Date: 17.09.2002
Country: Court of Justice of the European Communities
Number: C-334/00
Court: Court of Justice of the European Communities
Parties: Fonderie Officine Meccaniche Tacconi SpA vs Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)
Citation: http://www.unilex.info/case.cfm?id=813

JUDGMENT OF THE COURT

17 September 2002

[...]

In Case C-334/00,

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 Corte suprema di cassazione (Italy) for a preliminary ruling in the proceedings pending before that court between

Fonderie Officine Meccaniche Tacconi SpA

and

Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS),

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OPINION OF ADVOCATE GENERAL
GEELHOED

[...]

III - Factual and procedural background

The factual background

10.
The facts in the main proceedings are as follows.
11.
Fonderie Officine Meccaniche Tacconi (hereinafter: 'Tacconi') and HWS Heinrich Wagner Sinto Maschinenfabrik GmbH (hereinafter: 'HWS') negotiated a contract for the sale to Tacconi of an automatic moulding plant. HWS is the manufacturer of the moulding plant. The contract was to be concluded by B.N. Commercio e Finanza Spa (hereinafter: 'BN'), a leasing company, and HWS. Tacconi had, with the consent of HWS, concluded a leasing contract in respect of the moulding plant with BN. The moulding plant was subsequently never delivered.
12.
The parties disagree as to whether or not a contract was entered into between BN and HWS. Tacconi takes the view that it was not because HWS refused to sell the moulding plant to BN. Tacconi also claims that during the negotiations HWS rejected each of the offers made. Then, following protracted negotiations, it had suddenly broken off negotiations. HWS, on the other hand, takes the view that a contract was indeed entered into.

Proceedings

13.
On 23 January 1996 Tacconi summoned HWS, which is established in Germany, to appear before the Tribunale di Perugia in Italy. Tacconi asked the court to declare that the contract between BN and HWS for the purchase of the plant had not been concluded. It based its claim on what it considered to be HWS's unjustified refusal to sell the plant to BN. Tacconi submitted that during the negotiations HWS had failed to fulfil its obligations and act in good faith by rejecting each of the offers made and then, following protracted negotiations, suddenly breaking off negotiations. The legitimate expectation held by Tacconi, which had trusted that the contract would be concluded, had thereby been dashed. Consequently, Tacconi claimed that HWS had incurred pre-contractual liability under Article 1337 of the Codice Civile. (4) At first instance Tacconi claimed that the court should order HWS to redress all the damage caused to it, calculated at ITL

3 000 000 000.
14.
In its defence HWS contended that it had concluded a contract with Tacconi and claimed that the Italian courts lacked jurisdiction on account of the arbitration clause, contained in the general terms and conditions of the contract, under which a foreign court was chosen. In the alternative, it asked the Tribunale di Perugia to declare that, under Article 5(3) of Convention, Tacconi lacks locus standi. With regard to the substance, it contended that the court should dismiss the applicant's claims. By way of further alternative and as a counterclaim, HWS contended that the court should order Tacconi to pay DEM 450 248.39.
15.
It should be noted that HWS does not dispute Tacconi's claim that it broke off negotiations suddenly. Nor does it do so in the proceedings before this Court.
16.
On 16 March 1999 Tacconi brought an action before the Corte Suprema di Cassazione under Article 41 of the Codice di Procedura Civile for a declaration as to which court has jurisdiction. It claimed that the court should declare that the Italian courts have jurisdiction to hear and determine the dispute. Tacconi contended that the decision on awarding jurisdiction had to be taken in accordance with the rules of the Convention. The action which it had brought concerned a matter relating to delict or quasi-delict within the meaning of Article 5(3) of the Convention. Under this article, the court for the place where the harmful event occurred has jurisdiction. 'Harmful event' means the losses to the person claiming to have suffered damage. On those grounds, according to Tacconi, the action was properly brought before the Tribunale di Perugia. Tacconi is established in Perugia and that is the place where the damage which Tacconi is claimed to have suffered occurred.
17.
HWS made a counterclaim in which it submitted that the contract was entered into by letter of 28 April 1995 which was sent to confirm Tacconi's order of 27 April 1995. Consequently, the Italian courts lack jurisdiction since a foreign forum was awarded jurisdiction in the general terms and conditions of the contract.

The question referred for a preliminary ruling

18.
By order of 9 June 2000, lodged at the Court Registry on 11 September 2000, the Corte Suprema di Cassazione (Italy) referred the following question for a preliminary ruling:

'Does an action against a defendant for pre-contractual liability fall within the scope of matters relating to delict or quasi-delict (Article 5(3) of the Convention)? If not, does it fall within the scope of matters relating to a contract (Article 5(1) of the Convention)? If it does, what is "the obligation in question"? Otherwise, is the general criterion of "domicile of the defendant" the only criterion applicable?'

19.
In the order for reference the national court takes the view that the liability does not derive from a contract. According to Tacconi, no contract was concluded with HWS. Nevertheless, in Italy pre-contractual liability is governed by the law on contracts. Consequently, it is linked to matters relating to a contract within the meaning of Article 5(1) of the Convention. The criterion for special jurisdiction provided for in this provision does not appear, however, to be applicable to pre-contractual liability. In the view of the national court, such liability does not arise from the failure to fulfil a contractual obligation but rather from the failure to observe the legal requirement to act in good faith when negotiating and agreeing a contract.

Proceedings before the Court

20.
The parties to the main proceedings and the Commission have submitted written observations to the Court. No hearing has been held.

[...]

V - Observations submitted

46.
Tacconi contends that pre-contractual liability must be regarded as non-contractual and therefore constitutes a delict or quasi-delict. It adds that during the pre-contractual stage there is no contractual link between the parties.
47.
Tacconi construes the case-law of the Court as meaning that the concept 'matters relating to a contract' cannot cover a situation in which there is no obligation freely assumed by one party towards another. (40) Tacconi contends that at the pre-contractual stage there is no contractual link between the parties and if no agreement results from the negotiations no contractual obligation can arise therefrom in respect of the parties.
48.
HWS argues that, according to the case-law of the Court, the Convention must be interpreted independently, that is to say without having regard to the interpretation thereof in accordance with applicable national law. Consequently, HWS

considers that no importance is attached to academic writings and Italian case-law according to which pre-contractual liability is equivalent to liability arising from a delict or quasi-delict. HWS recalls Kalfelis which held that it must be recognised that the concept of 'tort, delict and quasi-delict' 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). (41) In the view of HWS, Article 5(1) of the Convention does not apply because it presupposes the existence of a contract and the action brought by Tacconi relates precisely to the fact that no contract was entered into.
49.
Furthermore, HWS contends that the difference between pre-contractual liability and liability arising from a delict and quasi-delict within the meaning of Article 5(3) is that the latter applies to any person who infringes the general rule of neminem laedere (inflict no damage on another), and thus any person who commits an offence or infringes an absolute right. Pre-contractual liability, on the other hand, can only be invoked against a person who has a particular relationship with the injured party, that is to say a person involved in negotiations over a contract. HWS considers that a person entering into negotiations with another accepts the risk that the other party might infringe the rules relating to good faith and thereby cause it damage.
50.
HWS concludes that the criteria of special jurisdiction do not apply to pre-contractual liability and therefore the general rule of jurisdiction in Article 2 is applicable in this case. (42) Consequently, it should have been sued in a German court.
51.
In its observations the Commission gives an account of the case-law of the Court. It points to the restrictive interpretation of Article 5 of the Convention, the independent meaning of the concepts of 'matters relating to a contract' and 'matters relating to tort, delict or quasi-delict' and the requirement that a normally well-informed defendant be able reasonably to predict before which courts, other than those of the State in which he is domiciled, he may be sued. In the view of the Commission, it is also evident from Handte that the concept 'matters relating to a contract' does not cover a situation in which there is no obligation freely assumed by one party towards another. (43) If this concept did cover such a situation, it would be contrary to the principle of legal certainty. In the view of the Commission, the Court considers that therefore the element of freedom forms the basic condition governing entering into a contract.
52.
The Commission further contends that the concept 'matters relating to a contract' is open to a literal interpretation. The concept 'matters relating to tort, delict or quasi-delict', however, is not. It takes the view that the Court used liability as a common denominator in respect of tort, delict or quasi-delict for that reason. This means that actions which do not explicitly form part of contractual law are covered by 'matters relating to tort, delict or quasi-delict'. This interpretation provides clear criteria for the application of special jurisdiction.
53.
The Commission considers that it is advisable to draw a distinction between actions aimed at enforcing contractual obligations and actions aimed at establishing the liability of the defendant. With regard to the first category of actions, the particular nature of the contractual obligation justifies the choice of bringing proceedings before the courts for the place of performance of the obligation in question. As regards the second category of actions, the courts for the place where the harmful event occurred are, in general, best placed to entertain such proceedings.
54.
In the light of the foregoing, the Commission concludes that an action for pre-contractual liability falls within the scope of matters relating to delict or quasi-delict within the meaning of Article 5(3).

VI - Pre-contractual liability

55.
It follows from the principle of freedom of contract that each person is free to choose with whom and on what matter he wishes to enter into negotiations and the point to which he wishes to continue negotiations. Therefore, in principle persons are free to break off negotiations whenever they wish to so without incurring liability in that regard. However, the freedom to break off negotiations is not absolute. Article 2.15 of the UNIDROIT principles provide that 'a party who ... breaks off negotiations in bad faith is liable for losses caused to the other party'. According to the explanatory note to this article, negotiations can reach a point after which they may no longer be broken off abruptly and without justification. When such a point is reached depends firstly on the extent to which the other party, as a result of the conduct of the first party, had reason to rely on the positive outcome. Secondly, it depends on the number of issues on which the parties had already reached agreement. However, where a party breaks off negotiations abruptly and without justification, it must compensate for the loss incurred by the other party.
56.
Thus, pre-contractual liability arises where negotiations on a contract are broken off without justification.
57.
This is the first time that the Court has had to deal, in connection with the Convention, with the legal nature of the liability which can arise between two potential contracting parties during negotiations over a contract. The Convention lays down no rules on liability arising from pre-contractual relations per se. The clearest indication is still to be found in the Evrigenis Report which provided clarification on the Convention on the occasion of the accession of Greece. This report states that pre-contractual relations can fall within the scope of Article 5(1). (44) However, the report does not state the foundation on which this view is based. Furthermore, there are extensive academic writings on pre-contractual liability in the Member States and also in connection with international private law. The academic writings do not follow the same lines in all the Member States.
58.
In most legal systems a party which breaks off negotiations without just cause, having created an expectation on the part of the other party that a contract will be entered into, is liable for the negative contractual interest. In general, such interest includes not only the expenses but also the lost opportunities to conclude another contract with a third party.

Negotiations which are broken off dash an expectation that they will lead to a result. In this respect I will briefly examine some of these legal systems below. This brief account of the law relating to pre-contractual liability is certainly not intended to provide an exhaustive picture of the law in the Member States as it now stands, but merely serves as an illustration. The Court may use national law as a source of inspiration when answering the questions referred to it.
59.
In Italian law Article 1337 of the Codice Civile contains a specific provision governing pre-contractual liability. Parties must act in good faith during negotiations over and the formation of a contract. A party who breaks off negotiations without just cause, having created an expectation that a contract will be entered into, is liable for the negative contractual interest. Such negative interest specifically includes lost opportunities in addition to expenses. (45) The positive interest is not compensated for, that is to say the other party need not be placed in the situation in which it would have been had the contract actually been concluded. The legal requirement which is not observed when negotiations are broken off abruptly is intended to prevent the other party suffering harm as a result of the fact that it is involved in negotiations and not because the negotiations did not ultimately result in a contract. Fault is not required.
60.
In German law a party who culpably breaks off negotiations without just cause or on irrelevant grounds, having created an expectation on the part of another party that a contract will certainly be entered into, is liable for the negative contractual interest. Usually the liability is based on the doctrine of culpa in contrahendo: a party who suddenly breaks of negotiations is liable for the culpable non-fulfilment of the obligation to take account of the other party's interests. (46) Therefore, in German law almost the same criterion applies as in Italy, except that the requirement relating to fault has a role to play.
61.
French law does not lay down provisions on pre-contractual negotiations and entering into contracts. Pre-contractual liability is based on the doctrine of abuse of rights in conjunction with reasonableness and equity. It arises wherever a party suddenly breaks off negotiations without just cause at a time when the other party could legitimately expect that a contract would be entered into. As long as no contract has been entered into, the harm which results from the pre-contractual stage is regarded as covered by the law governing tort, delict or quasi-delict. The loss suffered by the other party must be compensated for. It is uncertain whether this also covers lost opportunities (‘perte d'une chance’) because it is not established that a contract with a third party has actually been entered into. Furthermore, the French courts appear reluctant to declare that pre-contractual liability exists as they do not wish to curb the principle of freedom of contract.
62.
Netherlands law is different. Liability is possible before the other party can legitimately expect that the contract will be entered into. Under Netherlands law, a stage can be reached in negotiations at which they may no longer be broken off. However, where this occurs, liability for positive contractual interest is possible. (47) Three stages in the negotiations are identified. In the first stage negotiations may be broken off without liability being incurred. This is followed by a stage during which negotiations may be broken off, but the costs incurred by the other party must be compensated for. Finally, there is the concluding stage at which negotiations may no longer be broken off. This is reached when the other party can legitimately expect that a contract will be entered into or there are no other circumstances which justify the negotiations being broken off. If a party breaks off negotiations at this stage, it can even be liable for lost profit. In Netherlands academic writings it is argued that at this stage actions may be subsumed under Article 5(1) of the Convention on account of the ‘closeness of the links’ which has developed between the parties. (48)
63.
Liability arising from negotiations which have been broken off has not been recognised in United Kingdom law since time immemorial. The risk that a party will break off negotiations before a contract has been entered into is regarded as a ‘business loss’. The continental notion of pre-contractual good faith per se is unknown in the United Kingdom. There is no obligation to negotiate in conformity with the requirements of reasonableness and equity. However, neither of these facts mean that there are no rules governing conduct during the pre-contractual stage. For example, liability can be based of the doctrine of ‘misrepresentation’. (49) However, I consider that the legal concept of ‘estoppel by representation’ (50) is more important. In accordance with this legal concept, a party may not withdraw a previous statement if the other party has suffered harm as a result of that statement. Thus, this legal concept is - albeit not identical - comparable with notions in continental law such as the protection of good faith and legitimate expectations. Finally, it should be noted that in so far as liability arises as a result of negotiations which have been broken off, this is based on actions which constitute a ‘tort’. A clear distinction must be drawn between such liability and liability in connection with failure to fulfil contractual obligations.
64.
I now turn to the relevance of the abovementioned legal principles to the answer to the question which has been referred in the light of the Convention.
65.
To that end, I will divide the negotiation process into two stages. During the first stage freedom of contract is paramount. The parties may break off negotiations. However, during the second stage the parties may no longer break off negotiations. The expectation which been created on the part of the other party and the harm which it suffers because negotiations are broken off can give rise to liability. In any event, that liability includes the negative contractual interest, that is to say the expenses incurred and the opportunities lost. In general this liability does not go so far as to enable the other party to demand that the contract nevertheless be concluded. (51)
66.
It is possible that a further, third stage should be identified - which I deduce from the legal principles in the Netherlands. It is possible that the links between the parties are so close that a positive contractual interest can also be claimed. This involves either an action for the contract nevertheless to be concluded or compensation which is the equivalent thereto.

VII - Assessment

[...]

The importance of pre-contractual relations

75.
As the national court emphasises, the pre-contractual liability derives from the failure to observe a legal requirement and not from the failure to fulfil a contractual obligation. That is because there is no contract. In the present case the legal requirement derives from Article 1337 of the Italian Codice Civile under which parties must act in good faith during negotiations over a contract.
76.
I consider that this requirement is a generally applicable rule of conduct enshrined in law which does not differ from other rules of conduct derived from law. Under certain circumstances failure to comply with such rules of conduct can constitute a delict or quasi-delict. Consequently, Article 5(3) of the Convention should apply.
77.
That would make it possible to give a simple answer to the question referred by the national court. However, I consider that the issue of pre-contractual liability is more complex in nature. In my view, the decisive factor as regards the application of the Convention is whether an agreement has been entered into between the parties. Have the parties assumed obligations towards one another? Where an obligation has been freely assumed, Article 5(1) applies. I would draw a distinction between obligations and expectations - legitimate or otherwise - which the parties have in relation to one another. Such expectation can consist in the negotiations not being broken off suddenly or, for example, negotiations being held at the same time - but not openly - with a competitor. I consider that the dashing of such expectations constitutes a delict or quasi-delict.
78.
The obligation referred to in the above paragraph need not relate to the actual contract on which negotiations are being held. It can also relate to a preformation contract under which one of the parties makes a start on performance. By way of illustration, I refer to the case in the main proceedings. Even before there is a complete contract for delivery of the moulding plant by HWS, which also lays down all the financing terms and conditions, for example, an agreement may possibly exist between the parties under which HWS is to make a start on performance by, for example, reserving production capacity or ordering materials. Disputes which subsequently arise could, possibly, fall within the scope of Article 5(1) of the Convention.
79.
The criteria laid down in Article 17 of the Convention could also be relevant in answering the question concerning the time at which an obligation arises. This relates in particular to the criteria referred to at Article 17(b) and (c). Where there is no agreement in writing (or evidenced in writing), the existence of an obligation can be inferred from:
- the practices which the parties have established between themselves, or,
- in international trade or commerce, the usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
80.
I will clarify my view by reference to the various stages in the negotiating process which I identified in Section VI of this Opinion. (54)
81.
During the first stage of the negotiating process the parties may break off negotiations without incurring liability. At this stage Article 5 of the Convention is irrelevant. There is no delict or quasi-delict, or an agreement.
82.
During the second stage an expectation has been created which can result in harm. At this point a party may no longer break off negotiations suddenly. If it nevertheless does so, it commits, under certain circumstances, a delict or quasi-delict. It can then be ordered to compensate for the expenses incurred by the other party or to compensate for the opportunities lost by the other party.
83.
The third stage is the stage at which there is still no (signed) contract, but at which it can be inferred from the circumstances that an obligation has been assumed between the parties. At this stage Article 5(1) of the Convention can apply. Such circumstances might lie in the fact that agreement has been reached on the main aspects of a contract - the draft of the contract and the price - but negotiations are still under way on the other terms and conditions. It is also possible that one of the party has already made a start on performing the contract since it was able to deduce from the conduct of the other party that it intended to conclude a contract. Finally, I refer to the circumstances set out in Article 17 of the Convention.
84.
I am aware that at the third staged described here there is almost a complete contract. The extent to which this stage is regarded as pre-contractual depends on the content of national private law.
85.
I conclude that an action for pre-contractual liability can be regarded as falling within the scope of matters relating to delict or quasi-delict within the meaning of Article 5(3) of the Convention. Where such action relates to an obligation which the other party has assumed towards the claimant, it must also be regarded as falling within the scope of matters relating to a contract within the meaning of Article 5(1) of the Convention.

VIII - Conclusion

86.

In the light of the foregoing, I propose that the Court should answer the question referred by the Corte Suprema di Cassazione as follows:

”An action for pre-contractual liability can be regarded as falling within the scope of matters relating to delict or quasi-delict within the meaning of Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. Where such action relates to an obligation which the other party has assumed towards the claimant, it must also be regarded as falling within the scope of matters relating to a contract within the meaning of Article 5(1) of that Convention.”

1: - Original language: Dutch.
2: - OJ 1972 L 299, p. 32. The consolidated version of the Convention, which has since been amended, is to be found in OJ 1998 C 27, p. 1.
3: - OJ 2001 L 12, p. 1.
4: - In this connection Tacconi claims that there is culpa in contrahendo on the part of HWS.
5: - Furthermore, Regulation No 44/2001 considers that the sound operation of the internal market is a principal objective.
6: - Case C-295/95 Farrell v Long [1997] ECR I-1683, paragraph 13.
7: - Case C-68/93 Shevill and Others v Presse Alliance [1995] ECR I-415, paragraph 39.
8: - See inter alia Case C-51/97 Réunion européenne and Others v Spliethoff's Bevrachtingskantoor and Another [1998] ECR I-6511, paragraph 15.
9: - Case 34/82 Peters [1983] ECR 987, paragraph 9.
10: - This the Court confirmed inter alia in Case 9/87 Arcado v Haviland [1988] ECR 1539, paragraph 11, and Case C-26/91 Handte v Traitements Mécano-chimiques des Surfaces [1992] ECR I-3967.
11: - See Case 189/87 Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and Others [1988] ECR 5565, paragraph 15.
12: - Case 14/76 De Bloos v Société en commandite par actions Bouyer [1976] ECR 1497, paragraph 9.
13: - Case 266/85 Shenavai v Kreischer [1987] ECR 239, paragraph 19.
14: - Kalfelis, cited in footnote 11, paragraph 20.
15: - Kalfelis, cited in footnote 11, paragraph 19.
16: - Cited in footnote 9, paragraph 12 of the judgment.
17: - Case 21/76 Bier v Mines de potasse d'Alsace [1976] ECR 1735 and Case C-220/88 Dumez France and Tracoba v Hessische Landesbank and Others [1990] ECR I-49.
18: - See the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-440/97 GIE Groupe Concorde and Others v The Master of the vessel ‘Suhadiwarno Panjan’ and Others [1999] ECR I-6307, paragraphs 64 and 65.
19: - Case 220/84 AS-Autoteile Service v Malhé [1985] ECR 2267, paragraph 15.
20: - See, in that regard, P. Vlas, Forumshopping in EEX en EVEX, Aansprakelijkheid en Verzekering, volume 3, 1995, p. 112-118.
21: - Kalfelis, cited in footnote 11, paragraph 19.
22: - See, for example, Case C-89/91 Shearson Lehman Hutton v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen [1993] ECR I-139, paragraph 16, and Handte, cited in footnote 10, paragraph 14.
23: - Cited in footnote 17, paragraphs 16 and 19. That judgment was concerned with the provisions regarding agreements concluded by consumers. See, to the same effect, Case C-412/98 Group Josi Reinsurance Company v Universal General Insurance Company [2000] ECR I-5925, paragraph 50.
24: - Opinion in Case C-96/00 Gabriel v Schlank & Schick [2002] ECR I-6367.
25: - See Case 38/81 Effer v Hans-Joachim Kantner [1982] ECR 825, paragraph 7, and the Opinion of Advocate General Reischl in that case.
26: - De Bloos, cited in footnote 12, paragraph 11, and confirmed in Shenavai, cited in footnote 13, paragraph 20.
27: - Case 133/81 Ivenel v Schwab [1982] ECR 1891.
28: - See Effer, cited in footnote 25, paragraph 7.
29: - Cited in footnote 12. See paragraphs 10 and 11 of the judgment.
30: - Advocate General Lenz shares this view. See Opinion in Case C-288/92 Custom Made Commercial v Stawa Metallbau [1994] ECR I-2913.
31: - Peters, cited in footnote 9.
32: - See Custom Made Commercial, cited in footnote 30, paragraph 15.
33: - See Case 12/76 Industrie Tessili Italiana Como v Dunlop [1976] ECR 1473, paragraph 13.
34: - See Kalfelis, cited in footnote 11, paragraph 18.
35: - Case C-364/93 Marinari v Lloyds Bank and Zubaidi Trading Company [1995] ECR I-2719, paragraph 18.
36: - See Bier, cited in footnote 17, paragraph 11.
37: - Cited in footnote 17, paragraph 20.
38: - See Bier, cited in footnote 17, paragraph 15 et seq.
39: - Cited in footnote 35, paragraph 21.
40: - It refers to Handte, cited in footnote 10, paragraph 15.
41: - Cited in footnote 11, paragraph 17.
42: - HWS has clearly abandoned its view that pre-contractual liability is connected with contractual obligation.
43: - Cited in footnote 10, paragraph 15.
44: - The Evrigenis Report, OJ 1986 C 298, paragraph 49.
45: - According to the UNIDROIT Principles, losses are to be understood as meaning expenses incurred by the other

party and the lost opportunity to conclude another contract with a third person.
46: - In Germany there is no consensus as to whether and to what extent fault is required.
47: - See judgment of the Hoge Raad of 18 June 1982, Nederlandse Jurisprudentie 1983, p. 723 (Plas/Valburg).
48: - See the note by Schultz on the Peters judgment (cited in footnote 9), Nederlandse Jurisprudentie 1983, p. 644, and J.E.J.Th. Deelen, IPR en de afgebroken onderhandelingen, Studiekring 'Prof. Mr. J. Offerhaus', Reeks Handelsrecht No 18, 1984, p. 126.
49: - Compare this with the continental doctrine of error.
50: - In addition, United Kingdom law also provides for 'promissory estoppel'. In accordance with this legal concept, a party can be held to a promise which it made to another party. 'Promissory estoppel' is usually invoked in existing contractual relations. Normally it cannot be used in respect of pre-contractual liability.
51: - This also applies - and to an even greater extent - to the system in the United Kingdom which applies different legal principles from the continental legal systems described above.
52: - Indeed, the framer of the Convention was clearly hostile towards this (see Dumez France and Tracoba, cited in footnote 17, and Group Josi, cited in footnote 23).
53: - Cited in footnote 10, paragraph 15.
54: - See paragraphs 65 and 66 above.

* *

JUDGMENT OF THE COURT

[...]

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, M. Wathelet, R. Schintgen, J.N. Cunha Rodrigues (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:
- Fonderie Officine Meccaniche Tacconi SpA, by F. Franchi, avvocato, - Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), by M.P. Ginelli, avvocato, and R. Rudek, Rechtsanwalt,
- the Commission of the European Communities, by A.-M. Rouchaud and G. Bisogni, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2002,

gives the following Judgment:

1. By order of 9 June 2000, received at the Court on 11 September 2000, the Corte suprema di cassazione (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 ofJudgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) three questions on the interpretation of Article 5(1) and (3) of that convention, 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 version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) (hereinafter 'the Brussels Convention').

2. Those questions were raised in proceedings between Fonderie Officine Meccaniche Tacconi SpA ('Tacconi'), a company incorporated under Italian law, established in Perugia (Italy), and Heinrich Wagner Sinto Maschinenfabrik GmbH ('HWS'), a company incorporated under German law, established in the Federal Republic of Germany, concerning compensation claimed from HWS by Tacconi to make good the damage allegedly caused to Tacconi by HWS's breach of its duty to act honestly and in good faith on the occasion of negotiations with a view to the formation of a contract.

LEGAL BACKGROUND

A. The Brussels Convention

3.The first paragraph of Article 2 of the Brussels 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.Article 5(1) and (3) of the Brussels 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 quasi-delict, in the courts for the place where the harmful event occurred'.

B. National law

5. Article 1337 of the Italian Codice Civile (Civil Code) provides that, in the context of the negotiation and formation of a contract, the parties must act in good faith.

THE MAIN PROCEEDING AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

6. On 23 January 1996 Tacconi brought an action against HWS in the Tribunale di Perugia (District Court, Perugia) for a declaration that a contract between HWS and a leasing company B.N. Commercio e Finanza SpA ('BN') for the sale of a moulding plant, in respect of which BN and Tacconi had already, with the agreement of HWS, concluded a leasing contract, had not been concluded because of HWS's unjustified refusal to carry out the sale, and hence its breach of its duty to act honestly and in good faith. HWS thereby infringed the legitimate expectations of Tacconi, which had relied on the contract of sale being concluded. Tacconi therefore asked the court to order HWS to make good all the damage allegedly caused, which was calculated at ITL 3 000 000 000.

7. In its defence, HWS pleaded that the Italian court lacked jurisdiction because of the existence of an arbitration clause and, in the alternative, because Article 5(1) of the Brussels Convention was applicable. On the substance, it contended that Tacconi's claim should be dismissed and, 'strictly in the alternative and as a counterclaim', that Tacconi should be ordered to pay it DEM 450 248.36.

8. By application served on 16 March 1999, Tacconi applied, pursuant to Article 41 of the Italian Codice di Procedura Civile (Code of Civil Procedure) concerning preliminary decisions on jurisdiction, to the Corte suprema di cassazione for a declaration that the Italian courts had jurisdiction over the main proceedings. Tacconi claimed that no agreement had been reached between it and HWS because its proposals had all been met by counter-proposals. It therefore relied on the pre-contractual liability of HWS on the basis of Article 1337 of the Italian Civil Code and submitted that under Article 5(3) of the Brussels Convention the 'place where the harmful event occurred' must also be understood as the place where the person claiming to have been harmed has sustained loss. The loss at issue in the main proceedings was incurred in Perugia, where Tacconi has its office.

9.In its order for reference, the national court considered that the criterion for special jurisdiction in Article 5(1) of the Brussels Convention does not appear to apply to pre-contractual liability, which does not result from the non-performance of a contractual obligation. No such obligation existed in the case at issue in the main proceedings, since no contract was concluded.

10. Since it considered that an interpretation of the Brussels Convention was thus needed in order to decide the issue of jurisdiction, the Corte suprema di cassazione decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:
'1. Does an action against a defendant seeking to establish pre-contractual liability fall within the scope of matters relating to tort, delict or quasi-delict (Article 5(3) of the Brussels Convention)?
2. If not, does it fall within the scope of matters relating to a contract (Article 5(1) of the Brussels Convention), and if it does, what is the obligation in question?
3. If not, is the general criterion of the domicile of the defendant the only criterion applicable?'

Question 1

11.By its first question the national court asks whether an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

Observations submitted to the Court

12. Tacconi and the Commission submit, citing the case-law of the Court (Case 189/87 Kalfelis [1988] ECR 5565, Case C-261/90 Reichert and Kockler [1992] ECR I-2149, and Case C-26/91 Handte [1992] ECR I-3967), that since pre-contractual liability does not derive from obligations freely assumed by one party towards another, it is a matter relating to tort, delict or quasi-delict.

13.According to Tacconi, it is quite plain that at the pre-contractual stage, since the contract has not yet been concluded, there is no contractual link which could bind the parties to each other.

14.The Commission submits that, on the basis of the Court's case-law, it is possible to state a general principle that all claims referred to by the Brussels Convention seeking to establish the liability of a defendant give rise, in any event, to the application of one of the two criteria of special jurisdiction in Article 5(1) and (3) of the convention.

15.The Commission concludes that disputes concerning pre-contractual liability fall within the scope of Article 5(3) of the Brussels Convention, since, first, an action founded on the defendant's pre-contractual liability is by definition a claim seeking to establish liability on the part of the defendant and, second, that liability is not based on obligations freely

assumed by the defendant towards the claimant, but on duties as to conduct imposed, more or less specifically, by a source external to the parties involved in the pre-contractual relationship.

16.HWS submits, on the other hand, that pre-contractual liability is of a different nature from liability in tort, delict or quasi-delict. The latter applies to any person who breaches the general rule against causing harm to others and infringes 'absolute' rights.

17.Pre-contractual liability, however, may be imputed only to a person who has a special relationship with the person who has suffered harm, namely that resulting from thenegotiation of a contract. Consequently, by contrast with the principles applicable to matters relating to tort, delict or quasi-delict, pre-contractual liability cannot be assessed except by reference to the content of the negotiations.

18.Moreover, submitting that Article 5(1) of the Brussels Convention cannot be applied either in this case, since Tacconi's claim rests on the hypothesis that no contract was concluded, HWS argues that pre-contractual liability is neither liability in tort, delict or quasi-delict nor liability in contract, and that the German courts therefore have jurisdiction to hear the case in accordance with the general provision in Article 2 of the Convention.

Findings of the Court

19.It should be observed at the outset that the Court has consistently held (see Case 34/82 Martin Peters Bauunternehmung [1983] ECR 987, paragraphs 9 and 10, Reichert and Kockler, paragraph 15, and Handte, paragraph 10) that the expressions 'matters relating to a contract' and 'matters relating to tort, delict or quasi-delict' in Article 5(1) and (3) of the Brussels Convention are to be interpreted independently, having regard primarily to the objectives and general scheme of the Convention. Those expressions cannot therefore be taken as simple references to the national law of one or the other of the Contracting States concerned.

20. Only such an interpretation is capable of ensuring the uniform application of the Brussels Convention, which is intended in particular to lay down common rules on jurisdiction for the courts of the Contracting States and to strengthen the legal protection of persons established in the Community by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued (see Case C-295/95 Farrell [1997] ECR I-1683, paragraph 13, and Case C-256/00 Besix [2002] ECR I-1737, paragraphs 25 and 26).

21.As the Court has held, the concept of 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of the Brussels Convention 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) of the Convention (Kalfelis, paragraph 18, Reichert and Kockler, paragraph 16, and Case C-51/97 Réunion Européenne and Others [1998] ECR I-6511, paragraph 22).

22.Moreover, while Article 5(1) of the Brussels Convention does not require a contract to have been concluded, it is nevertheless essential, for that provision to apply, to identify an obligation, since the jurisdiction of the national court is determined, in matters relating to a contract, by the place of performance of the obligation in question.

23. Furthermore, it should be noted that, according to the Court's case-law, the expression 'matters relating to contract' within the meaning of Article 5(1) of the BrusselsConvention is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (Handte, paragraph 15, and Réunion Européenne and Others, paragraph 17).

24.It does not appear from the documents in the case that there was any obligation freely assumed by HWS towards Tacconi.

25.In view of the circumstances of the main proceedings, the obligation to make good the damage allegedly caused by the unjustified breaking off of negotiations could derive only from breach of rules of law, in particular the rule which requires the parties to act in good faith in negotiations with a view to the formation of a contract.

26. In those circumstances, it is clear that any liability which may follow from the failure to conclude the contract referred to in the main proceedings cannot be contractual.

27.In the light of all the foregoing, the answer to the first question must be that, in circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

Questions 2 and 3

28.As the first question has been answered in the affirmative, there is no need to answer the other questions put by the national court.

[...]

On those grounds,

THE COURT,

in answer to the questions referred to it by the Corte suprema di cassazione by order of 9 June 2000, hereby rules:

”In circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of 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, 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.”

[...]