Court of Justice EU, 27 October 1998, Réunion Européenne v Spliethoff

LITIGATION – PRIVATE INTERNATIONAL LAW

Matters relating to tort

- **Action of subrogated party is matter relating to a tort withi9n the meaning of article 5(3) of the Convention**

that an action by which the consignee of goods found to *be damaged on completion of a transport operation by* sea and then by land, or by which his insurer who has been subrogated to his rights after compensating him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued that document on his headed paper but against the person whom the plaintiff considered to be the actual maritime carrier, falls within the scope not of matters relating to a contract within the meaning of Article 5(1) of the Convention but of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention.

Place of discovery of the damage is not the place where the harmful event occurred

- **The answer to be given to the third question must therefore be that the place where the consignee of the goods, on completion of a transport operation by sea and then by land, merely discovered the existence of the damage to the goods delivered to him cannot serve to determine the 'place where the harmful event occurred' within the meaning of Article 5(3) of the Convention, as interpreted by the Court.**

Indivisible dispute?

- **The answer to the fourth question must therefore be that Article 6(1) of the Convention must be interpreted as meaning that a defendant domiciled in a Contracting State cannot be sued in another Contracting State before a court seised of an action against a co-defendant not domiciled in a Contracting State on the ground that the dispute is indivisible rather than merely displaying a connection**

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Court of Justice EU, 27 October 1998
(J.-P. Puissochet, J. C. Moitinho de Almeida (Rapporteur) and C. Gulmann,)
JUDGMENT OF 27. 10. 1998 —CASE C-51/97
JUDGMENT OF THE COURT (Third Chamber)
27 October 1998 *
In Case C-51/97,

REFERENCE to the Court by the Cour de Cassation (France), under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, for a preliminary ruling in the proceedings pending before that court between
Réunion Européenne SA and Others
and
Spliethoff's Bevrachtingskantoor BV, and the Master of the vessel Alblasgracht V002, on the interpretation of Articles 5(1) and (3) and 6 of the said Convention of 27 September 1968 (OJ 1975 L 204, p. 28), 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),
* Language of the case: French.
THE COURT (Third Chamber),
composed of: J.-P. Puissochet, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur) and C. Gulmann, Judges,
Advocate General: G. Cosmas,
Registrar: R. Grass,
after considering the written observations submitted on behalf of:
— Spliethoff's Bevrachtingskantoor BV and the Master of the Alblasgracbt V002,
by D . Le Prado, of the Paris Bar,
— the French Government, by K. Rispal-Bellanger, Head of Sub-directorate in the Legal Directorate, Ministry of Foreign Affairs, and J.-M. Belorgey, Chargé de Mission in the same Directorate, acting as Agents,
— the German Government, by P. Gass, Ministerialdirigent in the Federal Justice Ministry, acting as Agent,
— the Commission of the European Communities, by J. L. Iglesias, Legal Adviser, acting as Agent, assisted by H . Lehman, of the Paris Bar, having regard to the report of the Judge-Rapporteur, **after hearing the Opinion of the Advocate General at the sitting on 5 February 1998,**
gives the following
Judgment
1 By judgment of 28 January 1997, received at the Court on 7 February 1997, the Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters four questions on the interpretation of Articles 5(1) and (3) and 6 of that convention (OJ 1975 L 204, p . 28), 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).

2 Those questions arose in proceedings brought by nine insurance companies and, as lead insurer, the company Réunion Européenne (hereinafter 'the insurers'), which have been subrogated to the rights of the company Brambi Fruits (hereinafter 'Brambi'), whose registered office is in Rungis (France), against Spliethoff's Bevrachtingskantoor BV, whose registered office is in Amsterdam (Netherlands), and the Master of the vessel Alblasgracbt V002, residing in the Netherlands, following the discovery of damage to a cargo of 5 199 cartons of pears delivered to Brambi, in the carriage of which the defendants were involved.

The Convention

3 The first paragraph of Article 2 of the Convention provides:

'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.'

4 The first paragraph of Article 3 provides:

'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 this Title.'

5 According to Article 5 of the Convention,

'[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 ...

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

...'

6 Article 6(1) of the Convention adds that where such a person is one of a number of defendants, he may also be sued in the courts for the place where any one of them is domiciled.

7 Finally, Article 22 provides:

'Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.'

The main proceedings

8 The goods at issue in the main proceedings were carried by sea, in eight refrigerated containers, from Melbourne (Australia) to Rotterdam (Netherlands) aboard the vessel Alblasgracht V002 under a bearer bill of lading issued on 8 May 1992 in Sydney, Australia, by Refrigerated Container Carriers PTY Ltd (hereinafter 'RCC'), whose registered office is in Sydney, then by road under an international consignment note, to Rungis in France, where Brambi discovered the damage. The fruit had ripened prematurely owing to a breakdown in the cooling system.

9 The insurers paid compensation for the damage suffered by Brambi. Having been subrogated to that company's rights as a result of that payment, they brought proceedings to recoup their loss against RCC on whose headed paper the bill of lading had been issued for the sea voyage, against Spliethoff's Bevrachtingskantoor BV, which actually carried the goods by sea despite not being mentioned on the bill of lading, and, finally, against the Master of the vessel Alblasgracht V002, as representative of the owners and charterers of that vessel, before the Tribunal de Commerce (Commercial Court), Créteil, in whose jurisdiction Rungis is situated.

10 By judgment of 17 May 1994 the Tribunal de Commerce, Créteil, declared that it had jurisdiction as regards RCC , on the basis that the goods were to be delivered to Brambi in Rungis. However, it declined jurisdiction under Article 5(1) of the Convention as regards Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002, taking the view that the operation did not constitute a through transport operation from Melbourne to Rungis since an international consignment note had been drawn up for the carriage of the goods from Rotterdam to Rungis. The Tribunal de Commerce, Créteil, therefore considered that it should decline jurisdiction in the proceedings brought by the insurers against Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002 in favour of the courts of Rotterdam, Rotterdam being the place of performance of the obligation within the meaning of Article 5(1) of the Convention, or those of Amsterdam or of Sydney pursuant to Article 6(1) of the Convention, according to which a person who is one of a number of defendants may be sued before the courts for the place where any one of them is domiciled.

11 The Cour d'Appel (Court of Appeal), Paris, confirmed, by judgment of 16 November 1994, that the Tribunal de Commerce, Créteil, lacked international jurisdiction as regards Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002, whereupon the insurers appealed to the Cour de Cassation, claiming that it had not been established that Brambi had concluded an agreement with those defendants and that the Cour d'Appel could not therefore apply Article 5(1) of the Convention to them. According to the insurers, the Cour d'Appel should have applied Article 5(3) of the Convention concerning jurisdiction in matters relating to tort, delict or quasi-delict.

12 In the alternative, the insurers claimed that the dispute was indivisible since RCC , as well as both Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002, had been involved in the same transport operation. The Tribunal de Commerce, Créteil, having accepted jurisdiction for the proceedings against RCC , should have done so for the proceedings against the other two defendants.

13 Considering that the decision to be given depended on an interpretation of the Convention, the Cour de Cassation stayed proceedings pending a ruling from the Court of Justice on the following questions:

'1 . Is an action by which the consignee of goods found to be damaged on completion of a transport operation by sea and then by land, or by which his insurer who has been subrogated to his rights after compensating

him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued that document on his headed paper but against the person whom the plaintiff considered to be the actual maritime carrier, based on the contract of transport and does it, for that or any other reason, fall within the scope of matters relating to contract within the meaning of Article 5(1) of the Convention?
2. If the foregoing question is answered in the negative, is the matter one relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention or is it appropriate to have recourse to the principle laid down in Article 2 of the Convention that the courts of the State in whose territory the defendant is domiciled have jurisdiction?
3. In the event that the matter is to be regarded as one relating to tort, delict or quasi-delict, may the place where the consignee, after completion of the maritime transport operation and then the final overland transport operation, merely discovered that the goods delivered to him were damaged, constitute — and if so under what conditions — the place of occurrence of the damage which, according to the judgment of the **Court of Justice of 30 November 1976 in Case 21/76 Bier v Mines de Potasse d'Alsace [1976] ECR 1735**, may be the place "where the harmful event occurred" within the meaning of Article 5(3) of the Convention?'
4. May a defendant domiciled in the territory of a Contracting State be brought, in another Contracting State, before the court hearing an action against a co-defendant not domiciled in the territory of any Contracting State, on the ground that the dispute is indivisible, rather than merely displaying a connection?

The first and second questions

14 According to Spliethoff's Bevrachtingskantoor BV and the Master of the Alblasgracht V002, the dispute is a matter relating to a contract within the meaning of Article 5(1) of the Convention since the action against them is based on the bill of lading, the document containing the transport contract.
15 It must be pointed out that, according to settled case-law (Case 34/82 Peters v ZNAV [1983] ECR 987, paragraphs 9 and 10, Case 9/87 Arcado v Haviland [1988] ECR 1539, paragraphs 10 and 11, and Case C-26/91 Handte v Traitements Mécano- Chimiques des Surfaces [1992] ECR 1-3967, paragraph 10), the phrase 'matter relating to a contract' in Article 5(1) of the Convention is to be interpreted independently, having regard primarily to the objectives and general scheme of the Convention, in order to ensure that it is applied uniformly in all the Contracting States; that phrase cannot therefore be taken to refer to how the legal relationship in question before the national court is classified by the relevant national law.
16 It is also settled case-law that, under the system of the Convention, the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and that it is only by way of derogation from that principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention (see, in particular, Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, paragraph 13).
17 It follows, as the Court held in paragraph 15 of Handte, cited above, that the phrase 'matters relating to contract', as used in Article 5(1) of the Convention, is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards the other.
18 In this case, it is clear from the findings of the national courts at first instance and on appeal that the bearer bill of lading issued by RCC covers the carriage of the goods by sea to Rotterdam, the port of discharge and delivery, that it specifies Brambi as the person to whom the arrival of the goods must be notified and that it indicates that the goods are to be carried aboard the Alblasgracht V002.
19 It must therefore be held that that bill of lading discloses no contractual relationship freely entered into between Brambi on the one hand and, on the other, Spliethoff's Bevrachtingskantoor BV and the Master of the Alblasgracht V002, who, according to the insurers, were the actual maritime carriers of the goods.
20 In those circumstances, the action brought against the latter by the insurers cannot be a matter relating to a contract within the meaning of Article 5(1) of the Convention.
21 It is next necessary to determine whether such an action is concerned with a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention.
22 In its judgment in **Case 189/87 Kalfelis v Schröder [1988] ECR 5565, paragraph 18**, the Court defined the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1).
23 That is the position in the main proceedings. Where insurers who have been subrogated to the rights of the consignee of goods which, on completion of a sea voyage followed by overland transport, are found to be damaged claim compensation for the loss, relying on the bill of lading for the sea voyage, from the persons whom they regard as actually having carried the goods by sea, the purpose of their action is to establish the carriers' liability and does not, as is clear from paragraphs 18 to 20 of this judgment, fall within the scope of 'matters relating to a contract' within the meaning of Article 5(1) of the Convention.
24 In those circumstances, it must be held that such an action is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention and that, therefore, the general principle that the courts of the State in which the defendant is domiciled are to

have jurisdiction, laid down in the first paragraph of Article 2 of the Convention, is inapplicable.
25 The jurisdiction in matters relating to tort, delict or quasi-delict of the courts for the place where the harmful event occurred is one of the 'special jurisdictions' listed in Articles 5 and 6 of the Convention, which constitute exceptions to the general principle laid down in the first paragraph of Article 2.
26 The answer to the first two questions must therefore be that an action by which the consignee of goods found to be damaged on completion of a transport operation by sea and then by land, or by which his insurer who has been subrogated to his rights after compensating him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued that document on his headed paper but against the person whom the plaintiff considered to be the actual maritime carrier, falls within the scope not of matters relating to a contract within the meaning of Article 5(1) of the Convention but of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention.

The third question

27 It must borne in mind at the outset that, as the Court has held on several occasions (see the judgments in **Case 21/76 Bier v Mines de Potasse d'Alsace, cited above, paragraph 11**, Case C-220/88 Dumez France and Tracoba [1990] ECR 1-49, paragraph 17, **Case C-68/93 Shevill and Others v Presse Alliance [1995] ECR 1-415, paragraph 19**, and Case C-364/93 Marinan v Lloyds Bank and Another [1995] ECR 1-2719, paragraph 10), the rule of special jurisdiction in Article 5(3) of the Convention, the choice of which is a matter for the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.
28 It must next be observed that in the judgments cited above in **Mines de Potasse d'Alsace**, paragraphs 24 and 25, and Shevill and Others, paragraph 20, the Court held that, where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places.
29 In Marinari, cited above, paragraph 13, the Court made it clear that the choice thus available to the plaintiff cannot however be extended beyond the particular circumstances which justify it, since otherwise the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the Contracting State where the defendant is domiciled are to have jurisdiction would be negated, with the result that, in cases other than those expressly provided for, jurisdiction would be attributed to the courts of the plaintiff's domicile, a solution which the Convention does not favour since, in the second paragraph of Article 3, it excludes application of national provisions which make such jurisdiction available for proceedings against defendants domiciled in the territory of a Contracting State.
30 The Court went on to infer, in paragraph 14 of that judgment, that whilst it has thus been recognised that the term 'place where the harmful event occurred' within the meaning of Article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.
31 For the same reasons, in Dumez France and Tracoba, cited above, the Court held that the rule on jurisdiction laid down in Article 5(3) of the Convention cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets.
32 It follows that a consignee of goods who, on completion of a transport operation by sea and then by land, finds that the goods delivered to him are damaged may bring proceedings against the person whom he regards as the actual maritime carrier either before the courts for the place where the damage occurred or the courts for the place of the event giving rise to it.
33 As the Advocate General emphasises in points 54 to 56 of his Opinion, in an international transport operation of the kind at issue in the main proceedings the place where the event giving rise to the damage occurred may be difficult or indeed impossible to determine. In such circumstances, it will be for the consignee of the damaged goods to bring the actual maritime carrier before the courts for the place where the damage occurred. It must be pointed out in that regard that, in an international transport operation of the kind at issue in the main proceedings, the place where the damage occurred cannot be either the place of final delivery, which, as the Commission rightly pointed out, can be changed in mid-voyage, or the place where the damage was ascertained.
34 To allow the consignee to bring the actual maritime carrier before the courts for the place of final delivery or before those for the place where the damage was ascertained would in most cases mean attributing jurisdiction to the courts for the place of the plaintiff's domicile, whereas the authors of the Convention demonstrated their opposition to such attribution of jurisdiction otherwise than in the cases for which it expressly provides (see, to that effect, Dumez France and Tracoba, cited above, paragraphs 16 and 19, and Case C-89/91 Shearson Lehman Hutton v TVB [1993] ECR I-139, paragraph 17). Furthermore, such an interpretation of the Convention would make the determination of the

competent court depend on uncertain factors, which would be incompatible with the objective of the Convention which is to provide for a clear and certain attribution of jurisdiction (see, to that effect, Marinari, paragraph 19, and Handte, paragraph 19, both cited above).
35 In those circumstances, the place where the damage arose in the case of an international transport operation of the kind at issue in the main proceedings can only be the place where the actual maritime carrier was to deliver the goods.
36 That place meets the requirements of foreseeability and certainty imposed by the Convention and displays a particularly close connecting factor with the dispute in the main proceedings, so that the attribution of jurisdiction to the courts for that place is justified by reasons relating to the sound administration of justice and the efficacious conduct of proceedings.
37 The answer to be given to the third question must therefore be that the place where the consignee of the goods, on completion of a transport operation by sea and then by land, merely discovered the existence of the damage to the goods delivered to him cannot serve to determine the 'place where the harmful event occurred' within the meaning of Article 5(3) of the Convention, as interpreted by the Court.
The fourth question
38 It must be noted at the outset that the Convention does not use the term 'indivisible' in relation to disputes but only the term 'related', in Article 22.
39 As the Court made clear in Case 150/80 Elefanten Schuh v Jacqmain [1981] ECR 1671, paragraph 19, Article 22 of the Convention is intended to establish how related actions which have been brought before courts of different Contracting States are to be dealt with. It does not confer jurisdiction; in particular, it does not accord jurisdiction to a court of a Contracting State to try an action which is related to another action of which that court is seised pursuant to the rules of the Convention.
40 In that judgment the Court held that Article 22 of the Convention applies only where related actions are brought before courts of two or more Contracting States.
41 It is clear from the documents before the Court in this case that separate actions have not been brought before the courts of different Contracting States, so that, in any event, the conditions for the application of Article 22 are not met.
42 It must next be borne in mind that, under Article 3 of the Convention, 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 Title II.
43 Those rules include, in Article 6(1) of the Convention, the rule that a person may also be sued, 'where he is one of a number of defendants, in the courts for the place where any one of them is domiciled'.
44 As is clear from the very wording of Article 6(1), it applies only if the proceedings in question are brought before the courts for the place where one of the defendants is domiciled.
45 That is not the case here.
46 It must be observed that the objective of legal certainty pursued by the Convention would not be attained if the fact that a court in a Contracting State had accepted jurisdiction as regards one of the defendants not domiciled in a Contracting State made it possible to bring another defendant, domiciled in a Contracting State, before that same court in cases other than those envisaged by the Convention, thereby depriving him of the benefit of the protective rules laid down by it.
47 In any event, the exception provided for in Article 6(1) of the Convention, derogating from the principle that the courts of the State in which the defendant is domiciled are to have jurisdiction, must be construed in such a way that there is no possibility of the very existence of that principle being called in question, in particular by allowing a plaintiff to make a claim against a number of defendants with the sole purpose of ousting the jurisdiction of the courts of the State where one of those defendants is domiciled (**Kalfelis, cited above, paragraphs 8 and 9**).
48 Accordingly, after pointing out that the purpose of Article 6(1) of the Convention, and of Article 22, is to ensure that judgments which are incompatible with each other are not given in the Contracting States, the Court held in **Kalfelis** that, for Article 6(1) of the Convention to apply there must exist between the various actions brought by the same plaintiff against different defendants a connection of such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.
49 In that connection, the Court also held in **Kalfelis** that a court which has jurisdiction under Article 5(3) of the Convention over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.
50 It follows that two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected.
51 Finally, as the Court held in paragraph 20 of **Kalfelis**, whilst it is true that disadvantages arise from different aspects of the same dispute being adjudicated upon by different courts, it must be pointed out, on the one hand, that a plaintiff is always entitled to bring his action in its entirety before the courts for the domicile of the defendant and, on the other, that Article 22 of the Convention allows the first court seised, in certain circumstances, to hear the case in its entirety provided that there is a connection between the actions brought before the different courts.
52 The answer to the fourth question must therefore be that Article 6(1) of the Convention must be interpreted as meaning that a defendant domiciled in a Contracting State cannot be sued in another Contracting State before a court seised of an action against a co-defendant not domiciled in a Contracting State on the ground that

the dispute is indivisible rather than merely displaying a connection.

Costs

53 The costs incurred by the French and German Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber)

in answer to the questions referred to it by the Cour de Cassation by judment of 28 January 1997, hereby rules:

1) An action by which the consignee of goods found to be damaged on completion of a transport operation by sea and then by land, or by which his insurer who has been subrogated to his rights after compensating him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued that document on his headed paper but against the person whom the plaintiff considered to be the actual maritime carrier, falls within the scope not of matters relating to a contract within the meaning of Article 5(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, but of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that Convention.

2) The place where the consignee of the goods, on completion of a transport operation by sea and then by land, merely discovered the existence of the damage to the goods delivered to him cannot serve to determine the 'place where the harmful event occurred' within the meaning of Article 5(3) of the Convention of 28 September 1968, as interpreted by the Court.

3) Article 6(1) of the Convention of 27 September 1968 must be interpreted as meaning that a defendant domiciled in a Contracting State cannot be sued in another Contracting State before a court seised of an action against a co-defendant not domiciled in a Contracting State on the ground that the dispute is indivisible rather than merely displaying a connection.

Puissochet Moitinho de Almeida Gulmann

Delivered in open court in Luxembourg on 27 October 1998.

OPINION OF ADVOCATE GENERAL COSMAS
delivered on 5 February 1998

I — Preliminary observations

1. By four preliminary questions the French Cour de Cassation (Court of Cassation) requests an interpretation from the Court of Article 5, paragraphs 1 and 3, and Article 6 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters,1 as amended most recently by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.2

II — The facts

2. The facts of the present case do not emerge with all desirable clarity from the order for reference, from the observations of the parties or from the case-file in the main proceedings. According to the case-file, the French company Brambi Fruits, with its registered office in Rungis (hereinafter 'Brambi'), purchased, in May 1988, 3 a large quantity of pears from the Australian company F. W. Year, with its registered office in Melbourne.

3. It was under cover of a bearer bill of lading issued, on 8 May 1992, in Sydney by the Australian company Refrigerated Container Carriers PTY Ltd, with its registered office in Sydney (hereinafter 'RCC') that the goods were loaded, in eight refrigerated containers containing 5 199 boxes of pears, in the port of Melbourne on board the vessel Alblasgracht V002, bound for the port of Rotterdam, which was designated as the place of delivery and unloading of the goods. This vessel was, it seems, operated by the Dutch company Spliethoff's, which is not referred to in the bill of lading and which has its registered office in Amsterdam. Brambi was merely to be notified of the bill of lading.

4. From Rotterdam, the containers were transported by road, under cover of international consignment notes, to Rungis in France, where the registered office of Brambi is situated. The consignment notes for this part of the journey indicate that they were issued by the company Transeco and refer to 'Conship' as the carrier.

5. When the consignment arrived at Rungis, Brambi noticed that it was damaged and entered reservations against delivery. The damage resulted from a premature ripening of the fruit, due to a breakdown in the cooling system. 4 Compensation for the damage was paid by the company Réunion Européenne and nine other insurance companies, all of whom were plaintiffs and are now appellants in the final appeal in the main proceedings.

6. After having paid out the compensation due, the insurers, subrogated to the rights of Brambi, brought an action before the Tribunal de Commerce (Commercial Court), Créteil, in the jurisdiction of which Rungis is situated. Their action was brought, on the one hand, against RCC , who had issued the bill of lading for the maritime part of the transport operation, and, on the other, against (a) Spliethoff's and (b) the master of the vessel Alblasgracht, in their capacity as the actual maritime transporters.

7. The Tribunal de Commerce held, having regard to the correspondence between Brambi and RCC , that the pears were intended to be delivered in Rungis and that, as a result, it had jurisdiction over the 'transaction' between these two companies. Thus, presumably under the first paragraph of Article 4 of the Convention, it

applied French law and not the provisions of the said Convention, since the Commonwealth of Australia is not a party to the latter. In addition, the Tribunal de Commerce held that RCC had not respected its 'contract' and ordered it to pay compensation of some FRF 400 000 to the insurers, as well as the costs of the proceedings. 5 In contrast, the Tribunal de Commerce declared that it lacked jurisdiction in so far as the other two defendants were concerned, on the following grounds: there was nothing to show that there was combined joint transport from Melbourne to Rungis; the place where the defendants were to perform their obligation was Rotterdam; and, as a result, by virtue of the Convention, the competent courts were those of Rotterdam, where the goods were to be delivered, or those of Amsterdam, place of domicile of the defendants.

8. On appeal by the insurers, the Cour d'Appel (Court of Appeal), Paris, upheld the decision at first instance in holding that the liability of Spliethoff's and of the master of the vessel was necessarily based on contract and that, as a result, the abovementioned Netherlands courts had jurisdiction by virtue of Article 2 and Article 5(1) of the Brussels Convention.

9. The insurers brought a final appeal against this decision before the Cour de Cassation. They submitted that the dispute with the defendants was not contractual in character, as the Cour d'Appel had wrongly held, but was clearly a tortious dispute governed by Article 5(3) of the Convention, with the consequences which result therefrom as regards jurisdiction. In the alternative, the insurers submitted that, since all three of the defendants had taken part in the same maritime transport operation, the dispute was indivisible. As a result, the Cour d'Appel should also have declared that it had jurisdiction in regard to the other two defendants, since it had accepted that it had jurisdiction in regard to the first defendant.

10. Having decided that the resolution of the dispute required an interpretation of the Convention, in particular with regard to the autonomous nature of the concept of 'matters relating to a contract', the French Cour de Cassation referred the following four questions to the Court of Justice.

III — The questions for preliminary ruling

The French Cour de Cassation requests the Court of Justice to rule on the following questions:

'1 . Is an action by which the consignee of goods found to be damaged on completion of a transport operation by sea and then by land, or by which his insurer who has been subrogated to his rights after compensating him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued the document on his headed paper but against the person whom the plaintiff considered to be the actual maritime carrier, based on the contract of transport and does it, for that or any other reason, fall within the scope of matters relating to contract within the meaning of Article 5(1) of the Convention?

2. If the foregoing question is answered in the negative, is the matter one relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention or is it appropriate to have recourse to the principle laid down in Article 2 of the Convention that the courts of the State in whose territory the defendant is domiciled have jurisdiction?

3. In the event that the matter is to be regarded as one relating to tort, delict or quasidelict, may the place where the consignee, after completion of the maritime transport operation and then the final overland transport operation, merely discovered that the goods delivered to him were damaged, constitute — and if so under what conditions — the place of occurrence of the damage which, according to the judgment of the Court of Justice of 30 November 1976 in Case 21/76 Bier v Mines de Potasse d'Alsace [1976] ECR 1735, may be the place "where the harmful event occurred" within the meaning of Article 5(3) of the Convention?

4. May a defendant domiciled in the territory of a Contracting State be brought, in another Contracting State, before the court hearing an action against a co-defendant not domiciled in the territory of any Contracting State, on the ground that the dispute is indivisible, rather than merely displaying a connection?'

IV — The legal framework

11. Article 2 of the Convention provides:

'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 ...'.

12. Article 3 provides:

'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 this Title'.

13. Article 4 provides:

'If the defendant is not domiciled in a Contracting State, the jurisdiction of the Courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.'

14. Article 5 of the Convention provides:

'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 ...

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

15. Article 6 of the Convention provides:

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

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled ...'.

16. Finally, Article 22 of the Convention provides:

'Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings. A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that country permits the consolidation of related actions and the

court first seised has jurisdiction over both actions. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

V — The substance

The first question

17. The defendants submit that, to the extent that the action they are subject to has as its basis the bill of lading, i. e. the formal document of the contract of carriage, the dispute concerns matters relating to contract. In contrast, the German and French Governments, as well as the Commission, submit that, in the absence of a contractual link between the purchaser and the maritime carrier, the dispute is not contractual in nature.

18. The defendants' position cannot be accepted.

19. It should first be recalled that the Convention seeks to unify the rules of international jurisdiction of the Contracting States. Its objective is, in particular, to avoid, in so far as possible, 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. 6 The legal protection of persons established in the Community and legal certainty are thus reinforced.

20. Under the system of the Convention, the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction (Article 2); it is only by way of derogation from this principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may (in the case of special jurisdiction) or must (in the case of exclusive jurisdiction or prorogation of jurisdiction), depending on the case, be sued in the courts of another Contracting State. 7 In fact, in general, the defendant is regarded, from a procedural point of view, to be the weaker party as a result of the fact that it is he who is being sued by the plaintiff, except in certain specified cases where it is the plaintiff who is considered to be the weaker party, and will thus be favoured by the Convention. 8

21. Thus, Article 5 provides for situations of special jurisdiction where the plaintiff may choose to sue the defendant other than in the place of his domicile. This freedom of choice was introduced having regard to the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings. 9

22. One of these situations arises in disputes in matters relating to contract. The concept of 'matters relating to a contract' is not defined in the Convention. However, as the Court has repeatedly emphasised, in order to ensure the full effectiveness of the Convention, this concept has to be interpreted independently, by reference to the system and objectives of the Convention, and it cannot be understood as referring simply to the classification that national law gives to the legal relationship at issue before the national court. 10

23. The concept of matters relating to a contract was defined in particular in the Handte case. 11 In that case, a French company having its registered office in Bonneville had purchased products from the subsidiary of a German company, which had its registered office in Strasbourg. As the products appeared to be defective, it brought an action before the Tribunal de Grande Instance (Regional Court), Bonneville, for compensation against both the seller and the German company which had manufactured the product. When asked to rule on the question of whether the relationship between the sub-buyer and the manufacturer was contractual in character (the only situation in which the manufacturing company could have been sued before the courts of the 'place of performance of the obligation'), the Court held, having recalled the objectives of the Convention, that the concept of 'matters relating to a contract' within the meaning of Article 5(1) could not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (paragraph 15), as in the case of the relationship between the sub-buyer of goods purchased from an intermediate seller and the manufacturer of those goods (paragraph 16). The Court emphasised that 'where there is a chain of international contracts, the parties' contractual obligations may vary from contract to contract, so that the contractual rights which the sub-buyer can enforce against his immediate seller will not necessarily be the same as those which the manufacturer will have accepted in his relationship with the first buyer' (paragraph 17). In those circumstances, the Court held that, in the absence of a contractual relationship between a manufacturer and a sub-buyer, where the identity and domicile of the latter may reasonably be unknown to the former, the manufacturer cannot foresee before which courts, other than those of his domicile, he may be sued, which would be incompatible with the principle of legal certainty which the Convention seeks to protect (paragraphs 18 and 20).

24. It follows from this case-law that, within the meaning of Article 5(1) of the Convention, which is to be strictly interpreted in so far as it derogates from Article 2, 12 an action for compensation does not constitute a 'matter relating to a contract' except where there is an agreement freely entered into, not as between the plaintiff and a third party or between the defendant and a third party, but between the plaintiff and the defendant and on the condition that the plaintiff submits in his application that the defendant is in breach of the obligations imposed on him as a result of that agreement.

25. In the present case, the referring court asks whether, in the given circumstances, the dispute can be considered as having a contractual character because it has as its basis the 'contract of transport'. But which 'contract of transport' and between whom?

26. This point is not clear, and neither the plaintiffs nor the defendants, in their written submissions in the main proceedings and in their observations in the present

proceedings, have really clarified things, not to say that they have studiously avoided clarifying them.
27. It follows in any event from the findings of the court of first instance and from those of the court of second instance that the delivery of the pears to Rungis was agreed between RCC and Brambi, probably in the context of a contract of transport between the two companies concerning the carriage of the goods from Melbourne to Rungis. 13 The transport was in any event completed in two stages clearly separate and independent from each other, the first by sea and the second by land.
28. For the maritime stage, which is the only one of interest to us here, RCC issued a bill of lading to the bearer, on which the consigner is stated to be the Year company (i. e. the seller), while Brambi is mentioned as being the person to which the bill of lading should be notified and the transport is shown as having to be carried out on the vessel Alblasgracht. The courts of first and second instance decided that, although the form carried the pre-printed reference that it was combined transport (i. e. covering several types of transport), the bill of lading related in reality only to the maritime part of the transport, since the port of unloading and delivery was Rotterdam. From these factors, the courts at first instance and on appeal concluded that the actual maritime transporter was Spliethoff's, which was not referred to in the bill of lading, but which is the operator of the vessel on which the transport took place.
29. As regards the relationship between Brambi and Spliethoff's, we do not have any clear evidence. The allegations of the parties in the course of the main proceedings and their written observations before the Court do not in fact allow us to say whether there was a contractual link between the two companies. On the contrary, the plaintiffs submitted, without being contradicted on this point by any convincing argument on the part of the defendants, that RCC sub-contracted the performance of the maritime transport to Spliethoff's. 14 This implies, logically, that a contract must have been concluded between RCC and Spliethoff's. 15 Whether or not such a contract existed, however, is irrelevant in the present case since, in any event, Brambi is a third party in relation to this contract. In fact, as indicated above (see point 20), in order for there to be a 'matter relating to a contract' within the meaning of Article 5(1) of the Convention, it is not sufficient that there is any kind of contract, even relating to the case, between the plaintiff or the defendant and a third party; there must be a contract between the plaintiff and the defendant.
30. Consequently, in the present case, irrespective of the legal nature of the bill of lading in question, 16 and apart from the question of the link between RCC and Brambi, one can draw a reasonably clear conclusion from the documents on the case-file, namely that there was no contractual link freely entered into between Brambi, on the one hand, and Spliethoff's and the master, on the other hand.
31. As a result, to the extent that the national courts, who have sole jurisdiction to decide on the facts, concluded that there was no contractual link between Brambi and the defendants, or more precisely between the former and Spliethoff's, the dispute cannot in any sense be considered as having a contractual basis within the meaning of Article 5(1) of the Convention. 17

The second question

32. All of the parties agree that, to the extent that the liability of the maritime carrier transporter is engaged and the dispute does not have a contractual basis, it is a tortious matter.
33. This point of view should be accepted.
34. As I have stated previously, by way of derogation from the general principle of international jurisdiction of the place of domicile of the defendant, Article 5(3) of the Convention provides that the latter may be sued: 'in matters relating to tort, delict or quasidelict, in the courts for the place where the harmful event occurred.'
35. According to the case-law of the Court, the concept of 'matters relating to tort, delict or quasi-delict' in Article 5(3), must, in a similar manner to the concept of 'matters relating to a contract' in Article 5(1), be regarded as an autonomous concept. In order to ensure uniformity in all the Member States, it must be recognised that the concept covers 'all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1)'. 18
36. As, in the present case, the liability of the defendants is at issue because of the damage sustained to the goods during the maritime transport and since the dispute is not contractual, it necessarily concerns a dispute relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention. As a result, in so far as we are dealing with a case of special jurisdiction, it is not appropriate to apply Article 2 establishing general jurisdiction.

The third question

37. It should be noted that, by its third question, the referring court seeks to ascertain whether, in the circumstances of the main proceedings, the place where the damage was simply discovered is the 'place where the harmful event occurred', within the meaning of Article 5(3) of the Convention, as interpreted by the Court.
38. This questions raises two problems. The first is to determine the place where the harmful event occurred when the damage took place in the course of international transport, such as that in the main proceedings. The second problem is to determine whether this place corresponds with the place where the damage was simply discovered.
39. In principle, all of the parties are agreed that the place where the damage was simply discovered is irrelevant if it does not correspond with the place where the harmful event actually occurred or with the place where the damage arose. In addition, as can be inferred from their observations, the defendants and the French Government consider that, in circumstances such as those of the main proceedings, the place where the damage occurs is where the maritime voyage was concluded

and where the defendants were required to deliver the goods.
40. These points of view call for consideration.
41. As the Court has consistently held, this rule of special jurisdiction contained in Article 5(3), which depends on the exercise of a choice by the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the domicile of the defendant, with a view to the sound administration of justice and the efficacious conduct of the proceedings. 19
42. The meaning of the expression 'place where the harmful event occurred' used in Article 5(3) as a criterion of special international jurisdiction is not particularly clear. The Jenard Report 20 has already stated: 'The Committee did not think it should specify whether that place is the place where the event which resulted in damage or injury occurred, or whether it is the place where the damage or injury was sustained. The Committee preferred to keep to a formula which has already been adopted by a number of legal systems'.
43. In Mines de Potasse d'Alsace, 21 the Court stated that the meaning of the above expression 'is unclear when the place of the event which is at the origin of the damage is situated in a State other than the one in which the place where the damage occurred is situated' (paragraph 13) and it asked whether, in such a case, it was necessary to choose as the connecting factor the place of the event giving rise to the damage, or the place where the damage occurred, or to accept that the plaintiff had an option between the one and the other of those two connecting factors (paragraph 14). According to that judgment, the place of the event giving rise to the damage, no less than the place where the damage occurred, could, depending on the case, constitute a significant connecting factor from the point of view of jurisdiction. In fact, both could constitute significant factors connecting the dispute with the court seised, given that each of them could be particularly helpful from the point of view of the evidence and of the conduct of the proceedings (paragraphs 15 to 17). 22 Thus, the Court held that where the place of the occurrence of the event which might give rise to liability in tort, delict or quasi-delict and the place where that event resulted in damage were not identical, the expression 'place where the harmful event occurred' in Article 5(3) of the Convention had to be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, with the result that the defendant could be sued, at the option of the plaintiff, in the courts of either of them (paragraphs 24 and 25). 23 The Court also held that to opt only for the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness (paragraph 20). 24
44. In Mines de Potasse d'Alsace, the place of the harmful event (that of the discharge of waste by the French company into the Rhine, leading to the pollution of its waters) was clearly different from the place where the damage was suffered (the place where the Dutch horticultural business irrigated its plantations with the polluted waters, causing considerable damage to them). However, this distinction is not always easy to make, all the more so where the exact determination of the place where the damage occurred presents certain difficulties in other respects. The Court has, in its case-law, ruled on a large number of similar questions in like circumstances.
45. In Shevill and Others, 25 the Court had to answer the question of which court has jurisdiction in the case of defamation by the press, where the newspaper was published in one State, but the damage particularly resulted from its circulation in the State of domicile of the person defamed. The Court held that both the courts where the damage occurred and the courts where the harmful event originated, that is to say, the courts of the place of publication of the newspaper, had jurisdiction and that this was for all the harm caused by the unlawful act (paragraphs 24 and 25). This place where the damage occurred is 'the place where the event giving rise to the damage, entailing tortious, delictual or quasi-delictual liability, produced its harmful effects upon the victim' (paragraph 28). On the basis of these considerations, the Court concluded that the courts of each of the Member States in which the defamatory publication is circulated are only competent to rule on the question of compensation for injury caused to the reputation of the victim from the circulation of the newspaper in the corresponding State (paragraphs 29 to 33).
46. In Dumez France and Tracoba (C-220/88), French companies had brought an action before their national courts against German banks for compensation in respect of the damage they suffered following the insolvency of their subsidiaries established in Germany. According to the plaintiffs, the damage was brought about by the suspension of a property-development project in Germany for a German prime contractor: the damage was the direct result of the cancellation by the German banks of the loans granted to the prime contractor. In its judgment of 11 January 1990, 26 the Court held in this case that the damage caused to the parent companies was merely an indirect consequence of the damage suffered by their subsidiaries in a different place (paragraphs 13 to 16) and, having rejected an interpretation of the Convention which would have allowed the plaintiff to determine, except in certain specified cases, the competent court by his choice of domicile (paragraph 19), the Court held that 'the rule on jurisdiction laid down in Article 5(3) of the Convention cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets' (paragraph 22, emphasis added).
47. The decision in Marinari 27 is of greater interest. In this case, Mr Marinari, domiciled in Italy, had lodged a bundle of promissory notes with an English bank. The

employees of the bank, after opening the envelope, refused to return the promissory notes and advised the police of their existence, considering that they were of dubious origin, which led to Mr Marinari's arrest and sequestration of the promissory notes. Having been released by the English authorities, Mr Marinari brought an action against the bank in the Italian courts seeking, on the one hand, payment of the face value of the promissory notes, and on the other hand, compensation for damage suffered as a result of his detention, for breach of several contracts and for damage to his reputation. When asked to rule on whether the Italian or English courts had jurisdiction over the matter, the Court, after recalling the principles set out in the case-law of Mines de Potasse d'Alsace, Dumez France and Tracoba and Shevill and Others, held that the option open to the plaintiff to choose between the place of the event giving rise to the damage and the place where the damage occurred cannot be extended beyond the particular circumstances which justify it, without negating the general principle that the courts of the Contracting State where the defendant is domiciled are to have jurisdiction; it would lead, in cases other than those expressly provided for, to recognition of the jurisdiction of the courts of the plaintiff's domicile, a solution which the Convention does not favour since, in the second paragraph of Article 3, it excludes application of national provisions which make such jurisdiction available for proceedings against defendants domiciled in the territory of a Contracting State (paragraph 13). The Court thus held that the term 'place where the harmful event occurred' cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere (paragraph 14). More particularly, this concept cannot be construed as including the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State (paragraph 15).

48. In my opinion, the abovementioned case-law shows that, in order to determine the 'place where the damage occurred', it is essential to define the relevant 'damage'. 'Damage' means any harm to the property or person of the plaintiff, where it relates to the event giving rise to the damage, that is to say to the illegal behaviour attributed to the defendant by a direct and causal link, 28 to the exclusion of indirect, more remote damage or damage which is suffered by an indirect victim. Consequently, 'the place where the damage occurred' is that where the event giving rise to the damage caused injury, within the above meaning, to the plaintiff.

49. The above case-law provides sufficient elements to determine the 'place where the damage occurred' in the case where the damage occurs in the course of international carriage of goods, as in the present case.

50. First of all, it must be observed that the basic obligation imposed on every carrier is to load the goods at a given point and to deliver them intact at another point. As a result, carriers are, in principle, liable for any damage caused to the goods between the departure and the arrival points of the voyage, that is to say for the entire duration of that voyage.

51. When the consignee entered into a contract with one carrier only, the liability of the latter towards the former for damage caused to the goods during the voyage is contractual in nature. Consequently, where both are domiciled in the Community, Article 5(1) of the Convention allows the consignee to sue the carrier before the courts of the place where the goods were delivered or should have been delivered.

52. Let us suppose, however, that the carrier, without the consignee's knowledge, had entrusted part of the transport to another carrier (the sub-contractor), even domiciled in the Community, who caused the damage to the goods. In this case, the first carrier remains liable towards the consignee, by virtue of the contract which binds them. The subcontractor is liable, on the one hand, towards the original carrier by virtue of the contract between them and, on the other hand, by reason of his tortious liability 29 towards the consignee, to whom he is not bound by any contractual link.

53. In the latter case, the consignee may, according to Mines de Potasse d'Alsace, sue the sub-contractor either before the courts of the place where the harmful event occurred, or before the courts of the place where the damage occurred.

54. The place where the damage occurred may be known to the plaintiff and may be located in the Community, in which case the court having jurisdiction will be easily determined. It may also be impossible to locate this place, or the place may be outside the Community, so that it will not be possible to identify the court having jurisdiction. 30 The harmful conduct may also have lasted for the entire voyage, and it would thus not be reasonable to require the plaintiff to seise the courts of all the places through which the vessel sailed. In such circumstances, the consignee must limit himself to the place where the damage occurred. We must now consider where this place is located.

55. First, the place where the damage occurred cannot be that of the 'final delivery' of the goods, that is to say the place where the initial carrier had to deliver the goods to the consignee, as the plaintiffs argue. The reasons for this are obvious. In an international transport operation, such as that in the main proceedings, which is performed by several successive carriers, there is a succession of transport contracts under which the rights and obligations of the parties may vary significantly. The sub-contractor may not know the place where the initial carrier had agreed with the consignee to deliver the goods, and may be unaware of the existence and the address of the latter. As a result, this place does not have any organic link with the dispute between the consignee and the subcontractor. In addition, as the Commission rightly points out, in international trade, goods may change destination in transit, with the result that their place of destination may not be determined easily, or it may even be determined arbitrarily by the plaintiff, which would encourage forum shopping. Moreover, as the place of final delivery of the goods is in general the place where the plaintiff's commercial

establishment is located, choosing this place in the present case might amount to setting the place where the plaintiff is domiciled or where his professional establishment is located up as a new jurisdiction criterion, to which the Convention is expressly opposed. 31 Such an outcome would be contrary to the rule set out in Article 2 of the Convention, as well as to the general scheme which the latter aimed at establishing.

56. In addition, the place where the damage occurred cannot be that where the damage was merely ascertained by the plaintiff. Indeed, if an international transport operation is performed by several successive carriers, as in the present case, the damage allegedly caused to the goods by an intermediate carrier may be ascertained either in the course of one of the subsequent stages of the voyage, or at the place of delivery of the goods, or at the place to which the goods were sent subsequently, etc., all places which the defendant could not foresee in any way. If the place where the damage was ascertained was relevant, international jurisdiction would be subject to uncertain and fortuitous elements, which would be contrary to the fundamental objective of the Convention, which is 'to provide for a clear and certain attribution of jurisdiction'. 32 In addition, such an interpretation could attribute jurisdiction to the court of a place having no connection with the subject-matter of the dispute, so that, as regards the quality of evidence, the court of that place would be irrelevant. 33 Finally, the plaintiff could always assert that he ascertained the damage where his domicile or business is located, with the consequences which are explained in the above paragraph.

57. In my opinion, in a case such as that in the main proceedings, the place where the damage occurred may only be that up to which the sub-contractor against whom the plaintiff takes legal action was in charge of the goods, that is the place where he had to deliver the goods.

58. In the first place, there is indeed a causal link between the harmful event and the damage. The plaintiffs argue that, during the carriage, the defendants did not comply with the normal refrigeration temperature, and that this caused the pears to ripen prematurely. The defendants' conduct, if true, is likely to have caused the deterioration of such fragile goods. This deterioration constitutes in itself direct damage to the property, in the broad sense of the term, of the consignee or the assignee of the goods. 34 The fact that the deterioration of the goods was progressive (either because of its nature, or because of the negligence of the other carriers) is not relevant to what concerns us here and does not alter the fact that the damage occurred during the course of the transport and, at the latest, at the end of that transport. 35

59. In addition, this place is clear and foreseeable for the defendant and, as a result, it ensures legal certainty. Second, it is by nature closely linked to the dispute between the consignee and the defendant and it facilitates the gathering of evidence. As a result, it promotes the proper administration of justice. Moreover, it even favours the plaintiff to a certain extent, in so far as it entitles him to choose a place which may be closer to his domicile than the domicile of the defendant, when it is difficult or impossible to determine the place where the damage occurred, or where that place is very remote. In addition, if the initial carrier entrusted the transport to a single sub-contractor, the place of performance of the initial carrier's service and the place where the damage occurred will be the same, which limits the number of courts likely to have territorial jurisdiction, to the benefit of the proper administration of justice over the whole dispute. Consequently, this solution takes into account all the interests in question and does not lead to favouring one of the parties in particular.

60. In the present case, to the extent that, in the main proceedings, the defendants are alleged to be liable for the damage which occurred during the maritime transport from Melbourne to Rotterdam, it is in the latter port that the goods were, for the last time, under the defendants' responsibility and suffered the harmful consequences of the unlawful conduct attributed to the latter. 36 As a result, that is where the damage occurred for the purposes of Article 5(3) of the Convention.

The fourth question

61. Considering the chronological background to the case set out above, the last question of the referring court must be construed as seeking to ascertain, essentially, whether the Convention allows persons domiciled in a Contracting State, against whom a claim has been brought under Article 5(3), to be sued before the court of another Contracting State, which is seised of another claim within the same action, brought against a defendant who is not domiciled in a Contracting State and which is, in addition, based on national law, on the ground that the dispute concerning the two cases is 'indivisible' rather than merely displaying a connection.

62. The question submitted does not refer to any concrete provisions for which it seeks the interpretation. Moreover, while the term 'related' is explained in Article 22, the term 'indivisible' applied to the dispute, as used in the question as a potential criterion of jurisdiction, is not referred to in the Convention. 37

63. In these circumstances, it should first be recalled that, under Article 3 of the Convention, a person domiciled in a Contracting State may not be sued before the courts of another Contracting State except in the cases expressly and exhaustively provided for in Sections 2 to 6 of Title II. 38

64. Article 22, which refers to related actions, forms part of Section 8 of Title II above. Thus, this Article does not apply in the present case. As the Court held in Elefanten Schuh, 39 'Article 22 of the Convention is intended to establish how related actions which have been brought before courts of different Member States are to be dealt with. It does not confer jurisdiction; in particular, it does not accord jurisdiction to a court of a Contracting State to try an action which is related to another action of which that court is seised pursuant to the rules of the Convention' (paragraph 19). 'The answer... should therefore be that Article 22 of the Convention applies only where related actions are brought before courts of two or more Contracting States' (para-

graph 20). In the circumstances, irrespective of whether the action brought against RCC and the action brought against the defendants are 'related actions' within the meaning of Article 22 of the Convention, the fact is that separate actions were not brought before the courts of different Member States. As a result, and in any event, the conditions for the application of Article 22 are not satisfied.

65. Let us return to Article 3 of the Convention. Of Sections 2 to 6 of Title II, sections 3 to 5 do not concern us in the present case. Since Article 5 does not offer the possibility of changing the court having jurisdiction, the only provision relating to the subject-matter of the preliminary question is Article 6(1). I will thus restrict myself to examining this provision.

66. It follows from the wording of this provision that an indispensable condition for its application is, in the first place, that the action is brought before the courts of the place of domicile of one of the defendants. 40 This obviously means that the domicile of this defendant must be situated in a Contracting State and that, as a result, this defendant must be domiciled in a Contracting State. In addition, as the case-law shows, it is necessary in the second place that there is a connecting factor, within the meaning of Article 22, between the actions which concern the defendants. 41

67. As to the first condition, it should be recalled that RCC , to which the dispute with the defendants is allegedly linked, does not have a registered office in the jurisdiction of the Tribunal de Commerce of Créteil, before which it was sued, but rather in a non- Contracting State. As a result, and for this reason above all, the defendants cannot be sued before the Tribunal de Commerce of Créteil on the basis of Article 6(1) of the Convention.

68. As regards the second condition, it should be noted that the Court has already addressed, in the Kalfelis case, the question of whether a criterion of national law such as mere connection or indivisibility can be used for the definition of the concept of 'connection' for the purposes of Article 6(1) of the Convention, where several actions are brought against the same defendant.

69. The Court emphasised that the exception to the principle of Article 2 contained in Article 6(1) must be treated in such a manner that there is no possibility of the very existence of that principle being called into question (paragraph 8). That possibility might arise if a plaintiff were at liberty to make a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the State where one of the defendants is domiciled; it is necessary for that purpose that there should be a connection between the claims made against each of the defendants (paragraph 9), the nature of which must be determined independently (paragraph 10). After having stated that Article 6(1), in the same manner as Article 22, seeks to avoid the risk in the Contracting States of judgments which are incompatible with each other (paragraph 11), the Court held that 'The rule laid down in Article 6(1) therefore applies where the actions brought against the various defendants are related when the proceedings are instituted, that is to say where it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. It is for the national court to verify in each individual case whether that condition is satisfied' (paragraph 12).

70. Such is the situation where several actions are brought against different defendants. In Kalfelis, however, the question arose as to whether, in the case of actions based concurrently on tortious liability, breach of contract or unjust enrichment, the court having jurisdiction under Article 5(3) for one of the heads of claim could adjudicate on the action in so far as it was not based on tort or delict. On this point, the Court first observed that the special jurisdictions enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively. Consequently, the Court ruled that 'a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based' (paragraph 19). 42 In fact, the Court went on, this solution presented a disadvantage arising from different aspects of the same dispute being adjudicated upon by different courts; however, this disadvantage was counterbalanced by the possibility for the plaintiff to bring his action in its entirety before the courts for the domicile of the defendant, as well as the possibility which Article 22 offers in certain conditions to the first court seised to hear the case (paragraph 20).

71. In view of the foregoing, it follows that two claims for compensation in the same action, brought against different defendants, with one based on contractual liability and the other on tortious liability, cannot be considered as having a connection.

72. This solution should also, for the same reason, be adopted in the present proceedings. As regards the action for compensation, if the court seised of the action based on tortious liability does not have jurisdiction to rule on the action which is founded on contractual liability, the court seised of this latter action (a fortiori, if this is under provisions other than those in the Convention) cannot rule on the former request either. Therefore, Article 6(1) cannot be applied in the present case.

VI — Conclusion

For those reasons, I propose that the questions submitted be answered as follows:

(1) In a situation such as that in the main proceedings, an action by which the consignee of goods seeks redress from the carrier for damage suffered at the hands of the carrier, who is assumed to have insured the maritime part of the transport, by reason of damage to the goods during this phase of the transport, is not a 'matter relating to a contract' within the meaning of Article 5(1) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as last amended by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, to the

extent to which there is no contractual link freely entered into between the plaintiff and the defendant.
(2) The matter is tortious within the meaning of Article 5(3) of the Convention where this action brings into question the liability of the carrier for the damage and there is no contractual link between the plaintiff and the defendant.
(3) The place where the plaintiff only discovered the damage cannot be used to determine the 'place where the harmful event occurred' within the meaning of Article 5(3) of the Convention, as interpreted by the Court.
(4) Articles 3 and 6(1) of the Convention must be interpreted as meaning that a person domiciled in a Contracting State may not be sued before the courts of another Contracting State seised of an action brought against a co-defendant domiciled outside the territory of any Contracting State on the ground that the dispute is indivisible rather than merely displaying a connection.

* Original language: Greek.
1 — OJ 1972 L 299, p. 32.
2 — OJ 1989 L 285, p. 1.
3 — This date is referred to in the documents in the main proceedings. It may be an error, since it pre-dates the transport in question by four years.
4 — See the observations of the defendants before the Cour d'Appel as well as the expert's report referred to in the decision at first instance.
5 — It should be pointed out that RCC did not appear before the French courts and has also not submitted observations in the present proceedings.
6 — Case C-269/95 Benincasa [1997] ECR I-3767, paragraphs 25 and 26, and Case C-295/95 Farrell [1997] ECR I-1683, paragraph 13.
7 — See Case C-26/91 Handle [1992] ECR I-3967, paragraph 13, as well as the decisions in Benincasa (paragraph 13) and Farrell (paragraph 18), cited in footnote 6.
8 — Farrell (paragraph 19), cited in footnote 6.
9 — Case 21/76 Mines de Potasse d'Alsace [1976] ECR 1735, paragraph 11, and Case C-288/92 Custom Made Commercial [1994] ECR 1-2913, paragraph 12.
10 — Case 34/82 Peters [1983] ECR 987, paragraphs 9 and 10, Case 9/87 Arcado [1988] ECR 1539, paragraphs 10 and 11, and Handte, paragraph 10, cited in footnote 7.
11 — Cited in footnote 7. 12 — Case 189/87 Kalfelis [1988] ECR 5565, paragraph 19.
12 — Case 189/87 Kalfelis [1988] ECR 5565, paragraph 19.
13 — See point 7 above.
14 — The defendants even relied on a bill of lading allegedly issued by Spliethoff's in the context of the transport of the goods (see, for example, their submissions in the final appeal proceedings), but they have not produced any evidence in support of this.
15 — It is perhaps because of this that the Cour d'Appel decided that it was dealing with a 'matter relating to a contract', with Rotterdam as the place of performance of the obligation. In relation to the wide range of forms which the relationship between a carrier and a subcontractor may take, see P. Delebeque: 'Sous-traitance et transport', Le droit maritime français, 1995 (47, p. 245).
16 — The Commission explored in detail the question of whether the bill of lading contains a contract for maritime transport or if it constitutes evidence of such a contract or the transfer of ownership in the goods. I do not believe that the answer to these questions is relevant to the present case (see in this regard Case 71/83 Tilly Russ [1984] ECR 2417 and the Opinion of Advocate General Sir Gordon Slynn, as well as the commentary of R. Roland 'Le connaissement et le droit européen', Jurisprudence du port d'Anvers, 1983-1984, p. 403). Suffice it to point out that a bill of ladine presupposes a contract for transport. Such a finding, however, serves no purpose here, since any contract for transport between RCC and Brambi would be irrelevant, whereas a contract between Brambi and Spliethoff's, which would indeed be of assistance in resolving the present case, has not been established and does not appear to have been concluded.
17 — It should at least be pointed out that the possible existence of a contractual link between Brambi and Spliethoff's and, as a result, the connection of the dispute with 'matters relating to a contract', does not indicate in any event that the dispute with the master also had a contractual basis within the meaning of Article 5(1) of the Convention. Brambi could not, logically, have concluded a contract with the master individually. The latter was merely an employee of the actual carrier and, as a result, if liability was incurred vis-à-vis the consignee, such liability could only be tortious. As we will see hereafter, it follows that, for each claim against Spliethoff's, on the one hand, and against the master, on the other hand, another court will have jurisdiction under the Convention, without the fact that the plaintiffs base their claim on the same cause of action being of any relevance in the present case (see point 70 below).
18 — Kalfelsis (paragraphs 16 and 17), cited above in footnote 12, and Case C-261/90 Reichert [1992] ECR I-2149, paragraph 16.
19 — Mines de Potasse d'Alsace (paragraph 11), cited above in footnote 9, Case C-364/93 Marinari [1995] ECR I-2719, paragraph 10 et seq. and Case C-68/93 Shevill and Others [1995] ECR I-415, paragraph 19 et seq.
20 — OJ 1979 C 59, p. 26.
21 — See footnote 9 above.
22 — See also the decision in Shevill and Others (paragraph 21), cited above in footnote 19.
23 — Marinari (paragraph 11) and Shevill and Others (paragraph
20), cited above in footnote 19.
24 — See Marinari (paragraph 12) and Shevill and Others (paragraph 22), cited above in footnote 19.
25 — Cited above in footnote 19.
26 — [1990] ECR I-49.
27 — Cited above in footnote 19.
28 — Tortious, delictual or quasi-delictual liability can arise only if there is evidence of a causal link between

the damage and the event in which that damage originates (see Mines de Potasse d'Alsace (paragraph 16), cited above in footnote 9).

29 — See point 32 et seq. above. On the thorny issue of the liability of successive carriers in cases of combined transport, see M. Remond-Gouilloud: Droit Maritime, Pedone, Paris 1993, paragraph 601 et seq.

30 — In my opinion, considering the difficulty in determining the place where the harmful event occurred, the place where the damage occurred cannot be deemed to be that 'place', as suggested by the German Government

31 — See Dumez France and Tromba (paragraphs 16 to 18) and Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 17.

32 — Marinari (paragraph 19), cited above in footnote 19.

33 — Marinari, paragraph 20.

34 — The German Government considers that one must address the question of who owns the goods during their transport. Such a view would however restrict in an unjustified manner the circle of those entitled to invoke Article 5(3) of the Convention. Moreover, determination of this question would make it very difficult to verify whether the court seised of the matter has jurisdiction. As a result, this criterion does not seem to be suitable for the present case.

35 — See in this regard H. Gaudemet-Tallon: Les conventions de Bruxelles et de Lugano, LGDJ, Paris, 1993, paragraph 191.

36 — Whether they are or not genuinely liable for the damage is not relevant here, that is to say in regard to the issue of determining the court having jurisdiction. This question relates to the substance of the case, which the court seised of the matter is not bound to decide in order to determine whether it has jurisdiction or not (see Custom Made Commercial (paragraph 20), cited above in footnote 9), and it will be examined by the court which will be designated as having jurisdiction according to the Convention rules. If the harmful event appears to have actually occurred during the maritime transport and if the carrier is liable for it, the court will uphold the action and hold the defendant liable. If the factual circumstances on which the claim is based are not established or if the damage may not be attributed to the subcontractor (because, for instance, the shipper had chosen inadequate containers) or if there are grounds for exempting the sub-contractor from all liability (for instance, where the damage is due to force majeure), the court will set aside the claim and will, if appropriate, hold the plaintiff liable to pay the legal costs of the proceedings which were superfluous. To apply Article 5(3) of the Convention, one must refer to the facts on which the claim is based, that is the place where, according to the Convention, and according to the evidence put forward by the plaintiff, the harmful event occurred or where the damage occurred. As a prerequisite for the determination of this place, the court seised of the matter must, of course, assess the facts, in accordance with the national court's procedural rules (see Shevill and Others (paragraphs 36 and 41), cited above in footnote 19). This assessment is absolutely necessary to enable the court seised to decide, of its own motion if need be (see Shearson Lehman Hutton (paragraph 10), cited above in footnote 31), on its own jurisdiction.

37 — The referring court may be thinking of the 'indivisibilité' or 'connexité renforcée' under French law (see point 8 and footnote 12 of the Opinion of Advocate General Darmon in Kalfelis, cited above in footnote 12). As will be seen below (point 68 of the present Opinion), the Court rejected that criterion as a criterion for determining international jurisdiction in Kalfelis.

38 — At least unless they have indicated their agreement. In the present case, there is neither a question of prorogation of jurisdiction within the meaning of Article 17 of the Convention nor an implied prorogation of jurisdiction within the meaning of Article 18, since, in any event, the defendants have, in principle, appeared and put forward their defence.

39 — Case 150/80 [1981] ECR 1671.

40 — See P. Gothot and D. Holleaux: La Convention de Bruxelles du 27 septembre 1968, Paris, 1985, paragraph 114, and H. Gaudemet-Tallon, paragraph 223.

41 — See the judgment in Kalfelis, cited above in footnote 12. Academic writing says much the same (see Gaudemet-Tallon and Others, paragraph 224, Gothot-Holleaux and Others, paragraph 111).

42 — It should be recalled that the Court did not follow the view of Advocate General Darmon, who argued that the dispute in the contractual matter, as the main basis, 'channels' with it the additional disputes which arose at the time of the contract, so that jurisdiction could only be determined on the basis of Article 5(1) (see point 28 et seq. of the Opinion).