OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 15 OCTOBER 1969[1]

Mr President,
Members of the Court,

This is not the first time you have had to give a ruling on the interpretation to be given to Article 52 of Regulation No 3 of the Council concerning social security for migrant workers; this article lays down the conditions under which an institution which has paid benefit to one of its nationals as a result of an injury may institute proceedings against the third party responsible for the injury. Your judgments of 1965 to a large extent dictate the reply to be given to the questions put to you by the Cour supérieure de justice of the Grand Duchy; it is however rash to think that this court of appeal will find within your decision all the factors necessary for it to settle the dispute before it. The circumstances under which the dispute arose and developed are in fact quite exceptional and involve either problems of private international law or of the implementation of international agreements which you are not bound to recognize.

The facts are as follows. On the night of 18 to 19 April 1964, Mr Paul Simon, an employee of the Société nationale des chemins de fer luxembourgeois (CFL), residing in Luxembourg, was killed in a traffic accident at Martelange, in Belgium, while he was in a car belonging to and driven by Mr Fernand Hein, also of Luxembourg nationality.

The widow of Mr Simon, acting on her own behalf and as next friend of her child, brought an action in the tribunal d'arrondissement, Luxembourg, against Mr Hein's insurers, the Compagnie belge d'assurances générales sur la vie et contre les accidents (the Belgian General Accident and Life Insurance Company); claims were also made against the Compagnie belge in the same court by the Caisse de maladie des CFL 'Entr'aide médicale', for the sum of FB 2 010 being the payment in advance of the funeral expenses, and by the Société nationale des chemins de fer luxembourgeois for the sum of FB 249 529, being the equivalent of the payment in advance of the widow's pension and orphan's allowance paid as a result of the death of Mr Simon.

The Caisse de maladie and the CFL were unsuccessful on the ground that as the act giving rise to the damage occurred abroad the law applicable was the *lex loci delicti,* in this case Belgian law, according to which the basis of payment is not the fault of the third party responsible but the application of statutory provisions and consequently affords no redress.

An appeal was made on this point to the Cour supérieure de justice of the Grand Duchy, and, since the import of Article 52 for the present case had been debated in the course of the proceedings, a judgment of 20 May 1969 brought before you three questions which I shall consider in succession.

I

Let us first of all recall the wording of Article 52 the interpretation of which is requested:

> 'If a person who is in receipt of benefit under the legislation of one Member State, in respect of an injury sustained in the territory of another State, is entitled to claim compensation for that injury from a third party in the latter State's territory, any claims by the institution liable for pay-

1 — Translated from the French.

ment of benefit against such third party shall be governed by the following rules:

(a) where the said institution is, under the legislation applicable to it, subrogated to the rights of the beneficiary against the third party, such subrogation shall be recognized by each Member State;

(b) where the said institution has a direct claim against the third party, such claim shall be recognized by each Member State.

Implementation of these provisions shall be the subject of bilateral agreements.'

The first question is worded as follows:

'Is the concept of 'migrant worker' which appears in Article 52 of Regulation No 3 of 25 September 1958 concerning social security for migrant workers applicable to a wage-earner who has his place of work and permanent residence in the Grand Duchy, who, in the course of a pleasure trip was involved in a traffic accident owing to the fault of a third party, in the territory of another Member State, in this case in Belgian territory.'

The Luxembourg court is thus preoccupied with two points:

— Does Article 52—and in general Regulation No 3—concern only migrant workers in the strict sense, that is to say those who have been successively employed in two or more States in the Community, or wage-earners in general, who are affiliated to a social security scheme in one or other of the six States who are travelling in another State?

— In any event is this article applicable when the movement was quite unconnected with the injured person's work?

With regard to those two points your case-law contains numerous rulings which are so precise that further discussion of the solutions adopted seems to me to be precluded.

Without dwelling on the conclusions which might be drawn, by implication at least, from the judgment in the *Hoekstra (née Unger)* case of 19 March 1964 (Case 75/63 [1964] E.C.R. 177), I shall merely recall the judgment in the *Bertholet* case of 11 March 1965 (Case 31/64, Rec. 1965, p. 118), according to which it is sufficient for the application of those provisions that the person concerned is in receipt of benefit under the legislation of one Member State in respect of an injury sustained in the territory of another Member State and is entitled to claim compensation for that injury from a third party in the latter State's territory; this solution is also encountered in the judgment in the *Koster (née Van Dijk)* case of the same date (Case 33/64, Rec. 1965, p. 140). This interpretation of Article 52—which moreover does not employ the term 'migrant worker'—results from the very wide notion which you have conceived of the scope *ratione personae* of Regulation No 3.

The principal reason for the Luxembourg court's hesitation no doubt derives from the fact that the accident which gave rise to the proceedings is unconnected with the injured person's work and occurred in the course of a 'pleasure trip' to quote the terms of the judgment making the reference. From the file we learn that the two motorists in fact went to Belgium to continue a night of revelry begun in the Grand Duchy which induced the two Luxembourg courts to order an inquiry in order to establish whether the driver was fit to drive his car.

Nevertheless it does not appear that this particular aspect should be taken into consideration, surprising though it may appear at first sight. According to your judgments which have already been quoted the condition indicated above is sufficient without the necessity of considering whether the act giving rise to the damage is connected with the injured person's work. In the *Koster (née Van*

Dijk) case, for example, the accident occurred while the injured party was out walking while on holiday; the time of this walk and the circumstances in which it took place cannot prevent the application of Article 52. Therefore I can only suggest that you confirm the reply previously given.

II

The Luxembourg court subsequently asks you whether the disputed article is applicable when the person liable for payment of benefit does not raise the action before the foreign court but before the national court.

It is here that the unusual feature of the case is met and in order to understand it the case envisaged by Article 52 must be recalled.

A worker of one Member State who sustains an accident in the territory of another Member State may receive social security benefit under his national legislation and at the same time claim compensation from the third party who caused the injury before the courts of the latter State and in accordance with its law. In this case how are the rights of the institution which has paid the benefit to be established with regard to the third party? Article 52 settles the question by a reference to the law applicable to that institution: if the latter is subrogated pursuant to its own legislation or if it has a direct claim each Member State shall recognize such subrogation or claim. As has been said, we are thus concerned with a rule of conflict of laws designed to decide between the divergent national solutions. The court before whom the matter is brought will normally apply its own national law, which is the *lex loci delicti,* to the injured person's action for damages against the person liable, but not to the right of recourse of the institution which has paid the benefit on behalf of the person liable. In this respect reference is made to the legislation of the country of that institution.

Article 52, however, only mentions instances when the court before which the case is brought is that of the State in whose territory the accident occurred. In this case, no doubt because both parties to the dispute were of Luxembourg nationality, proceedings were instituted in the courts of the Grand Duchy.

Keeping to the wording of Article 52 the answer must therefore be that it is not applicable; it would then be Luxembourg law—perhaps its private international law—which would govern the entire question, both the injured person's action and that of the institution which replaced him. It may be that in the end a solution would be arrived at identical with that of the regulation but through a national and not a Community remedy.

Nevertheless the Commission emphasizes that although the authors of the regulation took account of the most frequently recurring situation the rule has general scope and is to be applied even when the proceedings are instituted before a national court. In order to justify this solution it recalls that the subrogation provided for in Article 52 in favour of national social security institutions constitutes, as you have said, 'a logical and fair counterpart to the extension of the obligations of the said institutions throughout the entire Community'.

This argument, combined with the desirability of unifying the rules applicable to the position of those bodies, leads me, not without serious hesitation caused by the wording of Article 52, to suggest that you reply in the affirmative to the question put by the Cour supérieure de justice of the Grand Duchy.

III

Finally, in its third question, which is really in two parts, the Luxembourg court recalls that subparagraph (b) of the first paragraph of Article 52 provides for a 'direct claim' in favour of the person liable for payment of benefit.

It asks you by what law or remedy it may act in accordance with the spirit of the authors of the regulation and whether this claim may be relied upon without being the subject of a previous bilateral Belgian-Luxembourg agreement, as the existing agreement of 16 November 1959 was limited to subparagraph (a) which refers to legal substitution.

The meaning and scope of that agreement has been the subject of much discussion both in the written observations and at the Bar. Some wished to use the term 'substitute' which appears there and which seems to them wider than the term 'subrogate' used in subparagraph (a) to conclude that it also refers to a direct claim; others derive support from the preliminary studies in connexion with the Luxembourg Law confirming this diplomatic instrument in order to maintain that it treated only legal substitution in the strict sense. In fact, although by quite exceptional procedures, to be explained by the conditions of the drafting of the regulation, Article 52 lays down bilateral agreements for its implementation, they continue to retain their own legal characteristics and are not integrated into the regulation; they do not form a provision of Community law which must be interpreted by you, which the Luxembourg court more or less openly requests (*Caisse régionale de securité sociale du Nord de France* v *Torrekens,* 7 May 1969 [1969] E.C.R.). You must keep to Regulation No 3 and, understood in this sense, the question put appears to me to require the following reply. First, the court before whom the action for damages is brought by the injured person against the third party must, under Article 52, recognize the legal subrogation or the direct claim of the institution liable for payment of benefit, when such subrogation or direct claim exists *pursuant to legislation applicable to that institution.* It is only that legislation which may therefore determine what must be understood by those two concepts and it is to that legislation that reference must be had by the court in appraising its exact scope and content without it being possible, it seems, for a Community concept to emerge in this connexion.

Secondly, your previous judgments have very clearly laid down the principle that the provisions of the first paragraph of Article 52 of Regulation No 3 are applicable even before a bilateral agreement, as referred to in the second paragraph of that Article, is concluded between the Member States concerned, and the rule is valid both for the recognition of the direct claim and for the legal subrogation. You acknowledge such an agreement as being intended only to allow the contracting States to settle amongst themselves 'any possible details concerning the application' of the provisions in order to facilitate the adaptation of national law to the Community rules. The result of this concept is that although a bilateral agreement may arrange the conditions whereby the national law providing for the subrogation may be implemented, without infringing Community law it may not exclude the application of legislation containing such subrogation and the same holds good in the case of legislation acknowledging a direct claim. The conclusion of such an agreement would constitute a failure on the part of the contracting States to fulfil an obligation under the Treaty and would come within the procedure of Article 169 but this is merely a hypothesis.

In sum, I am of the opinion that an affirmative reply should be given to the first two questions; with regard to the third question I am of the opinion that the direct claim referred to in subparagraph (b) of the first paragraph of Article 52 of Regulation No 3 is that recognized by the legislation applicable

to the institution liable for payment of benefit and which may be relied upon even in the absence of the bilateral agreement referred to in the second paragraph of the same article.