

European Court of Justice, 7 March 1995, Shevill v Presse Alliance



**LITIGATION – PRIVATE INTERNATIONAL LAW**

**Article 5(3) of the Brussels convention**

- [That rule of special jurisdiction is based on the existence of a particularly close connecting factor between the dispute and the court](#)

It is settled case-law that that rule of special jurisdiction, 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.

- ["place where the harmful event occurred" 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](#)

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, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.

- [In the case of a libel by a newspaper article the place of the event giving rise to the damage, is the place where the publisher of the newspaper in question is established](#)

In the case of a libel by a newspaper article distributed in several Contracting States, the place of the event giving rise to the damage, within the meaning of those judgments, can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation. The court of the place where the publisher of the defamatory publication is established must therefore have jurisdiction to hear the action for damages for all the harm caused by the unlawful act. However, that forum will generally coincide with the head of jurisdiction set out in the first paragraph of Article 2 of the Convention.

- [The courts of each Contracting State in which the victim claims to have suffered injury to his reputation are territorially the best placed to assess the libel committed in that State](#)

It follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim's reputation. In accordance with the requirement of the sound administration of justice, the basis of the rule of special jurisdiction in Article 5(3), the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation are territorially the best placed to assess the libel committed in that State and to determine the extent of the corresponding damage.

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**European Court of Justice, 7 March 1995**

(G.C. Rodríguez Iglesias, F.A. Schockweiler, P.J.G. Kapteyn and C. Gulmann, G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, J.L. Murray, D.A.O. Edward)

In Case C-68/93,

REFERENCE to the Court 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 by the House of Lords for a preliminary ruling in the proceedings pending before that court between

Fiona Shevill,  
Ixora Trading Inc.,  
Chequepoint SARL,  
Chequepoint International Ltd  
and

Presse Alliance SA

on the interpretation of Article 5(3) of the abovementioned Convention of 27 September 1968 (Journal Officiel 1972, L 299, p. 32) 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) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler (Rapporteur), P.J.G. Kapteyn and C. Gulmann (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, J.L. Murray, D.A.O. Edward,

J.-P. Puissochet and G. Hirsch, Judges,

Advocate General: M. Darmon, and subsequently P. Léger,

Registrar: Lynn Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Miss Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Limited, by H.M. Boggis-Rolfe, Barrister, instructed by P. Carter-Ruck & Partners, Solicitors,

° Presse Alliance SA, by M. Tugendhat QC, instructed by D.J. Freeman & Co., Solicitors,

° the United Kingdom, by J.D. Colahan, of the Treasury Solicitor's Department, acting as Agent, and A. Briggs, Barrister,

° the Spanish Government, by A.J. Navarro González, Director General for Community Legal and Institutional Coordination at the Ministry of Foreign Affairs, and M. Bravo-Ferrer Delgado, State Attorney, acting as Agents,

° the French Government, by H. Renie, Deputy Principal Secretary of Foreign Affairs at the Ministry of Foreign Affairs, acting as Agent,

° the Commission of the European Communities, by N. Khan, of the Legal Service, acting as Agent, having regard to the Report for the Hearing,

the Sixth Chamber of the Court having heard the oral observations of Miss Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Limited, represented by H.M. Boggis-Rolfe, Presse Alliance SA, represented by M. Tugendhat QC, the United Kingdom, represented by S. Braviner, of the Treasury Solicitor's Department, acting as Agent, and A. Briggs, Barrister, the German Government, represented by J. Pirrung, Ministerialrat at the Federal Ministry of Justice, acting as Agent, the Spanish Government, represented by M. Bravo-Ferrer Delgado, and the Commission, represented by N. Khan, at the hearing on 21 April 1994,

the Sixth Chamber having heard the Opinion of Advocate General Darmon at the sitting on 14 July 1994, the Sixth Chamber of 5 October 1994 having decided to refer the case back to the Court, having regard to the order of 10 October 1994 reopening the oral procedure,

after hearing the oral observations of Miss Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Limited, represented by H.M. Boggis-Rolfe, Presse Alliance SA, represented by M. Tugendhat QC, the United Kingdom, represented by S. Braviner and A. Briggs, the German Government, represented by M. Klippstein, Richter, acting as Agent, the Spanish Government, represented by M. Bravo-Ferrer Delgado, and the Commission, represented by N. Khan, at the hearing on 22 November 1994,

after hearing the [Opinion of Advocate General Léger](#) at the sitting on 10 January 1995,

gives the following

#### **Judgment**

1 By order of 1 March 1993, received at the Court on 15 March 1993, the House of Lords 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 (Journal Officiel 1972, L 299, p. 32), 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) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), hereinafter "the Convention", seven questions on the interpretation of Article 5(3) of the Convention.

2 Those questions were raised in proceedings brought by Miss Fiona Shevill, a United Kingdom national residing in North Yorkshire, England, Chequepoint SARL, Ixora Trading Inc. and Chequepoint International Limited against Presse Alliance SA, a company incorporated under French law whose registered office is in Paris, and seek to establish which courts have jurisdiction to hear an action for damages for harm caused by the publication of a defamatory newspaper article.

3 According to the documents before the Court, on 23 September 1989 Presse Alliance SA, which publishes the newspaper France-Soir, published an article about an operation which drug squad officers of the French police had carried out at one of the bureaux de change operated in Paris by Chequepoint SARL. That article, based on information provided by the agency France Presse, mentioned the company "Chequepoint" and "a young woman by the name of Fiona Shevill-Avril".

4 Chequepoint SARL, a company incorporated under French law whose registered office is in Paris, has operated bureaux de change in France since 1988. It is not alleged to carry on business in England or Wales.

5 Fiona Shevill was temporarily employed for three months in the summer of 1989 by Chequepoint SARL in Paris. She returned to England on 26 September 1989.

6 Ixora Trading Inc., which is not a company incorporated under the law of England and Wales, has since 1974 operated bureaux de change in England under the name "Chequepoint".

7 Chequepoint International Ltd, a holding company incorporated under Belgian law whose registered office is in Brussels, controls Chequepoint SARL and Ixora Trading Inc.

8 Miss Shevill, Chequepoint SARL, Ixora Trading Inc. and Chequepoint International Ltd considered that the abovementioned article was defamatory in that it suggested that they were part of a drug-trafficking network for which they had laundered money. On 17 October 1989 they issued a writ in the High Court of England and Wales claiming damages for libel from Presse Alliance SA in respect of the copies of France-Soir distributed in France and the other European countries including those sold in England and Wales. The plaintiffs subsequently amended their pleadings, deleting all references to the copies sold outside England and Wales. Since under English law there is a presumption of damage in libel cases, the plaintiffs did not have to adduce evidence of damage arising from the publication of the article in question.

9 It is common ground that France-Soir is mainly distributed in France and that the newspaper has a very small circulation in the United Kingdom, effected

through independent distributors. It is estimated that more than 237 000 copies of the issue of France-Soir in question were sold in France and approximately 15 500 copies distributed in the other European countries, of which 230 were sold in England and Wales (5 in Yorkshire).

10 On 23 November 1989 France-Soir published an apology stating that it had not intended to allege that either the owners of Chequepoint bureaux de change or Miss Shevill had been involved in drug trafficking or money laundering.

11 On 7 December 1989 Presse Alliance SA issued a summons disputing the jurisdiction of the High Court of England and Wales on the ground that no harmful event within the meaning of Article 5(3) of the Convention had occurred in England.

12 That application to strike out was dismissed by order of 10 April 1990. The appeal brought against that decision was dismissed by order of 14 May 1990.

13 On 12 March 1991 the Court of Appeal dismissed the appeal brought by Presse Alliance SA against that decision and stayed the action brought by Chequepoint International Limited.

14 Presse Alliance SA appealed against that decision to the House of Lords pursuant to leave to appeal granted by the latter.

15 Presse Alliance SA argued essentially that under Article 2 of the Convention the French courts had jurisdiction in this dispute and that the English courts did not have jurisdiction under Article 5(3) of the Convention since the "place where the harmful event occurred" within the meaning of that provision was in France and no harmful event had occurred in England.

16 Considering that the proceedings raised problems of interpretation of the Convention, the House of Lords by order of 1 March 1993 decided to stay the proceedings pending a preliminary ruling by the Court of Justice on the following questions:

"1. In a case of libel by a newspaper article, do the words 'the place where the harmful event occurred' in Article 5(3) of the Convention mean:

- (a) the place where the newspaper was printed and put into circulation; or
- (b) the place or places where the newspaper was read by particular individuals; or
- (c) the place or places where the plaintiff has a significant reputation?

2. If and so far as the answer to the first question is (b), is 'the harmful event' dependent upon there being a reader or readers who knew (or knew of) the plaintiff and understood those words to refer to him?

3. If and in so far as harm is suffered in more than one country (because copies of the newspaper were distributed in at least one Member State other than the Member State where it was printed and put into circulation), does a separate harmful event or harmful events take place in each Member State where the newspaper was distributed, in respect of which such Member State has separate jurisdiction under Article 5(3), and if so, how harmful must the event be, or what proportion of the total harm must it represent?

4. Does the phrase 'harmful event' include an event actionable under national law without proof of damage, where there is no evidence of actual damage or harm?

5. In deciding under Article 5(3) whether (or where) a 'harmful event' has occurred is the local court expected to answer the question otherwise than by reference to its own rules and, if so, by reference to which other rules or substantive law, procedure or evidence?

6. If, in a defamation case, the local court concludes that there has been an actionable publication (or communication) of material, as a result of which at least some damage to reputation would be presumed, is it relevant to the acceptance of jurisdiction that other Member States might come to a different conclusion in respect of similar material published within their respective jurisdictions?

7. In deciding whether it has jurisdiction under Article 5(3) of the Convention, what standard of proof should a court require of the plaintiff that the conditions of Article 5(3) are satisfied:

- (a) generally; and
- (b) in relation to matters which (if the court takes jurisdiction) will not be re-examined at the trial of the action?"

#### **The first, second, third and sixth questions**

17 The national court's first, second, third and sixth questions, which should be considered together, essentially seek guidance from the Court as to the interpretation of the concept "the place where the harmful event occurred" used in Article 5(3) of the Convention, with a view to establishing which courts have jurisdiction to hear an action for damages for harm caused to the victim following distribution of a defamatory newspaper article in several Contracting States.

18 In order to answer those questions, reference should first be made to Article 5(3) of the Convention, which, by way of derogation from the general principle in the first paragraph of Article 2 of the Convention that the courts of the Contracting State of the defendant's domicile have jurisdiction, provides:

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

[...]

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

[...]"

19 It is settled case-law (see [Case 21/76 Bier v Mines de Potasse d' Alsace \[1976\] ECR 1735, paragraph 11](#), and [Case C-220/88 Dumez France and Tracoba v Hessische Landesbank \(Helaba\) and Others \[1990\] ECR I-49, paragraph 17](#)) that that rule of special jurisdiction, 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.

20 It must also be emphasized that in *Mines de Potasse d'Alsace* the Court held (at paragraphs 24 and 25) 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, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.

21 In that judgment, the Court stated (at paragraphs 15 and 17) that the place of the event giving rise to the damage no less than the place where the damage occurred could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings.

22 The Court added (at paragraph 20) that to decide in favour only of 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.

23 Those observations, made in relation to physical or pecuniary loss or damage, must equally apply, for the same reasons, in the case of loss or damage other than physical or pecuniary, in particular injury to the reputation and good name of a natural or legal person due to a defamatory publication.

24 In the case of a libel by a newspaper article distributed in several Contracting States, the place of the event giving rise to the damage, within the meaning of those judgments, can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation.

25 The court of the place where the publisher of the defamatory publication is established must therefore have jurisdiction to hear the action for damages for all the harm caused by the unlawful act.

26 However, that forum will generally coincide with the head of jurisdiction set out in the first paragraph of Article 2 of the Convention.

27 As the Court held in *Mines de Potasse d'Alsace*, the plaintiff must consequently have the option to bring proceedings also in the place where the damage occurred, since otherwise Article 5(3) of the Convention would be rendered meaningless.

28 The 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.

29 In the case of an international libel through the press, the injury caused by a defamatory publication to

the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.

30 It follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim's reputation.

31 In accordance with the requirement of the sound administration of justice, the basis of the rule of special jurisdiction in Article 5(3), the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation are territorially the best placed to assess the libel committed in that State and to determine the extent of the corresponding damage.

32 Although there are admittedly disadvantages to having different courts ruling on various aspects of the same dispute, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established.

33 In light of the foregoing, the answer to the first, second, third and sixth questions referred by the House of Lords must be that, on a proper construction of the expression "place where the harmful event occurred" in Article 5(3) of the Convention, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.

#### **The fourth, fifth and seventh questions**

34 The national court's fourth, fifth and seventh questions, which should be considered together, essentially ask whether, in determining whether it has jurisdiction qua court of the place where the damage occurred pursuant to Article 5(3) of the Convention as interpreted by the Court, it is required to follow specific rules different from those laid down by its national law in relation to the criteria for assessing whether the event in question is harmful and in relation to the evidence required of the existence and extent of the harm alleged by the victim of the defamation.

35 In order to reply to those questions, it must first be noted that the object of the Convention is not to unify the rules of substantive law and of procedure of the different Contracting States, but to determine which court has jurisdiction in disputes relating to civil and commercial matters in relations between the Contracting States and to facilitate the enforcement of judgments (see Case C-365/88 *Hagen v Zeehaghe* [1990] ECR I-1845, paragraph 17).

36 Moreover, the Court has consistently held that, as regards procedural rules, reference must be made to the national rules applicable by the national court, provided that the application of those rules does not impair the effectiveness of the Convention (paragraphs 19 and 20 of the same judgment).

37 In the area of non-contractual liability, the context in which the questions referred have arisen, the sole object of the Convention is to determine which court or courts have jurisdiction to hear the dispute by reference to the place or places where an event considered harmful occurred.

38 It does not, however, specify the circumstances in which the event giving rise to the harm may be considered to be harmful to the victim, or the evidence which the plaintiff must adduce before the court seized to enable it to rule on the merits of the case.

39 Those questions must therefore be settled solely by the national court seized, applying the substantive law determined by its national conflict of laws rules, provided that the effectiveness of the Convention is not thereby impaired.

40 The fact that under the national law applicable to the main proceedings damage is presumed in libel actions, so that the plaintiff does not have to adduce evidence of the existence and extent of that damage, does not therefore preclude the application of Article 5(3) of the Convention in determining which courts have territorial jurisdiction to hear the action for damages for harm caused by an international libel through the press.

41 The answer to the referring court must accordingly be that the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seized, provided that the effectiveness of the Convention is not thereby impaired.

#### **Costs**

42 The costs incurred by the United Kingdom, the German, Spanish and French 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 action pending before the national court, the decision on costs is a matter for that court.

#### **On those grounds, THE COURT,**

in answer to the questions referred to it by the House of Lords, by order of 1 March 1993, hereby rules:

1. On a proper construction of the expression "place where the harmful event occurred" in Article 5(3) 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 and by the Convention of 25 October 1982 on the accession of the Hellenic Re-

public, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seized.

2. The criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seized, provided that the effectiveness of the Convention is not thereby impaired.

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#### Opinion of the Advocate-General

Mr President,  
Members of the Court,

1. It very infrequently happens that, by reason of the reopening of the oral procedure and as a result of happenstance in the order of business of the Court, Opinions are successively delivered by two Advocates General in the same case.

2. Having been called upon to state my views following delivery of the Opinion of my predecessor, I have found that my task has been eased; I concur, in effect, with the position adopted by him on 14 July 1994, and will merely add a few observations in answer to certain arguments advanced after the delivery of his Opinion, particularly during the second oral procedure.

3. It will be recalled that the facts are as follows: Miss Shevill, domiciled in the United Kingdom, and three companies established in different Contracting States have brought an action for defamation in the High Court against the company which publishes the newspaper "France-Soir". The High Court has dismissed an objection of want of jurisdiction, which has now come before the House of Lords on appeal. The latter court has sought a preliminary ruling from this Court on seven questions.

4. It cannot be seriously disputed that the defamation action falls within the class of actions concerning liability in tort and delict, and is covered by Article 5(3) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter "the Convention"). (1) (2)

5. Mr Darmon suggests that, apart from the courts of the State in which the defendant is domiciled, the courts having jurisdiction to hear and determine an action for defamation by a press article are either those of the place where the publication was printed, which are competent to award compensation in respect of the whole of the damage arising from the unlawful act, or

the courts of each Contracting State in whose territory the article has been distributed, which have jurisdiction with regard to the specific damage caused in that State. (3)

6. I am satisfied that that view is correct, for the following reasons.

7. As is well known, the jurisdictional options laid down by the rules of special jurisdiction contained in Article 5(3) of the Convention are justified by reasons relating to "... the sound administration of justice and the efficacious conduct of proceedings". (4)

8. In circumstances as complex as those of the present case, the determination of the forum must necessarily result from a compromise. The point has been made that "the objective of the sound administration of justice can be achieved only by maintaining a fine balance between, on the one hand, the requirement of proximity between the forum and the dispute and, on the other, the need for a degree of jurisdictional concentration". (5)

9. Given that the Convention embodies a unified system for the determination of judicial competence, the prime objective must be the designation of a centralized forum. The problem here lies in the special nature of non-material or non-pecuniary damage: it is difficult to identify, assess and compensate. Significantly, in certain areas of intellectual property law, such as that of trade marks, which also recognizes damage of that kind, international jurisdiction in cases of infringement is determined not according to the damage caused but on the basis of the sole causal event: the act of infringement itself. (6)

10. That interpretation accords squarely with the case-law of the Court. Thus, according to Messrs Bischoff and Huet, commenting on the judgment in Rueffer, (7) "... one of the major threads running through the Court's case-law on the interpretation of the Convention is its desire to avoid the 'dismemberment' of the issues referred to it (and the jurisdictional fragmentation which that might cause), and to incline instead towards a degree of unification, by applying the maxim *accessorium sequitur principale* and thereby relating the consequential act or matter back to the causative act or matter". (8)

11. Consequently, Mr Darmon rightly concluded in his Opinion that the courts of the place where the publication was printed ° that is to say, where the causal event occurred ° must be defined as the central forum having jurisdiction to determine the whole of the damage caused throughout the Community.

12. Nevertheless, that forum cannot be the sole forum, for two reasons.

13. First, that forum coincides most frequently ° if not invariably ° with the courts of the State in which the defendant is domiciled. In its judgment in *Mines de potasse d'Alsace*, (9) the Court held that "... to decide in favour only of 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".

14. Second, the courts of the place where the damage arose (that is to say, the place of distribution) cannot be excluded as a potential forum. They must constitute a possible choice for the purposes of ensuring the "... particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile" (10) on which the special jurisdiction attributed by Article 5(3) of the Convention is founded. (11)

15. For example, the victim of defamation arising from the publication in Contracting State A of a newspaper which is also distributed in Contracting State B, where that person is particularly well known, must be able, at his option, to sue in the courts of State A, if he considers that the damage suffered by him extends to the whole of the Community, or in those of State B, if he considers that the damage is limited to the territory of that latter State.

16. For that reason, it is suggested that the plaintiff should be able, at his option, to sue not only in the courts of the defendant's domicile and those of the place in which the causal event occurred but also in the courts of the place in which the damage arose. (12)

17. That solution obviates any risk of forum-shopping: each court before which proceedings are brought in places where distribution has occurred can award compensation for separate damage. Moreover, the courts of the place where the article was printed, having jurisdiction in respect of the whole of the damage, will generally apply, as regards damage arising in other Contracting States, the substantive laws of those States.

18. Such a solution accords with the principle that the rules of special jurisdiction must be interpreted restrictively.

19. It confers competence on the courts which are best qualified to assess the damage arising in their locality: the "particularly close connecting factor" between the court seised and the dispute is undeniable.

20. It is true that one major objection may be raised against such a solution: it gives rise to a potential multiplicity of competent forums, whereas the concentration of proceedings is "... one of the primary objectives of the Convention". (13)

21. The tendency of the Convention is to avoid the proliferation of forums, because such proliferation increases the risk of the irreconcilability of judgments, which constitutes a ground for non-recognition (Article 27(3) and (5) of the Convention) or for refusing an application for enforcement in Contracting States other than that in which such judgments have been given.

22. No such risk exists in the present case.

23. It is true that the judgments of courts seised in different Contracting States may conflict with one another, since they are governed by different substantive laws. They will not be irreconcilable, because they will each relate to compensation for a distinct head of damage (that arising in the territory of the Contracting State concerned).

24. I would add that, in any event, the plaintiff will always have the option of suing in respect of the whole of his claim before the courts of the defendant's domicile and those of the place in which the causal event occurred.

25. I now turn to the four points which seem to me to be central to the matter following the re-opening of the oral procedure in this case.

26. First, the "place where the harmful event occurred", within the meaning of Article 5(3), cannot amount to the place of distribution of the publication. In commenting on this point I will refer to the arguments submitted by the United Kingdom.

27. Second, the courts of the place in which the damage is suffered cannot constitute an appropriate forum.

28. Third, it appears to me that the solution arrived at in the judgment in *Shenavai* (14) must also be rejected.

29. Fourth, the courts of each place in which distribution takes place cannot be competent to determine the whole of the damage.

### **I ° Determination of the "place where the harmful event occurred"**

30. It is well known that, since delivering its judgment in *Mines de potasse d' Alsace*, cited above, the Court has regarded "the place where the harmful event occurred" as an independent concept. (15) It ruled that "Where the place of the happening of the event which may give rise to liability in tort, delict or quasidelict and the place where that event results in damage are not identical ...", that expression covers both "... the place where the damage occurred and the place of the event giving rise to it". (16)

31. The United Kingdom's view as regards defamation is that the place of the causal event is the same as that in which the damage occurred. It is the place in which a defamatory document is communicated to a third party: "... the communication of defamatory material ..., rather than the editing or printing of the newspaper, is the causal event which, both as a matter of English law, and in fact, immediately damages the victim". (17)

"The communication of the material is the immediate and direct cause of the damage. This act, therefore, constitutes a harmful event, and jurisdiction ... may be taken at the place where it occurred". (18)

32. I do not agree.

33. In my view, the situation in this case is the same as that with which the judgment in *Mines de potasse d' Alsace* was concerned, namely the geographical separation between the causal event and the place where the damage occurred. The places where the newspaper was distributed do not coincide with the place where it was published.

34. Consequently, to maintain that the causal event occurred where the article was distributed is to forego a forum which the Convention, as interpreted in *Mines de potasse d' Alsace*, recognizes as being available to the victim.

35. The Court justified that duality of jurisdiction by pointing out, in its judgment in *Mines de potasse d' Alsace*, that:

"... a decision in favour only of the place where the damage occurred would, in cases where the place of the event giving rise to the damage does not coincide with the domicile of the person liable, have the effect of excluding a helpful connecting factor with the jurisdiction of a court particularly near to the cause of the damage". (19)

36. The solution advocated by the United Kingdom effectively confuses (20) the place where the causal event arose with the place in which the damage occurred, and does not take the Court's case-law into account.

37. Consequently, a distinction must be drawn between the place of the causal event, such as that in which the newspaper was printed, and the place in which the harmful event occurred, such as that in which it was distributed.

### **II ° The courts of the place in which the damage is suffered cannot constitute an appropriate forum**

38. In matters relating to tort, delict or quasi-delict, can the words "place where the harmful event occurred" be construed as meaning the place where the damage is suffered, given that such an interpretation would effectively enshrine the concept of the *forum actoris* since the damage is generally suffered by the victim at his domicile? (21)

39. The Convention is based on the general jurisdictional rule *actor sequitur forum rei*, laid down in Article 2. Only in the exceptional cases restrictively enumerated in Articles 5(2), 8 and 14 does the Convention confer jurisdiction on the *forum actoris*, a forum not contemplated by the ordinarily applicable rules of law: "... save in cases for which express provision is made, the Convention appears to be clearly hostile to the attribution of jurisdiction to the courts of the plaintiff's domicile ...". (22)

40. Furthermore, it seems to me particularly difficult to bring the *forum actoris* within the framework of the special jurisdiction established by Article 5(3), which makes no express provision for it. That jurisdiction constitutes a derogation from the principle that jurisdiction is vested in the courts of the State of the defendant's domicile, and as such must be interpreted restrictively. (23)

41. In matters relating to liability in tort or delict, the Court has never attributed jurisdiction to the courts of the place where the damage is suffered. It has even formally excluded such jurisdiction in the case of an indirect victim. (24) Advocate General Darmon has shown, in his Opinion in the *Marinari* case, (25) currently at the stage of deliberation, that the rationale of Article 5(3) is based not on any compelling need to protect the victim but 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 ...", (26) and that the courts of the place where the damage was suffered do not meet that requirement.

42. Consequently, I am unable to see how jurisdiction to hear and determine an action for compensation for non-pecuniary damage resulting from defamation can vest in the courts of the place where the damage is suffered, when such special jurisdiction is excluded in

actions for compensation for physical damage. Is it conceivable, for example, that a German tourist who has been seriously injured in an accident in Spain should have to sue in the courts of that State ° Spain being the place where the damage occurred and where the causal event took place ° whereas the victim of defamation perpetrated by a publication should enjoy the benefit of the forum actoris?

43. True, it could be maintained that the victim of a defamatory press article is the target of an act which he neither desired nor sought, and that there is no risk that, in conferring jurisdiction on the courts of his domicile, the Court is enabling the victim to choose his forum. Can it be said, however, that the victim of physical damage desired or sought to any greater extent the act from which he suffered? Why should the Court grant to the former a privilege which the Brussels Convention denies to the latter?

44. Lastly, it might be thought that damage as specific as an attack on a person's reputation or honour is inseparable from that person and that it must necessarily occur in the place where he resides.

45. I am convinced that in such circumstances the place where the damage occurs coincides with the territory in which the publication is distributed. The damage is severable from the forum of the victim's domicile, which, as the United Kingdom has clearly shown, (27) does not necessarily have any connection with the damage. (28)

46. Finally, the adoption of the forum of the place where the damage is suffered ° and thus of the forum actoris ° would raise a particular problem in the dispute pending before the national court. Three of the four plaintiffs in the main proceedings are legal persons. How can their domicile be determined? Is it their seat or the place where they maintain their principal establishment?

47. The Convention does not define the domicile of legal persons any more than it defines that of natural persons. Article 53 provides that the seat of a company or other legal person is to be treated as its domicile and that, in order to determine that seat, "... the court shall apply its rules of private international law". The solutions applied by the laws of the different Contracting States vary greatly. (29) As has been pointed out, "There is the risk that those differences may have unfortunate results", (30) particularly as regards concurrent jurisdictions. Regrets have thus been expressed concerning "the absence of any uniform conflicts rule which is capable of being applied with certainty to any given case". (31)

48. Even though this problem is specific to the dispute before the national court, I consider that it represents an additional argument for rejecting the idea that competence vests in the courts of the place where the damage is suffered.

### **III ° It is inappropriate to apply the solution arrived at in Shenavai**

49. In its judgment in Shenavai, cited above, the Court applied the maxim *accessorium sequitur principale*: "... in other words, where various obligations are at issue, it

will be the principal obligation which will determine its jurisdiction". (32) The Court concluded from this that:

"For the purposes of determining the place of performance within the meaning of Article 5(1) of the Convention ..., the obligation to be taken into consideration in a dispute concerning proceedings for the recovery of fees commenced by an architect commissioned to draw up plans for the building of houses is the contractual obligation which forms the actual basis of legal proceedings". (33)

50. The defendant in the present case suggests that the Court should apply the same principle here. (34)

51. That possibility has been convincingly dismissed in the earlier Opinion. (35) I would add that the Court has previously declined to apply the principle *accessorium sequitur principale* in the context of Article 5(3). In its judgment in *Kalfelis*, (36) it held that a court seised of an action by virtue of the special jurisdiction conferred by Article 5(3) does not also have jurisdiction "over that action in so far as it is not so based". (37)

52. Lastly, how can the place where the main damage occurs be determined without appraising the reputation of the defamed person in the various Contracting States concerned, without calculating the number of copies distributed in each of those States, in short, without appraising the substance of the dispute? The Court has expressed the view that an interpretation of Article 5 consistent with "the purposes and spirit of the Convention" must enable "... the national court to rule on its own jurisdiction without being compelled to consider the substance of the case". (38)

53. Otherwise, a plaintiff could no longer be certain that the court in which he sues would accept jurisdiction. That would run counter to the requirement that jurisdictional rules must be predictable, as the Court ruled in *Roesler* (39) and in *Handte*, (40) cited above.

### **IV ° The courts of each Contracting State in whose territory the article has been distributed are competent to determine the specific damage caused in that State**

54. In matters relating to liability in tort and delict, "(the) jurisdiction (of the court of the place where the damage occurred) is ... by its nature functionally limited. According to the judgment in *Bier v Mines de potasse d'Alsace*, it is founded solely on the requirements of the sound administration of justice, and more precisely on the need for the existence of a connecting factor between the dispute and the court which is called upon to hear and determine it, particularly as regards matters of evidence and procedural organization". (41)

55. It follows that no sufficient link exists between the courts of a Contracting State and damage caused in another Contracting State, inasmuch as that damage is not connected with those courts by virtue either of the place where it occurred or of the place where the wrongful act was committed. The link of proximity between the forum and the dispute required by the Court's case-law exists only in respect of damage occurring in the territory of the State of the forum seised.

56. It is clear that any contrary solution would encourage forum shopping: the English courts could even find

themselves in danger, by reason of their "generosity" towards victims of defamation, of becoming the natural choice of forum in such matters.

57. The need to prevent any risk of forum shopping is particularly great when the subject-matter of the dispute is an area in which the substantive law applying in the Contracting States is not harmonized and gives rise to solutions which are markedly divergent from one Contracting State to another. That is particularly so in the case of the law of defamation.

58. For those reasons, I adopt the wording of the operative part of the Opinion delivered on 14 July 1994 by Mr Darmon.

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(\*) Original language: French.

(1) ° As amended by the Accession Convention of 25 October 1982 (OJ 1982 L 388, p. 1).

(2) ° As to this point, see paragraph 9 of the Opinion of Advocate General Darmon and paragraph 11 of the Commission's observations.

(3) ° Paragraph 71 of Mr Darmon's Opinion.

(4) ° Paragraph 17 of the judgment in Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49.

(5) ° P. Bourel: *Du rattachement de quelques délits spéciaux en droit international privé*, Recueil des cours, Académie de droit international de La Haye, 1989, II, volume 214, point 136, p. 366.

(6) ° See Articles 93(5) and 94 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

(7) ° Case 814/79 [1980] ECR 3807.

(8) ° *Journal du droit international*, 1982, No 1, p. 464, at p. 472 (emphasis added).

(9) ° Case 21/76 [1976] ECR 1735, paragraph 20.

(10) ° Judgment in *Dumez France and Tracoba*, cited above (footnote 4), paragraph 17.

(11) ° *Ibid.*

(12) ° See Mr Darmon's Opinion, paragraph 58.

(13) ° P. Bourel, *op. cit.*, paragraph 188, p. 357.

(14) ° Case 266/85 [1987] ECR 239.

(15) ° See Mr Darmon's Opinion, paragraph 21 et seq.

(16) ° Operative part of the judgment in *Mines de potasse d'Alsace*.

(17) ° Paragraph 16 of the United Kingdom's observations.

(18) ° *Ibid.*, paragraph 17.

(19) ° Paragraph 21 (emphasis added).

(20) ° See in that regard the observations of the Commission, paragraphs 19 and 19a, and of the defendant, paragraph 2.21.

(21) ° Opinion of Advocate General Darmon in Case C-364/93 *Marinari*, paragraph 31.

(22) ° Paragraph 17 of the judgment in Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139.

(23) ° Judgments in Cases 189/87 *Kalfelis* [1988] ECR 5565 (paragraph 19) and C-26/91 *Handte* [1992] ECR I-3967 (paragraph 14).

(24) ° Judgment in *Dumez France and Tracoba*, cited above.

(25) ° Cited in footnote 21 above, paragraph 16.

(26) ° Paragraph 17 of the judgment in *Dumez France and Tracoba*, cited above.

(27) ° Paragraph 20 of its observations and paragraph 46 of Mr Darmon's Opinion.

(28) ° As to this point, compare the analysis of the Supreme Court of the United States in *Keeton v Hustler Magazine Inc.*, 465 US 770, 79 L Ed 2d 790, 104 S Ct 1473, particularly [10]: There is no justification for restricting libel actions to the plaintiff's home forum. The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has certain minimum contacts ... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice ...

(29) ° These are listed in Rideau and Charrier: *Code de procédures européennes*, Litec, 1st edition, p. 461.

(30) ° H. Gaudemet-Tallon: *Les conventions de Bruxelles et de Lugano*, LGDJ, 1993, no 73. See also Rideau and Charrier, *op. cit.*, p. 461, and Beraudo: *Convention de Bruxelles*, J.Cl.Pr.Civ., fasc. 52-1, no 28.

(31) ° Beraudo, *op. cit.*, *ibid.*

(32) ° Paragraph 19.

(33) ° Operative part.

(34) ° See also A. Huet: *Journal de droit international*, 1994, p. 169, and T. Hartley: *Article 5(3) of the Brussels Convention*, *European Law Review*, 1992, volume 17, p. 274.

(35) ° Paragraph 80 et seq.

(36) ° Cited above, footnote 23.

(37) ° Paragraph 21.

(38) ° Judgment in Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913, paragraph 20. See also the judgment in Case 34/82 *Peters* [1983] ECR 987, paragraph 17, final sentence.

(39) ° Case 241/83, [1985] ECR 99, paragraph 23.

(40) ° Cited above, footnote 23, paragraph 19.

(41) ° P. Bourel, *op. cit.*, paragraph 115, p. 355.