# OPINION OF ADVOCATE GENERAL
# BOT
## delivered on 15 February 2007 [1]

1. These proceedings for a preliminary ruling relate for the first time to the interpretation of Article 5(1) of Council Regulation (EC) No 44/2001, [2] which lays down rules on special jurisdiction in matters relating to a contract derogating from the principle that jurisdiction is based on the defendant's domicile.

2. Subparagraph (b) of that provision provides that where the dispute relates to an international contract for the sale of goods the plaintiff may sue the defendant in the court of the place where, under the contract, the goods were delivered or should have been delivered.

3. In the present case it has to be established whether that provision is applicable and, if so, in what manner, if the action relates to goods delivered in several places in a Member State.

4. In this Opinion I shall maintain that Article 5(1)(b) of Regulation No 44/2001 is applicable where several places of delivery are involved, provided that they are all situated in a single Member State. I shall also argue that, where the action relates to all the deliveries without distinction, it is for national law to determine whether the plaintiff may sue the defendant in the court of any place of delivery or must bring his action in the court of one of those places in particular, and that, if national law sets no rule in this regard, the plaintiff may sue the defendant in the court of the place of delivery of his choice.

## I — Legal framework

5. Regulation No 44/2001 was adopted on the basis of Title IV of the EC Treaty, which grants the European Community power to adopt measures in the field of judicial

1 — Original language: French.

2 — Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

cooperation in civil matters insofar as necessary for the proper functioning of the common market.

6. It is intended to replace the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [3] in all the Member States. [4] Regulation No 44/2001 came into force on 1 March 2002. It applies only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force. [5]

7. The regulation is based largely on the Brussels Convention, with which the Community legislature aimed to ensure true continuity. [6] It reproduces the system of jurisdictional rules laid down in that convention, based on the principle that the courts of the State in which the defendant is domiciled have jurisdiction, to which it adds rules on exclusive or concurrent jurisdiction.

8. Article 2(1) of Regulation No 44/2001 thus provides that:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

9. Article 5 of Regulation No 44/2001 is worded as follows:

'A person domiciled in a Member State may, in another Member State, be sued:

3 — (OJ 1972, L 299, p. 32). 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), 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) and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1). A consolidated version of the Brussels Convention, as amended by these four accession conventions, was published at OJ 1998 C 27, p. 1 ('the Brussels Convention').

4 — Three Member States — the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland — obtained the right not to participate in principle in measures adopted on the basis of Title IV of the Treaty. However, Ireland and the United Kingdom have agreed to be bound by Regulation No 44/2001 (recital 20 in the preamble). The Kingdom of Denmark also undertook to apply Regulation No 44/2001 under an agreement of 19 October 2005, approved by Council Decision 2005/790/EC of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2005 L 299, p. 61). Pursuant to Article 68 of Regulation No 44/2001, the Brussels Convention continues to apply to the part of the territories of the Member States excluded from the scope of the Treaty, as defined in Article 299 of the Treaty. Finally, Regulation No 44/2001 has applied since 1 May 2004 to the ten new Member States of the European Union.

5 — Article 66 of the regulation.

6 — Recital 19 in the preamble to Regulation No 44/2001.

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

...'

## II — The dispute in the main proceedings

10. The dispute in the main proceedings is between Color Drack GmbH, [7] a company whose registered office is in Schwarzach (Austria), and LEXX International Vertriebs GmbH, [8] whose registered office is in Nuremberg (Germany).

11. Color Drack purchased sunglasses from LEXX International Vertrieb and paid for them itself in full, but had the latter company deliver them directly to its customers in various places in Austria.

12. Color Drack subsequently returned the unsold sunglasses to LEXX International Vertrieb and asked the latter to repay the sum of EUR 9 291.56, plus interest and associated expenses. As that sum remained unpaid, on 10 May 2004 Color Drack brought an action for payment against LEXX International Vertrieb in the Bezirksgericht (District Court) St. Johann im Pongau (Austria), in whose jurisdiction its registered office is situated.

13. That court ruled that it had territorial jurisdiction to hear the claim under Article

7 — Hereinafter 'Color Drack'.

8 — Hereinafter 'LEXX International Vertrieb'.

5(1)(b) of Regulation No 44/2001. It considered that the place of performance of the obligation to be taken into account for the return of the unsold goods was the location of the undertaking of Color Drack. It also allowed the claim on its merits.

14. The Landesgericht (Regional Court) Salzburg (Austria), to which LEXX International Vertrieb appealed, set aside this judgment on the ground that the court of first instance lacked territorial jurisdiction.

15. The Landesgericht held that Article 5(1)(b) of Regulation No 44/2001 provides for a single place of connection for all claims arising out of a contract of sale, including a claim for reimbursement after the return of the goods. According to that court, the autonomous determination of such a place under that provision is not possible where the goods have been delivered to several customers located in different places in Austria.

16. The Landesgericht concluded that, in so far as Article 5(1)(b) of Regulation No 44/2001 is not applicable, it is the provisions of Article 5(1)(a) of that regulation that must be applied, pursuant to Article 5(1)(c). In accordance with those provisions, Color Drack should, in the opinion of the Landesgericht, have brought its action for payment in the court in Nuremberg, which had jurisdiction as the court for the place of performance of the obligation in question.

17. The Oberster Gerichtshof (Supreme Court, Austria), to which Color Drack appealed, decided to stay the proceedings and to make a reference to the Court for a preliminary ruling on the interpretation of Article 5(1)(b) of Regulation No 44/2001.

18. In its order for reference, it states that it construes this provision in the following manner. First, since it provides for special jurisdiction, it must be interpreted strictly. Secondly, in contrast to Article 5(1) of the Brussels Convention, Article 5(1)(b) of Regulation No 44/2001 provides for a single place of connection for all claims deriving from a contract of sale or a contract for services. Finally, it is the place where the goods were actually supplied that is the decisive criterion for establishing international jurisdiction.

19. In the view of the Oberster Gerichtshof, the jurisdiction of the court seised at first

instance by Color Drack would not be a matter of debate if all the goods had been delivered directly to that company in Schwarzach. It wonders, however, whether that jurisdiction can be upheld where the goods were not delivered solely to the area covered by that court but to different places in the Member State of the purchaser.

20. It is in the light of these considerations that the Oberster Gerichtshof decided to stay the proceedings and to submit the following question to the Court for a preliminary ruling:

'Is Article 5(1)(b) of [Regulation No 44/2001] to be interpreted as meaning that a seller of goods domiciled in one Member State who, as agreed, has delivered the goods to the purchaser, domiciled in another Member State, at various places within that other Member State can be sued by the purchaser regarding a claim under the contract relating to all the (part) deliveries — if need be, at the plaintiff's choice — before the court of one of those places (of performance)?'

## III — Analysis

21. In its order for reference, the Oberster Gerichtshof points out that under national law there is no judicial remedy against its decisions. It is therefore authorised under Article 68 EC to refer to the Court for an interpretation of a provision of Regulation No 44/2001.

22. It is also common ground that Regulation No 44/2001 applies in the present case, since the contract on which Color Drack bases its action is a sale of goods and the action was brought by a claim for payment after 1 March 2002.

23. The question submitted by the referring court is in two parts. The court seeks to know first whether Article 5(1)(b) of Regulation No 44/2001 is applicable if, as agreed between the parties, goods have been delivered to different places in a single Member State.

24. If the answer to that question is in the affirmative, the referring court then asks the Court to state whether, where the claim relates to all the deliveries, the plaintiff may sue the defendant in the court of the place of delivery of his choice.

25. I shall examine each of these points in turn.

A — *The application of Article 5(1)(b) of Regulation No 44/2001 where there are several places of delivery in a single Member State*

26. LEXX International Vertrieb and the German and Italian Governments maintain that Article 5(1)(b) of Regulation No 44/2001 is not applicable where there are several places of delivery.

27. The German Government contends that the application of this provision in the case in point would be contrary to the wording of the provision, which mentions a single place of delivery.[9] According to the German Government, such an application would also run counter to the scheme of the regulation. It points out in this regard that the contested provision, being a rule on special jurisdiction, must be interpreted strictly. It also relies on Article 5(1)(c) of the regulation, under which Article 5(1)(a) applies if the conditions required by subparagraph (b) of that provision are not present.

28. The German Government, supported by the Italian Government, also refers to the purpose of Article 5(1)(b) of Regulation No 44/2001. It asserts that the object of that provision is to allow the parties to a contract to determine the court with jurisdiction to hear actions arising from the contract and to avoid a multiplication of jurisdictions. It maintains that the provision governs not only the international jurisdiction of the courts of a Member State but also their territorial jurisdiction.

29. The German and Italian Governments point out that where deliveries in several places are involved it is not possible to determine a single place of performance in accordance with the criteria laid down in Article 5(1)(b) of Regulation No 44/2001, and that to permit the plaintiff to bring his action in one of the places of delivery or in each of those places would run counter to the objective of that provision.

30. The Italian Government notes, moreover, that the optional jurisdictional rules laid down in Article 5(1) of Regulation No 44/2001 were adopted in the interest of

9 — The German Government refers in this regard to the German version ('der Ort in einem Mitgliedstaat'), the English version ('the place in a Member State') and the French version ('le lieu d'un État membre').

the sound administration of justice. In its view, where the contractual obligation is performed in several places, it is not possible to determine the place that exhibits the closest link between the dispute and the court with jurisdiction.

31. Lastly, the German Government maintains that its assessment is consistent with the position adopted by the Court in the *Besix* judgment, [10] in which it held that the choice of jurisdiction in matters relating to a contract laid down in Article 5(1) of the Brussels Convention was not applicable to a claim relating to an obligation not to do something which is not subject to any geographical limit.

32. I do not share that view. I consider, along with the United Kingdom Government and the Commission of the European Communities, that the choice of jurisdiction provided for in Article 5(1)(b) of Regulation No 44/2001 is applicable where, in accordance with the agreement between the parties, the goods have been delivered in different places within a single Member State.

33. I base my position on the system established by Article 5(1) of Regulation No 44/2001 and on the objectives pursued by that regulation, read in the light of the system of special jurisdiction in matters relating to a contract provided for in the Brussels Convention and the disadvantages it poses.

34. Before presenting these arguments, I shall indicate the reasons why, in my view, the reply to the question under examination does not lie in the wording of Article 5(1)(b) of Regulation No 44/2001.

1. The wording of Article 5(1)(b) of Regulation No 44/2001

35. In contrast to the German Government, I am of the opinion that the wording of Article 5(1)(b) of Regulation No 44/2001 does not enable us to determine whether or not the optional jurisdictional rule for which it provides is intended to apply where several places of delivery are involved.

36. I do not think that the reply to this question can be deduced from the reference to a single place of delivery as it appears in the phrase 'the place in a Member State

10 — Case C-256/00 *Besix* [2002] ECR I-1699.

where, under the contract, the goods were delivered or should have been delivered'.

37. In fact, the question we have to answer concerns the material scope of the provision in question. In the contested provision, that scope is determined by the concept of the 'sale of goods', and not by the phrase 'the place in a Member State where, under the contract, the goods were delivered or should have been delivered'. That phrase merely indicates the criterion of territorial jurisdiction in the case of a sale of goods. It specifies the place of performance that must be taken into account in this type of contract to determine the court with jurisdiction.

38. Moreover, Article 5(1)(b) of Regulation No 44/2001 provides that the plaintiff may bring an action before 'the courts' of the place of delivery of the goods. Depending on the extent of the territorial jurisdiction of the courts in the Member State concerned, as defined by its national rules, deliveries made in different places within that State may fall under the jurisdiction of the same court. Hence, the existence of multiple places of delivery in one and the same Member State does not necessarily mean that jurisdiction will be attributed to more than one court.

39. Consequently, if we were to rely solely on the wording of Article 5(1)(b) of Regulation No 44/2001 and on the reference to a single place of delivery, the question would still arise of whether this provision is applicable if all the deliveries take place within the jurisdiction of a single court.

40. These considerations show, in my opinion, that it is not possible to derive clear and precise indications from the wording of Article 5(1)(b) of Regulation No 44/2001 on which to base a reply to the question whether this provision applies — and, if so, the manner in which it applies — where there are several places of delivery.

41. According to settled case-law, where the wording of a provision of Community law does not of itself allow it to be determined with certainty how it is to be understood and applied in a given situation, it must be interpreted in the light of the scheme and objectives of the rules of which it forms part. [11] The reply to the question under

11 — Case C-63/00 *Schilling and Nehring* [2002] ECR I-4483, paragraph 24, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraphs 203 to 206 and the case-law cited. For a recent application, see Case C-283/05 *ASML Netherlands* [2006] ECR I-12041, paragraphs 16 and 22.

examination must therefore be determined by taking into account the scheme and objectives of Regulation No 44/2001.

2. The system established by Article 5(1) of Regulation No 44/2001 and the objectives pursued by that regulation

42. As I have indicated, Regulation No 44/2001, which replaces the Brussels Convention, draws heavily on that convention and provides continuity with it. We have also seen that Article 5(1) of Regulation No 44/2001 is an innovation by comparison with the content of Article 5(1) of the Convention.

43. In order correctly to understand the scope of this innovation and the conclusions to be drawn from it with regard to the conditions for applying Article 5(1)(b) of Regulation No 44/2001, it appears necessary to recall the content of the system of optional jurisdiction in matters relating to a contract laid down in the Brussels Convention and the difficulties posed by that system, which the Community legislature aimed to remedy by means of this regulation.

(a) The system of optional jurisdiction in matters relating to a contract under the Brussels Convention and its interpretation in the case-law

44. The Brussels Convention was adopted by the Member States on the basis of Article 220 of the EC Treaty, [12] under which Member States were called upon to enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

45. According to its preamble, its purpose is to lay down simple rules to facilitate the free movement of court judgments. Hence, according to the Court, its objectives 'include unification of the rules on jurisdiction of the Contracting States, so as to avoid ... the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued'. [13]

12 — Now Article 293 EC.

13 — Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 11.

46. The aim of the Brussels Convention is therefore to avoid the multiplication of the bases of jurisdiction in relation to one and the same legal relationship by unifying the Member States' rules on international jurisdiction by means of simple provisions that allow the parties easily to identify the court having jurisdiction.

47. These objectives are implemented in Article 2 of the Convention, which establishes the principle that the court having jurisdiction is the court of the defendant's domicile.

48. The contracting parties to the convention made provision for derogation from that principle regarding jurisdiction. They laid down several rules on special jurisdiction, some obligatory, as in the case of immovable property, insurance or consumer contracts, and others optional, in Article 5 of the Brussels Convention, in particular in matters relating to a contract, maintenance or claims for damages.

49. These special rules of jurisdiction were adopted to serve a precise objective. As regards the rules laid down in Article 5, the contracting parties wished to enable the plaintiff to bring his action before the court that was physically closest to the facts in the dispute and was thus best placed to assess those facts. The rules are justified, according to the Jenard Report, [14] by the 'fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it'.

50. Article 5 of the Brussels Convention therefore provided, in its original version, that the defendant could be sued, in matters relating to a contract, in the courts for the 'place of performance of the obligation in question'.

51. The Court has specified first the obligation that is to be taken into account and secondly how the place of performance of that obligation is to be determined.

52. Thus in the *De Bloos* judgment, [15] it held that the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based. [16] This is thus the contractual obliga-

14 — OJ 1979 C 59, p. 1, at p. 22.

15 — Case 14/76 *De Bloos* [1976] ECR 1497, paragraphs 11 and 13.

16 — This interpretation was confirmed at the time of conclusion of 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, which amended, in certain language versions, Article 5(1) of the Brussels Convention to specify that the obligation the place of performance of which determines the court having jurisdiction in matters relating to a contract is 'l'obligation qui sert de base à la demande'. The same formula was adopted in Article 5(1)(a) of Regulation No 44/2001.

tion that is the actual basis of the legal action or, in other words, the obligation whose non-performance is claimed.

53. In the *Tessili* judgment of the same date, [17] the Court ruled that the place where the obligation on which the application is based was or should be performed must be determined under the law governing the contested obligation in accordance with the rules of conflict of laws of the court before which the matter is brought.

(b) The problems raised by Article 5(1) of the Brussels Convention

54. Article 5(1) of the Brussels Convention, as it has been interpreted in case-law, has given rise to numerous criticisms. Among the difficulties posed by this provision, there are three shortcomings, by comparison with the objectives of the convention, that seem relevant to the present dispute.

55. The first relates to the risk of a multiplication of the courts with jurisdiction to hear disputes relating to one and the same contract.

56. As we have seen, the aim of the Brussels Convention is to avoid, so far as possible, creating a situation in which a number of courts have jurisdiction in respect of one and the same contract, in order to preclude the risk of irreconcilable decisions and to facilitate the recognition and enforcement of judgments in States other than those in which they were delivered. [18]

57. However, the combined application of the *De Bloos* and *Tessili* judgments may lead to a situation in which actions based on discrete obligations but relating to the same contract fall under the jurisdiction of courts in different Member States. That case-law indeed separates the obligations deriving from one and the same contract and determines the place of performance of the obligation forming the basis of the plaintiff's action in accordance with the law governing the contested obligation, under the conflict rules of the court seised.

58. The *Leathertex* case [19] provides a good illustration of the consequences of that case-law. In that case a Belgian company that had acted as commercial agent of the company Leathertex, established in Italy, sued the latter in Belgium for the payment of arrears of commission and compensation in lieu of notice for breach of contract. Under Belgian conflict rules, the obligation to pay compen-

17 — Case 12/76 *Tessili* [1976] ECR 1473, paragraph 13.

18 — *Besix*, paragraph 27 and the case-law cited.

19 — Case C-420/97 *Leathertex* [1999] ECR I-6747.

sation in lieu of notice had to be performed in Belgium, whereas the obligation to pay commission had to be performed in Italy. In that judgment the Court held that, in application of the case-law established in the *De Bloos* and *Tessili* judgments, the Belgian court could hear only the action for payment of compensation in lieu of notice, the other action falling under the jurisdiction of the Italian courts.

59. The Court has attempted to limit the effects of this case-law. In the *Shenavai* judgment [20] it ruled that in the specific case of a dispute concerned with a number of obligations arising under the same contract and forming the basis of the proceedings commenced by the plaintiff, the court before which the matter is brought could, when determining whether it had jurisdiction, apply the maxim *accessorium sequitur principale.* [21]

60. Nevertheless, the risk of a multiplication of the courts with jurisdiction remains if, as in the *Leathertex* case, the obligations in question are considered to be equivalent. In that situation, the same court does not have jurisdiction, under Article 5(1) of the Brussels Convention, to hear all of an action based on two equivalent obligations arising under the same contract if, under the conflict rules of the State of that court, one of these obligations must be performed in that State and the other in another Contracting State.

61. The second shortcoming of Article 5(1) of the Brussels Convention stems from the difficulty of implementing it and, hence, the lack of predictability of its outcome for the parties to the contract.

62. As we have seen, the aim of the Brussels Convention is to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued. [22] That convention is thus intended to strengthen in the Community the legal protection of natural and legal persons established there, by laying down common rules on jurisdiction to guarantee certainty as to the allocation of jurisdiction among the various national courts before which pro-

20 — Case 266/85 *Shenavai* [1987] ECR 239.

21 — *Shenavai*, paragraph 19.

22 — *Besix*, paragraph 26 and the case-law cited.

ceedings in a particular case may be brought. [23]

63. For the application of these rules to produce a predicable outcome for economic operators, they must be extremely simple. However, the method for determining the court with jurisdiction, as defined by the *De Bloos* and *Tessili* line of case-law, requires the national court before which the action is brought to make several complex assessments, the result of which cannot easily be foreseen by the parties to a contract.

64. Thus the court hearing the case must first determine the character of the contractual obligation forming the basis of the action. If the plaintiff bases his action on several obligations, the court will have to establish whether there is a ranking among them, enabling it to hear the case in its entirety, in accordance with the *Shenavai* judgment.

65. The court seised must then find the law which, in accordance with its rules on the conflict of laws, is applicable to the obligation forming the basis of the action. For example, where applicable, it will have to refer to the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980. [24]

66. Under the system established by that convention, the law applicable to the contract is the law chosen by the parties. Where no choice has been made, the convention lays down the principle that the contract is to be governed by the law of the State with which it is most closely connected and presumes that, subject to certain exceptions, that State is the one where the party who is to effect the performance which is characteristic of the contract has his habitual residence at the time of conclusion of the contract.

67. The substantive law that is thus selected may also take the form of an international convention signed and ratified by the Member State concerned, such as the United Nations Convention on contracts for the international sale of goods, signed in Vienna on 11 April 1980.

23 — *Besix*, paragraph 25.

24 — OJ 1980 L 266, p. 1, 'the Rome Convention'. In so far as the Brussels Convention contains optional jurisdiction allowing the plaintiff to choose between the courts of different Member States, the Member States could fear that the plaintiff would elect to bring his action in a particular court for the sole reason that the law applicable there was more favourable to him. The purpose of the Rome Convention is to reduce that risk, commonly termed 'forum shopping', by determining the substantive national law applicable by the court hearing the dispute. It therefore aims to ensure that the outcome as to the substance is the same, whatever the court chosen by the parties to the dispute. This convention is applicable in the fifteen States that were Members of the Union before the enlargement of 1 May 2004. The ten Member States that joined the Union on that date also signed the Rome Convention on 14 April 2005. On 14 January 2003 the Commission took steps to transform that convention into a regulation. On 15 December 2005 it presented a draft regulation to that effect (Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final).

68. Finally, on the basis of the substantive law applicable, the court must determine the place of performance of the contested contractual obligation. It can rule that it has jurisdiction only if that place is within its territorial jurisdiction.

69. This method is therefore complicated and involves the application of international conventions, each of which may raise serious difficulties of interpretation. [25]

70. The third shortcoming of Article 5(1) of the Brussels Convention stems from the fact that the rules taken into account to determine the court with jurisdiction are not best suited for designating the court with the closest link with the dispute to be resolved.

71. We have seen that the purpose of the option which this provision gives the plaintiff to derogate from the general principle that the courts of the domicile of the defendant have jurisdiction is to enable him to bring his action before the court closest to the facts in the dispute.

72. Admittedly, this objective must be reconciled with the objective of legal certainty, and more especially that of foreseeability, which are also pursued by the Brussels Convention and which the Court has recognised as having primacy over the objective of closeness. Moreover, the existence of a connecting factor between the court and the dispute is not of itself the criterion for jurisdiction provided for in Article 5(1) of the Brussels Convention, since the jurisdictional criterion expressly laid down in that provision is the place of performance of the obligation. [26]

73. The primacy of the objective of legal certainty over that of closeness may therefore justify the fact that, in a particular situation, the court in which the plaintiff brings his action in accordance with Article 5(1) of the Brussels Convention may not be the one with the closest link with the dispute.

74. The problem that arises in the implementation of this provision is more general, however. It has to do with the fact that the criteria to be applied pursuant to the *De Bloos* and *Tessili* line of case-law have not been set on the basis of the objective of closeness.

25 — See, in particular, with regard to the Rome Convention, the problem of the relationship between Article 4(2), which establishes a presumption in favour of the law of the country where the party who is to effect the performance characteristic of the contract has his habitual residence, and Article 4(5), which provides that this presumption must be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another State.

26 — Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913, paragraphs 14 and 15.

75. In accordance with the method defined by the case-law of the Court, the place of performance must be determined by applying the substantive law of the Member States or an international convention unifying that substantive law, and the purpose of such laws and conventions is not to determine court jurisdiction. It follows that with regard to the payment of a sum of money the court whose jurisdiction is recognised in accordance with this method is the court where the debtor or the creditor has his domicile, depending on whether, under the national law applicable, the payment is considered to be payable at the domicile of the debtor or at that of the creditor.

76. It is legitimate to consider that, in all of these scenarios, the objective of closeness has true meaning and can be properly satisfied only if the court with jurisdiction is the one of the place of contractual or actual performance of the contract. The jurisdiction of that court is thus justified because, by reason of its close link with the place of performance of the obligation that is characteristic of the contract, it is best placed to assess the material evidence or testimony adduced by the parties and, where applicable, itself to establish the facts.

77. It is in the light of these considerations that the new system of optional jurisdiction in matters relating to a contract established by Regulation No 44/2001 and the objectives which it pursues should be examined.

(c) The new system of optional jurisdiction in matters relating to a contract established by Regulation No 44/2001

78. If we examine the objectives pursued by Regulation No 44/2001, we find that, as with all measures adopted in the field of judicial cooperation in civil matters, its purpose, in accordance with Article 65 EC, is to improve and simplify the existing rules.

79. To that effect, and as stated in its 2nd and 11th recitals, that regulation aims to unify the rules of conflict of jurisdiction in civil and commercial matters by introducing rules of jurisdiction that are 'highly predictable'.

80. As in the Brussels Convention, those rules are founded on the principle that jurisdiction is generally based on the defendant's domicile, and this jurisdiction must always be available, as indicated in recital 11 in the preamble to Regulation No 44/2001. Likewise, as in the convention, in addition to this jurisdiction of principle, there must be alternative grounds of jurisdiction.

81. In this regard, the Community legislature expressly states that it is the closeness of

the court to the action that justifies these special jurisdictions. Recital 12 in the preamble to Regulation No 44/2001 states that these special grounds of jurisdiction are authorised because of the close link between the court and the action or in order to facilitate the sound administration of justice.

82. In order to attain these different objectives, the system of optional jurisdiction in matters relating to a contract laid down in Regulation No 44/2001 differs very clearly from that laid down in the Brussels Convention.

83. For example, Article 5(1)(b) of Regulation No 44/2001 sets an autonomous criterion of jurisdiction for the two most common types of contract in international commercial relations, namely contracts for the sale of goods and the provision of services.

84. Furthermore, in these two cases, this autonomous criterion of jurisdiction is the place of performance of the obligation that is characteristic of the contract, in other words the place of delivery of the goods in the case of a contract of sale and the place of provision of the services in that of a contract for the performance of services.

85. At this stage in my analysis we can draw the following lessons from the system established by Article 5(1) of Regulation No 44/2001 and the objectives pursued by that regulation.

86. First, with regard to contracts for the sale of goods and the provision of services, the provisions of Article 5(1)(b) of Regulation No 44/2001 constitute, as it were, the rule of 'principle' on special jurisdiction. The provision of Article 5(1)(a) of that regulation, which reiterates the old rule of the Brussels Convention, [27] now has a purely subsidiary role for these two types of agreement. As Article 5(1)(c) of the regulation explicitly states, subparagraph (a) of that provision applies only if subparagraph (b) does not apply.

87. Secondly, the rule on special jurisdiction contained in Article 5(1)(b) of Regulation No 44/2001 is intended to apply to all actions based on a contract. In other words, as demonstrated by the statement of the Commission's reasons for proposing this text

27 — Article 5(1)(a) of Regulation No 44/2001 provides that 'in matters relating to a contract, [a person domiciled in a Member State may, in another Member State, be sued] in the courts for the place of performance of the obligation in question'.

to the Council of the European Union on 14 July 1999,[28] the Community legislature wished to put an end to the multiplication of courts able to hear actions based on one and the same contract.

88. The place of delivery of goods and the place of provision of services now constitute the criterion of jurisdiction for all actions that may be brought on the basis of a contract for the sale of goods or a contract for the provision of services. It applies irrespective of the obligation forming the basis of the action and it also applies where the action relates to several obligations.

89. It follows that Article 5(1)(b) of Regulation No 44/2001 is intended to apply to an action seeking repayment for goods under a return clause, as in the present case. This analysis is shared by the referring court, which considers that Article 5(1) of Regulation No 44/2001 laid down a single connecting factor for all claims deriving from a contract, and thus also for all secondary contractual claims, such as those involved in the present case.

28 — Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM (1999) 348 final).

90. Thirdly, as in the system established by the Brussels Convention, the existence of a link between the court and the action is not, of itself, the criterion of jurisdiction laid down in Article 5(1)(b) of Regulation No 44/2001. That link is only the ground that forms the basis of that special jurisdiction. The criterion of jurisdiction is the place of delivery of the goods or provision of the services.

91. It follows that the main objective of this provision is legal certainty, by reason of which the common rules on jurisdiction must be highly predictable. By using an autonomous criterion as the criterion of jurisdiction, the Community legislature has abandoned the complex system for determining the place of performance of the contract set out in the *Tessili* line of case-law cited above. Similarly, by taking as an autonomous criterion a factor which more often than not will be purely factual, and hence easily identifiable by the parties, it enables the parties to predict reasonably which court other than that of the State in which the defendant is domiciled may hear an action deriving from a contract.

92. In the system established by Article 5(1)(b) of Regulation No 44/2001, legal certainty is thus ensured, because the parties to the contract know that all actions deriving

from that contract may be brought before the court of the place of delivery of the goods or provision of the services.

93. Furthermore, in this system the ground that forms the basis of this special jurisdiction is taken into account better because the court with jurisdiction is the one in whose territory the obligation that is characteristic of the contract is to be performed. Consequently, if the contract has been performed, or if actual performance of the contract has commenced, the court designated will, in the majority of cases, be the one physically closest to the evidence that may be relevant for resolving the dispute.

94. It is now time to examine whether such a system can be applied and can serve the objectives of Regulation No 44/2001 where there are several places of performance within a single Member State.

(d) The application of Article 5(1)(b) of Regulation No 44/2001 where there are several places of delivery within a single Member State

95. In the light of the foregoing factors, the question whether Article 5(1)(b) of Regulation No 44/2001 is intended to apply where several places of delivery are involved leads us, in reality, to examine whether, in such a case, the objective of ensuring a high degree of predictability can be satisfied.

96. I believe that this is indeed the case if all the deliveries take place in a single Member State.

97. In order to determine the degree of predictability which the defendant is entitled to expect under Regulation No 44/2001, it is necessary, in my view, to examine the main objective of that regulation.

98. According to recital 2 in the preamble to that regulation, its main objective is to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to the recognition and enforcement in a Member State of judgments delivered in another Member State.

99. It aims to resolve conflicts of jurisdiction in international disputes. As the United Kingdom Government rightly states, Regulation No 44/2001 determines the international jurisdiction of the courts of the

Member States. It thus aims to prevent concurrent proceedings being instituted in several Member States and irreconcilable judgments being given in two of those States.

100. This intention of Regulation No 44/2001 is expressed clearly in Article 2, under which persons domiciled in a Member State shall be sued 'in the courts of that Member State'. Similarly, Article 5(1)(b) of the regulation indicates the conditions in which, by derogation from Article 2, such a person 'may [be sued] in another Member State'. Regulation No 44/2001, like the Brussels Convention,[29] thus governs conflicts of international jurisdiction between the legal systems of the Member States.

101. Hence, the fact that there are several places of delivery within the same Member State and possibly several courts of that State with jurisdiction to hear the action does not jeopardise the objective pursued by Regulation No 44/2001. Even supposing that several courts of the Member State concerned may have jurisdiction because of the plurality of places of delivery, it remains a fact that all of these courts are in the same Member State. There is therefore no risk that irreconcilable judgments may be given by courts in different Member States.

102. Of course, an objection to this analysis could be made on the ground that Regulation No 44/2001 has not only international scope but also, to some extent, 'territorial' scope. For example, the court with jurisdiction under Article 5(1)(b) of that regulation is not just any court in the Member State concerned. The Community legislature wished the court appointed to hear the action to be the national court with substantive jurisdiction within whose territorial jurisdiction the goods were delivered or the services provided.

103. However, this stipulation is designed simply to ensure that the national court with jurisdiction is the one which, in general, has the closest links with the material facts in the dispute. This objective is not vitiated where there are several places of delivery within the same Member State. If, as in the present case, the action relates to all the deliveries without distinction, all the courts in whose territorial jurisdiction one or more of these deliveries was made have the same link of

29 — See in this regard *Besix*, paragraph 25.

closeness with the material facts in the dispute. Consequently, no matter which of these courts is the one in which the plaintiff institutes proceedings and before which all the actions based on the contract between the parties must be brought, the objective of closeness is satisfied.

104. It follows that, as the Commission has rightly indicated, the application of Article 5(1)(b) of Regulation No 44/2001 where several places of delivery within a single Member State are involved is consistent with the objective of closeness underlying this rule of special jurisdiction.

105. Lastly, since at present we are examining the question from the point of view of the actual situation of the defendant, I likewise do not believe that the application of the option in question where there are several places of delivery in a Member State runs counter to the protection which he is entitled to expect under Regulation No 44/2001.

106. The defendant, who is party to an international contract of sale, must expect that, under the option available to the plaintiff under Article 5(1)(b) of Regulation No 44/2001, he may be sued in a court of a Member State other than the one where he is domiciled. The defendant knows that, under that provision, the plaintiff has the option of suing him in the court of the place of performance of the obligation that is characteristic of the contract. In the present case, LEXX International Vertrieb, which delivered the goods in question in Austria, had to know that, in the event of a dispute, Color Drack could sue it in an Austrian court.

107. I do not believe that, for the defendant, there is any significant difference between a single delivery and several deliveries potentially leading to there being several courts with jurisdiction in a single Member State. The main difficult for a company or individual involved in an international dispute is defending his interests in a State other than his own. That company or individual is thus forced to choose a lawyer with whom he can communicate and who knows the language, procedure and modus operandi of the courts in that other State. Once the defendant has found that lawyer and decided to place trust in him, the question whether the lawyer is to

represent him in the said State before the court of one town or another really has no effect except on the amount of his expenses.

108. Moreover, where there are several places of delivery in the same Member State, the defendant, who knows what these places are since they are determined contractually, is able to foresee the courts of that State in which he may be sued by acquainting himself with the applicable national rules.

109. Lastly, in assessing the scope of Article 5(1)(b) of Regulation No 44/2001, it should be remembered that the parties to the contract can restrict or exclude the possibility of using the jurisdictional option laid down in that provision. For example, they may specify, by agreement among themselves, which of the various places of delivery is to be adopted as the criterion of jurisdiction. Article 5(1)(b) of Regulation No 44/2001 provides that the criteria of autonomous jurisdiction shall apply 'unless otherwise agreed'.

110. Similarly, the parties to the contract can designate the court or courts with jurisdiction to hear disputes stemming from the contract by means of an agreement conferring jurisdiction drawn in one of the forms required by Article 23 of Regulation No 44/2001.

111. In the light of these considerations, I am of the opinion that the optional jurisdictional rule provided for in Article 5(1)(b) of Regulation No 44/2001 is applicable where there are several places of delivery and those places are situated in a single Member State.

112. I do not believe that this position conflicts with the solution adopted by the Court in *Besix*.

113. In *Besix* the point at issue was whether the optional jurisdictional rules laid down in Article 5(1) of the Brussels Convention were applicable where the obligation on which the action was based consisted of an exclusivity clause under which two companies had undertaken to act together in the context of a public contract and not to commit themselves to other partners.

114. The Court held that the optional jurisdictional rule was not applicable in such a case because the contested contractual obligation consisted in an undertaking not to

do something, which was not subject to any geographical limit. Hence the Court found that it was not possible to determine a single place of performance since the obligation in question was to be performed in all the Member States.

115. This solution cannot, in my opinion, be transposed where all the places of performance of the contract are in a single Member State. [30]

116. It is now necessary to examine whether, under Regulation No 44/2001, the plaintiff can bring his action before the court of the place of delivery of his choice or before the court of a particular place of performance.

30 — The solution adopted in the *Besix* judgment could be transposed, in my view, if the places of delivery were in different Member States. In such a case, I consider that the optional jurisdictional rule laid down in Article 5(1)(b) of Regulation No 44/2001 would not be applicable, because the objective of foreseeability could not be achieved since the courts that potentially had jurisdiction under this provision were in several Member States. I am also of the opinion that, in such a scenario, taking account of the objective of foreseeability of the rules on jurisdiction pursued by Regulation No 44/2001 and the difficulties of applying Article 5(1)(a) of that regulation, the latter provision would not be applicable either. As the latter provision is purely subsidiary, its application should be confined to the situation envisaged by the Commission in its draft regulation of 1999, in other words where the place of delivery of goods or provision of services is in a third State. If the goods are delivered or the services provided in several Member States, the court with jurisdiction could not, in my opinion, be other than that of the domicile of the defendant, in accordance with the principle set out in Article 2 of Regulation No 44/2001.

B — *The question whether, pursuant to Article 5(1)(b) of Regulation No 44/2001, the plaintiff can bring his action before the court of the place of delivery of his choice or before the court of a particular place of performance*

117. The Commission maintains that if one of the various deliveries is the principal delivery and the others appear to be secondary deliveries the plaintiff should bring his action in the court of the place of performance of the principal delivery. In the absence of a principal delivery, the plaintiff could sue the defendant in the court of one of the places of delivery, at his convenience.

118. The Commission thus proposes to transpose the distinction between a principal obligation and an ancillary obligation established in the *Shenavai* judgment, cited above, to the context of Article 5(1)(b) of Regulation No 44/2001.

119. I do not favour the Commission's proposition, for the following reasons.

120. First, I consider that this proposition has no basis in Regulation No 44/2001.

121. As we have seen, Article 5(1)(b) of that regulation aims to allocate all actions based on one and the same contract to a single court. It also lays down that that court is the court of the place of performance of the obligation that is characteristic of the contract, so that it may be determined easily by the parties and correspond, as a general rule, to the court with the closest link to the facts in the dispute.

122. I have already indicated that the objective of foreseeability pursued by Regulation No 44/2001 is satisfied where all the places of performance are located in the same Member State, as the defendant knows that, unless otherwise agreed, he can be sued in the court of one of these places of performance.

123. We have also seen that, since the claim relates to all the deliveries without distinction, all the courts in whose territorial area a delivery took place have the same degree of closeness to the facts in the dispute. The objective of closeness underlying Article 5(1) of Regulation No 44/2001 is therefore satisfied in the same manner if the plaintiff sues the defendant in the court of any place of delivery. [31]

124. In the light of these considerations, I do not find, in Regulation No 44/2001, good reason to introduce new criteria for determining which court should be seised where several places of delivery are involved if the action relates to all of the deliveries.

125. Secondly, I am of the opinion that if the Commission's argument were followed it would have the result of reintroducing into the system of optional jurisdiction in matters relating to a contract provided for in Regulation No 44/2001 complex criteria that the Community legislature manifestly wished to abandon. It would be very difficult for the parties to a contract to determine clearly when a delivery was a principal delivery. Such a classification would again depend on detailed rules that could be provided only by case-law.

31 — The situation would be different if the action related specifically to the goods of one or several deliveries in particular. In such a case, I am of the opinion that the objective of closeness underlying Article 5(1) of Regulation No 44/2001 would oblige the plaintiff to bring his action in the court or one of the courts of the place of delivery of these goods.

126. For this reason I do not consider that Regulation No 44/2001 justifies laying down criteria such as those envisaged by the Commission in order to determine before the court of which place of delivery the defendant should be sued.

127. At the same time, I do not believe that Regulation No 44/2001 confers on the plaintiff a right to bring his action before the court of just any place of delivery. I do not believe that this regulation aims to ensure that the plaintiff has such freedom of choice. In my view, Article 5(1)(b) of the regulation requires that the plaintiff be able to sue the defendant in the court of one of the places of delivery of the goods and that that court hear all the disputes relating to the same contract. In other words, this provision requires that the plaintiff be able to sue the defendant in a court within whose territorial jurisdiction a delivery has been made and that that court be the only national court with jurisdiction to hear all the disputes arising from a contract for the sale of goods between the parties.

128. However, the question whether all the courts in whose area a delivery has been made have jurisdiction to hear such an action relating to all the deliveries, or whether this type of dispute falls within the jurisdiction of one of these courts in particular is, in my opinion, a matter to be determined according to the procedural autonomy of the Member State on whose territory the goods have been delivered.

129. Hence, if the law of that Member State does not lay down rules on special jurisdiction, the defendant may, if the action relates to all the deliveries, be sued in the court of one of the places of delivery, at the choice of the plaintiff.

130. In the light of these factors, I propose that the reply to the question from the Oberster Gerichtshof should be that, where there are several places of delivery, Article 5(1)(b) of Regulation No 44/2001 is applicable if, as agreed between the parties, the goods have been delivered in different places in a single Member State. If the action relates to all the deliveries, it is for the law of the Member State in which the goods have been delivered to determine whether the plaintiff may sue the defendant in the court of the place of delivery of his choice or only in the court of one of those places. If the law of that State does not lay down rules on special jurisdiction, the plaintiff may sue the defendant in the court of the place of delivery of his choice.

## IV — Conclusion

131. In the light of the foregoing considerations, I propose that the Court reply as follows to the question submitted for a preliminary ruling by the Oberster Gerichtshof:

Where there are several places of delivery, Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applicable if, as agreed between the parties, the goods have been delivered in different places in a single Member State.

If the action relates to all the deliveries, it is for the law of the Member State in which the goods have been delivered to determine whether the plaintiff may sue the defendant in the court of the place of delivery of his choice or only in the court of one of those places. If the law of that State does not lay down rules on special jurisdiction, the plaintiff may sue the defendant in the court of the place of delivery of his choice.