OPINION OF ADVOCATE GENERAL LÉGER
delivered on 12 December 1996 *

1. This reference for a preliminary ruling, made by the Circuit Court, County of Dublin, under Article 3 of the Protocol of 3 June 1971, [1] presents a further opportunity for defining one of the terms used by the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [2] as amended, in particular, by the 1978 Accession Convention [3] ('the Convention').

2. The point in issue is the interpretation of the term 'maintenance creditor' in Article 5(2) of the Convention, which has not hitherto been defined by the Court. That term identifies those who may invoke the special jurisdiction provided for by Article 5(2), and thus serves to define the scope of the choice of jurisdiction open to them. The Court is requested, in essence, to rule whether 'maintenance creditor' is to be interpreted as covering any person claiming maintenance or only a person whose status as a maintenance creditor has been recognized by judicial decision.

I — The special jurisdiction provided for by the Brussels Convention of 27 September 1968

3. The provisions of the Convention giving rise to the question referred are contained in Title II, headed 'Jurisdiction'.

4. The basic jurisdictional rule laid down by the Convention is set out in the first paragraph of Article 2, which 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.'

* Original language: French.

1 — Protocol 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 (OJ 1978 L 304, p. 50).

2 — OJ 1978 L 304, p. 36.

3 — 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 the amended text of the Convention of 27 September 1968, cited above, p. 77).

5. Article 5 of the Convention lays down, in certain areas, jurisdictional rules providing alternatives to the principle that jurisdiction is conferred on the courts of the State in which the defendant is domiciled. It provides, *inter alia*:

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

(...)

2. *in matters relating to maintenance*, in the courts for the place where the maintenance creditor is *domiciled or habitually resident* or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties'. [4]

6. A maintenance creditor therefore enjoys a *choice of jurisdiction*, being entitled to bring proceedings either in the courts for the place where the defendant is domiciled or in those for his or her own place of domicile or residence.

4 — Emphasis added.

II — Facts and procedure

7. According to the reference for a preliminary ruling in the present case, the applicant, Ms Jackie Farrell, an unmarried woman of 28 years of age, residing at Dalkey, Ireland, is the mother of a child born on 3 July 1988. Ms Farrell asserts that the father of her child is the respondent, Mr James Long, a married man who is habitually resident in Bruges, Belgium, where he also works.

8. The applicant applied to the District Court for an order requiring Mr Long to pay maintenance. The respondent contests the application on the ground that he denies being the father of the child.

9. On 11 February 1994 the District Court dismissed Ms Farrell's application on the ground that it lacked jurisdiction. On appeal to the Circuit Court, County of Dublin, Ms Farrell argued that the Irish courts had jurisdiction under Article 5(2) of the Convention. Mr Long maintained that the term 'maintenance creditor' referred only to a person already in possession of a maintenance order, and not to a person in the applicant's position, seeking such an order.

10. In the context of that appeal, the Circuit Court, County of Dublin, has referred the following question to the Court of Justice:

'Do the provisions of Article 5(2) of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels on the 27th day of September 1968 require as a condition precedent to the institution of maintenance proceedings in the Irish courts by an applicant who is domiciled in Ireland against a respondent who is domiciled in Belgium that the applicant has previously obtained an order for maintenance against the respondent?'

11. In his observations, [5] the respondent argues that the maintenance proceedings are ancillary to the issue of paternity and that the applicant cannot therefore rely on the first part of Article 5(2). Consequently, only the second part of that provision is applicable.

12. Since the relevance of the question referred is thus contested, it is necessary first of all to examine that point before undertaking an assessment of the contested concept.

5 — Point 1.5.

III — Applicability of Article 5(2)

13. As is apparent both from the question referred and the wording of the decision to seek a preliminary ruling, [6] the national court's question concerns the first part of Article 5(2), which applies to proceedings seeking payment of maintenance, and not the second part, which is restricted to maintenance applications ancillary to proceedings concerning the status of a person.

14. The national court therefore considers that the question raised is decisive for the determination of the dispute.

15. The Court of Justice has consistently held that 'the considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it are excluded from review by the Court of Justice'. [7]

6 — See, in particular, p. 7 of the judgment accompanying the reference for a preliminary ruling.

7 — Case 26/62 *Van Gend & Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1, at p. 11.

16. More particularly, it has ruled that 'when a national court or tribunal refers a provision of Community law for interpretation, it is to be supposed that the said court or tribunal considers this interpretation necessary to enable it to give judgment in the action' and that 'the Court cannot require the national court or tribunal to state expressly that the provision which appears to that court or tribunal to call for an interpretation is applicable'. [8]

17. I am of the view, therefore, that the question referred by the national court must be answered, regardless of its relevance to the dispute before it, and that the answer to be given requires an interpretation of the term 'maintenance creditor'.

IV — The term 'maintenance creditor'

18. According to the referring court, the law governing jurisdiction in the present proceedings is set out in the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 ('the 1988 Act'). That statute gives the force of law to the Convention in Ireland.

19. Whilst the term 'maintenance creditor', as used in Article 5(2) of the Convention, may call for interpretation, its meaning in the Irish statute cited by the national court appears less ambiguous.

20. First, Section 1 of the 1988 Act provides: '"maintenance creditor" means, in relation to a maintenance order, the person entitled to the payments for which the order provides'. [9]

21. Second, Rule 20 of the District Court [Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988] Rules, 1988, which deals with the procedure for bringing an application before the District Court, refers to an application brought by virtue of Article 5(2) of the Convention 'for the variation of a maintenance order'.

22. The national court, noting the divergence between the wording of the Convention and that of the Irish statute, states: '... it may be that the terms of the Irish statute do not fully reflect the intentions and purpose of the Convention'. [10]

8 — Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, paragraphs 17 to 19. see also Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 10.

9 — Page 3 of the judgment accompanying the reference for a preliminary ruling.

10 — Ibid., p. 7.

23. The question of the interpretation of the term 'maintenance creditor' appears, therefore, to be decisive.

(1) *An autonomous concept*

24. The numerous terms used in the Convention may differ in meaning from one Contracting State to another. The Court of Justice has had occasion, in the exercise of its interpretative functions, to decide whether such legal concepts must be regarded as autonomous, and therefore given a uniform interpretation in all the Contracting States, or whether they may bear their ordinary meaning under national law.

25. As the Court has held: 'Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the Treaty'. [11]

26. It is in the light of that principle, I suggest, that the intended meaning of the term 'maintenance creditor' must be sought.

27. Whilst the Court has not hitherto had occasion to interpret the term 'maintenance creditor', an autonomous definition has been given to other expressions used to define *the scope of some of the types of special jurisdiction* laid down by Article 5 of the Convention.

28. One instance is the term 'matters relating to a contract' in Article 5(1). The Court has stated: 'Having regard to the objectives and the general scheme of the Convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned'. [12]

29. The concepts contained in the phrase 'dispute arising out of the operation of a branch, agency or other establishment', which determine the special jurisdiction provided for in Article 5(5), provide another example. [13] In that connection, the Court has very clearly stated: 'Multiplication of the bases of jurisdiction in one and the same case

11 — Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473, paragraph 11.

12 — Case 34/82 *Peters* v *ZNAV* [1983] ECR 987, paragraph 9, and Case 9/87 *Arcado* v *Haviland* [1988] ECR 1539.

13 — Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183, paragraph 3 et seq.

is not likely to encourage legal certainty and the effectiveness of legal protection throughout the territory of the Community and therefore it is in accord with the objective of the Convention *to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction* contained in Article 2'. [14]

30. I propose that the Court should follow the line taken in those decisions, and regard the term 'maintenance creditor' as referring to *an autonomous concept.*

31. To decide otherwise would be to allow a situation in which persons could exercise a choice of jurisdiction in one Contracting State and not in another, depending on whether the national authorities chose to group them together within the same category or, on the contrary, to distinguish between them in accordance with criteria which might themselves vary from State to State.

32. In the preamble to the Convention, the Contracting States express their concern to strengthen in the Community the legal protection of persons therein established and, for that purpose, to determine the international jurisdiction of their courts. By resorting to a common set of norms, they evince a desire to establish a unified corpus of rules of jurisdiction precluding, in my view, any possibility that terms may vary in meaning.

33. A variable definition would not only give rise to discrimination which, in the light of the objective of protection set forth in the preamble, cannot be justified. It would maintain a complex fabric of rules of jurisdiction, inherent in the plurality of national laws, which the Convention was intended to reduce.

(2) *The meaning of the term 'maintenance creditor'*

34. As the Court has consistently held, the autonomous concepts used in the Convention must, for the purpose of its application, be interpreted by reference, first, *to the system and objectives of the Convention* [15] and, second, *to the general principles which stem from the corpus of the national legal systems.* [16]

14 — Ibid., paragraph 7, emphasis added.

15 — *Arcado* v *Haviland*, cited above, paragraph 11.

16 — Case 814/79 *Netherlands State* v *Rüffer* [1980] ECR 3807, paragraph 7.

35. Among the *legal systems of the Member States*, several categories may be discerned.

36. Most of the laws in the Member States (in Austria, Belgium, Denmark, England and Wales, Finland, Greece, Italy, the Netherlands and Sweden) *do not use the term 'maintenance creditor'* to define a domestic rule of jurisdiction. The concept of 'maintenance creditor' is not found in German law either, although there is a rule of jurisdiction in respect of maintenance obligations. Under French law, the applicant may choose, in matters relating to maintenance, to bring proceedings before the courts of the place where the creditor resides. However, the French legislation does not define what is meant by 'creditor', and the meaning of that term has not been judicially defined. Spanish law uses the term 'maintenance creditor', but no conclusions as to its meaning can be drawn either from legal literature or from case-law. The position is the same under Scots law. In Luxembourg law, on the other hand, the statute concerning territorial jurisdiction in matters relating to maintenance uses the term 'creditor' and expressly refers to 'applications for the payment of maintenance or for variation of a maintenance order'. In Ireland, doubt remains as to whether the 1988 Act is restricted to the enforcement within Ireland of maintenance decisions given in other States, or whether its provisions constitute rules governing the domestic or international jurisdiction of the Irish courts in the determination of maintenance obligations or variation of maintenance orders.

37. It does not seem possible, therefore, to derive from the national legal systems any general principle which may assist in the interpretation of the term 'maintenance creditor'. It is not used in most legal systems. Where it is, its meaning has not been determined with any certainty. Interpretation of the wording used in the Convention must therefore seek, primarily, to adhere as closely as possible to the objectives and system of the Convention.

38. What is meant by the term 'maintenance creditor' may be defined by examining, in turn, three possible meanings, ranging from the narrowest to the widest sense of the term.

39. First, as the respondent contends in part of his argument, [17] 'maintenance creditor' may mean a person in whose favour a maintenance order has been made. On that basis, Article 5(2) offers a choice of jurisdiction to persons who, having obtained a maintenance order in another Member State, wish to obtain an additional order in the State where they are domiciled or habitually resident.

40. Second, 'maintenance creditor' may mean a person whose right to maintenance has not been established but who is legitimately entitled, by reason of his or her

17 — Point 4.7 of his observations.

status, in particular a family link with the person against whom the application is made, to claim the payment of sums of money.

41. Lastly, in its widest sense, the term may apply to any person who seeks the payment of maintenance.

42. If the term is taken to mean *a person in whose favour a maintenance order has been made*, the scope of Article 5(2) appears remarkably restricted, especially if one attempts to identify the categories of cases in which a rule of special jurisdiction has been considered justified.

43. We may immediately discount those cases in which the maintenance creditor applies to the courts for the place where he or she is domiciled or habitually resident for recognition or enforcement of a judicial decision within the territorial jurisdiction of those courts. Article 5 forms part of Title II of the Convention, relating to jurisdiction. It does not fall within the scope of Title III, which lays down rules of jurisdiction specific to applications for recognition and enforcement of judgments and is thus designed to regulate such applications.

44. Two other categories of proceedings thus remain to be considered: those seeking determination of the amount of maintenance, where there has been an initial decision merely declaring that maintenance is in principle payable, and those seeking variation of the amount of maintenance originally ordered.

45. However, there is nothing in the Convention to justify dividing maintenance cases up into two categories: those seeking recognition of the claim and those seeking determination of the amounts due. Moreover, such a division does not appear compatible with the requirements as to simplified procedural rules and expeditious procedures by which the Treaty and the Convention seek to facilitate the reciprocal recognition and enforcement of judgments of courts or tribunals in the Member States. [18] Nor, moreover, does either the Commission or any of the parties or intervening States propose such an interpretation.

46. We may therefore question why a choice of jurisdiction should be reserved to a category of cases as limited as those seeking variation of maintenance obligations in respect of which a judicial decision has already been given. Nor is it clear why the initial maintenance proceedings should be excluded from such special jurisdiction.

18 — See Article 220 of the EC Treaty and the preamble to the Brussels Convention.

47. It is true that the danger that putative maintenance debtors would have to bear the principal burden imposed by legal proceedings improperly brought against them abroad might justify providing for a choice of jurisdiction limited strictly to applications brought by creditors recognized as such.

48. But if that concern was the justification for such a demarcation within the rules of special jurisdiction, it is surprising that there is no indication of it in the wording of Article 5(2) of the Convention or in the reports of Mr P. Jenard [19] and Professor Schlosser. [20]

49. On the contrary, the Jenard Report states:

'... the court for the place of domicile of the maintenance creditor is in the best position to know whether the creditor is in need and to determine the extent of such need.

However, in order to align the Convention with the Hague Convention, Article 5(2) also confers jurisdiction on the courts for the place of habitual residence of the maintenance creditor. This alternative is justified in relation to maintenance obligations since it enables in particular a wife deserted by her husband to sue him for payment of maintenance in the courts for the place where she herself is habitually resident, rather than the place of her legal domicile.' [21]

50. Not only does Mr Jenard draw no distinction between the initial proceedings and the application for the determination or variation of the amount of maintenance payable, but the explanations given by him attest to the general character, applicable without distinction to all proceedings brought in maintenance matters, of the rule laid down.

51. The justification given for the rule contained in Article 5(2) of the Convention, namely the capacity of the court to know whether the creditor is in need and to determine the extent of such need, is not valid only for a single category of maintenance proceedings; it is perfectly applicable to the initial proceedings seeking the payment of maintenance. Moreover, the example of a wife deserted by her husband, which Mr Jenard gives to show why the maintenance creditor's habitual residence should serve as an alternative criterion of jurisdiction, quite clearly relates to an initial application for maintenance, as is shown by the terminology used (suing 'for payment' of maintenance, not for the 'determination', 'review' or 'variation' of maintenance).

19 — Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1), known as 'the Jenard Report'.

20 — Report on 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 to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71), known as 'the Schlosser Report'.

21 — Jenard Report, cited above, p. 25.

52. Furthermore, counsel for the respondent referred at the hearing to a definition of the term 'debt' given in England in 1883, according to which 'a debt is a sum of money which is payable or which will become payable in the future by reason of a present obligation'. He inferred from this that, in the present case, entitlement to payment of this sum of money is not established whilst paternity remains in issue, which means that the question raised turns on the question of legal status.

53. I endorse the definition proposed, but, as stated above, [22] I do not consider that it is for the Court to assess the relevance of the question or the extent to which the answer to be given to it may resolve the dispute pending before the referring court.

54. On the other hand, once it is agreed that a debt is an obligation arising from some fact — which may be either a legal fact in the strict sense of the term or a legal act — by virtue of which the creditor *is entitled to payment* of a sum of money from his debtor, it becomes clear that a person does not need to have obtained a court judgment in order to qualify as a creditor. Such a judgment certainly constitutes undeniable proof of his status as a creditor. However, that status is not conditional on the existence of a judgment, since the fact giving rise to the obligation, and thus the debt, may well precede the judgment (as, for example, in the case of the loan of a sum of money giving rise to a repayment obligation or a blood relationship creating a maintenance obligation).

55. Consequently, the existence of a judgment does not in my view constitute a *sine qua non* for recognizing that a person is a maintenance creditor, which can be established by other criteria.

56. That is the position where it is possible to prove a *family relationship* between the person claiming maintenance and the person from whom it is claimed which is such as to render the maintenance claim legitimate.

57. It would be possible, by means of such a distinction, to reserve the choice of jurisdiction to putative creditors and to deny it to persons who merely claim maintenance without having any obvious entitlement thereto. Interpreted in that way, the rule laid down in Article 5(2) would protect those against whom improper claims are made from the excessive burden of legal proceedings abroad.

58. In my view, however, any such distinction is again precluded by the broadness of the wording of Article 5(2) and the need for simplicity in the procedural rules laid down by the Convention pursuant to Article 220 of the Treaty.

22 — See point 15 et seq. of this Opinion.

59. Different approaches may be taken with regard to what constitutes a family relationship as a criterion for determining whether a person is a maintenance creditor.

60. In a narrow sense, a maintenance creditor might be a person who is able to rely on a legally recognized family relationship with the person from whom maintenance is claimed. That construction would afford a choice of jurisdiction to, for example, a spouse or former spouse, or a child whose affiliation is established by the fact of the marriage or an act of recognition.

61. The advantage of such a solution lies in the fact that it is based on an objective criterion. However, it is open to challenge in two respects: first, in order to be accepted, such a precise distinction would have to be evident from the wording of Article 5(2) of the Convention or from the reports cited above, [23] which is not the case. Second, it deviates from the very definition of indebtedness, by denying the choice of jurisdiction to persons who are entitled to maintenance but who do not possess any legal status enabling them to establish such entitlement. A maintenance claim made, for example, on behalf of an unacknowledged child against his real parents would be excluded from the scope of Article 5(2) solely because of the denial of his parentage. It is not possible to define a creditor as a person entitled to the payment of a sum of money by reason of a fact giving rise to indebtedness and, at the same time, to deny a person the opportunity of proving the very fact — in this instance, parentage — giving rise to such status as a creditor.

62. In the broad sense, a maintenance creditor would then be a person who, in order to exercise a choice of jurisdiction, first proves the family relationship on which the indebtedness is based. In such circumstances, however, the criterion ceases to be objective, since the court seised is required, in each individual case, to assess the likely veracity of the alleged relationship. There is therefore a risk that the outcome may vary from one State to another, or even from one court to another, contrary to the minimum objectives of legal certainty and simplicity of procedural rules. Moreover, and for the same reasons, it is unacceptable that the determination of a rule of jurisdiction should be thus dependent on the outcome of complex arguments on a substantive issue.

63. The use of family relationships, in that sense of the term, in order to establish that a person is a maintenance creditor, and thus to determine the right to exercise a choice of jurisdiction, may therefore be seen as awkward, arbitrary and open to challenge.

64. The remaining solution, advocated by all of the parties except for the respondent, is to apply the widest definition to the term 'maintenance creditor'. According to that construction, 'maintenance creditor' within the meaning of the Convention must mean *the person bringing a principal claim for maintenance*. [24]

23 — See footnotes 19 and 20 to this Opinion.

24 — See, in particular, point 21 of the Commission's observations.

65. It is apparent from what has been stated above that that construction is most closely in accordance with the objectives pursued by the Convention, namely, simplicity, expeditiousness and legal protection of individuals.

66. The criterion for determining whether a person is eligible to effect a choice of jurisdiction is a very precise and objective one. Consequently, it reduces the risk of potential litigation arising from uncertainty as to its parameters, which may itself cause delay and unjustified differentiation between persons who may be entitled to make such a choice.

67. The claim relevant for that purpose may be one seeking either an initial maintenance order or the review of such an order. It does not require the bringing of separate proceedings, which would hardly accord with the efficacy which it is sought to achieve.

68. Lastly, the Court has held that 'although Article 5 makes provision in a number of cases for a special jurisdiction which the plaintiff may choose, this is because of the existence, in certain clearly-defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of proceedings'. [25]

69. Article 5(2) is designed to relieve the maintenance creditor from having to bring proceedings in a distant court. There are two main reasons for this.

70. First, the maintenance claimant is *ex hypothesi* and, in most cases, in practice the more impecunious of the parties to the proceedings, so that it seems fair that he or she should be spared the costs of an action abroad, including those incurred at the stage of the initial application.

71. Second, the court for the place where the applicant is domiciled or resident is best placed, by reason of its familiarity with the economic and social climate in which the applicant lives, to make findings as to the reality and extent of the needs expressed. It is in a position to determine the merits of the application and to appraise the amount to be awarded. Its suitability is no different whether it is seised of an initial application or a fresh stage in the litigation. This is confirmed by the Jenard Report, cited above, in which it is stated that the court for the place of domicile of the maintenance creditor is in the best position to know whether the maintenance creditor is in need and to determine the extent of such need. [26]

72. The term as thus defined appears to me, therefore, to accord with the system and objectives of the Convention as previously interpreted by the Court with a view to clarifying the provisions concerning special jurisdiction.

25 — *Peters*, cited above, paragraph 11. See also the Jenard Report, p. 22, and point 92 of the Schlosser Report, p. 102.

26 — Jenard Report, p. 25.

73. On this view, there is no reason why the proximity intended by the legislature between an individual and the court which is called upon to determine his or her claim should not also benefit those making initial maintenance applications.

74. It thus appears that the objective of the Convention is not to differentiate according to the type of proceedings brought but to facilitate the institution of lawsuits by maintenance claimants, who are frequently at a disadvantage. Consequently, for the purposes of deciding upon a rule of jurisdiction, it must be accepted that 'maintenance creditor', within the meaning of the Convention, designates a person claiming to qualify as such.

Conclusion

75. In the light of the foregoing considerations, I propose that the Court give the following answer to the question referred:

On a proper construction of Article 5(2) of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968, an applicant domiciled in Ireland, who wishes to bring maintenance proceedings under that provision before the Irish courts against a respondent domiciled in Belgium, does not need to have previously obtained an order requiring the respondent to pay maintenance.

The term 'maintenance creditor' in the first part of Article 5(2) must be interpreted as meaning any person who brings a claim for maintenance by way of principal application.