantly greater proportion being in the jurisdiction of one Contracting State than in any other, I do not think such a conclusion could so easily be drawn.

54. With those more general considerations in mind, I turn to the question of the significance of the last period of employment, which is the specific object of the Hoge Raad's second question.

35 — This view is borne out by paragraph 23(e) of the report on the 1989 accession convention, cited above in note 5.

36 — It might or might not be relevant in that regard that Mr Weber's action was brought initially not only against his employer Ogden but also against the company Catering Logistic Management BV, established in Hoorn, in the Netherlands, in the office of whose director the contract with Ogden was signed, according to Advocate General Strikwerda in his opinion delivered to the Hoge Raad.

55. In general, as I have suggested above, [37] I take the view that it flows from the very term 'habitually' that an entire period of employment must be taken into account. In general, to take account only of the last few months of a period of employment stretching over more than five years would be to deny the inherent meaning of that term — and the same holds true if, as I recommended in my Opinions in both *Mulox* and *Rutten*, [38] it is interpreted broadly in the sense of 'principally'.

56. That is not to deny that in some circumstances the most recent period of employment may have greater weight than earlier periods, as Ogden has pointed out in its observations. For example, after a long period working in one Contracting State, an employee might be posted to a branch of the same employer in another Contracting State. If that move were of a specifically temporary nature, it being understood that he would return to his previous post, it might not have any immediate bearing on the place where he habitually carried out his work. If on the other hand it were understood to be a permanent career move, involving a change of residence and other definitive steps, then that place might be transferred to the second Contracting State when the move occurred. A permanent posting following a series of varied temporary assignments might have a similar effect, and other situations may be imagined. Factors of that general kind were taken into account by the Court in *Mulox*, although it should be stressed that its reference [39] to the Contracting State in which the work was exclusively carried out at the time the proceedings were brought was complementary to other factors such as the place where the employee had established his residence and office since the beginning of his employment.

57. In the present case, only the national court can determine whether the circumstances of Mr Weber's employment in Danish territorial waters set it apart from his previous assignments in such a way and to such an extent that, despite its brief duration in relation to the period of employment as a whole, it should be regarded as establishing a new place where he habitually carried out his work for the purposes of Article 5(1) of the Brussels Convention. However, unless that is the case, the whole period of his employment should be taken into account when determining that place.

Entry into force of the WAMN

58. The Hoge Raad points out that Netherlands law did not designate a court with territorial jurisdiction to hear cases of the kind in issue until 1 February 1993, yet performance of the contract took place mainly before that date. It wishes to know

37 — At paragraph 38.

38 — See paragraph 32 of the Opinion in *Mulox* and paragraphs 33 and 34 of the Opinion in *Rutten*.

39 — See paragraph 39 above.

whether a distinction must be drawn, when determining the place where Mr Weber habitually carried out his work, between the periods before and after the designation by the WAMN of the Kantonrechter te Alkmaar as the court with such jurisdiction. By that question, it presumably envisages the possibility that the earlier periods should be left out of account.

59. The United Kingdom Government and the Commission consider the entry into force of the WAMN to be irrelevant, being a matter of purely national law which can have no effect on the uniform interpretation of the Brussels Convention. Ogden and the Netherlands Government take the opposite view, on the basis that the Kantonrechter had no jurisdiction over the relevant territory prior to that date. Mr Weber draws attention to the fact that the WAMN was the culmination of a lengthy process and that even before its entry into force there had been Netherlands legislation relevant to the protection of workers on the continental shelf.

60. I agree in principle with the United Kingdom Government and the Commission. The place at which the employee's work was habitually carried out is a question of fact (to be assessed in accordance with uniform rules of law) and cannot be affected by national legislation designating the court for that place. The significance of that factual matter lies in its relevance to determining the court which has jurisdiction to hear the proceedings, at the time when they are brought. The fact that, if the proceedings had been brought at an earlier date, the court in question would not have had jurisdiction to hear them can in itself have no bearing on its jurisdiction at the time when they are brought.

61. It is true that there is no provision to that effect in the Brussels Convention. However, under Article 54 the convention applies to proceedings instituted after its entry into force in the State in question, with the consequence that the proper forum may be determined in accordance with its rules even though the facts on which that determination is based may have occurred before it became applicable.[40] The same principle must apply *mutatis mutandis* when a court covered by the convention acquires new jurisdiction, whether territorial or substantive, and indeed it is difficult to see how it could be otherwise.

62. In the present case, it seems clear that when determining whether the place at which the work was habitually carried out lay within that territorial jurisdiction, there is thus no reason to disregard periods of work effected before the WAMN came into force. In any event, as I have pointed out, mining activities and installations in its continental shelf area have clearly been under Netherlands jurisdiction since the entry into force of the Continental Shelf Convention.

40 — In Case 25/79 *Sanicentral* v *Collin* [1979] ECR 3423, the Court held the date of commencement of the proceedings to be the relevant date for assessing the effect of a jurisdiction clause in a contract concluded before the convention entered into force on the choice of forum for proceedings commenced after its entry into force.

Conclusion

63. I am of the opinion that the Court should give the following replies to the Hoge Raad's questions:

(1) The courts of the coastal State are to be regarded as the courts for the place of performance of a contract of employment, for the purposes of Article 5(1) of the Brussels Convention, where the employment was habitually carried out on or above that State's continental shelf in circumstances in which international law gives that State jurisdiction over the activity of which the employment formed part and/or over the installations on which it was performed. It is for national law to determine the court with territorial jurisdiction in that regard.

(2) In order to determine the place where an employee habitually carried out his work, it is necessary in principle to take the whole period of employment into account. However, greater weight may be given to the most recent period if it was accomplished in a new, stable place of work.

(3) The determination of that place is an assessment of fact to be carried out by the national court in accordance with the criteria laid down by the Court of Justice. It cannot be affected by changes in the national rules allocating territorial jurisdiction to national courts.