OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 27 January 2009 [1]

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1 — Original language: Slovene.

I — Introduction

1. Almost no other provision of Community law has been the subject, at the time of its adoption, of such intense negotiations leading to an unforeseeable outcome, or the target of so many critical reactions from academics than Article 5(1) 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 (known as 'the Brussels I Regulation'; hereinafter 'Regulation No 44/2001'). [2] The purpose of this provision is to determine the court having jurisdiction for cases relating to a contract. In relations between the Member States of the Community, that provision replaced Article 5(1) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [3] (the 'Brussels Convention'). For that reason, in interpreting the article in question the Court will have to pay considerable heed to the will of the Community legislature. At the same time, the Court will have to start its work at the point where the legislature stopped and tackle the far from easy task of giving a precise definition to the concepts contained in the article in question and determining the jurisdiction for individual types of contract.

2. The point at issue in the present case is whether, for the purpose of determining the court having jurisdiction, a contract between parties in different Member States in which the owner of intellectual property rights permits the counterparty to that contract to use that right (licence agreement) [4] can be regarded as a contract for the provision of services within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001. At the same time, this case raises the question whether, in interpreting Article 5(1)(a) of Regulation No 44/2001, it is necessary to ensure continuity with the interpretation of Article 5(1) of the Brussels Convention.

3. This reference for a preliminary ruling has been submitted in the course of proceedings brought by the Falco Privatstiftung foundation and by Mr Thomas Rabitsch, applicants, against Ms Gisela Weller-Lindhorst, defendant, and relates to the non-payment of royalties which the defendant allegedly owed to the applicants under a licence agreement, in terms of which the defendant obtained a licence for the sale of video recordings of a concert for which the applicants claim copyright.

2 — OJ 2001 L 12, p. 1.

3 — Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1), the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), 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 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) to that convention.

4 — The referring court uses the term 'licence agreement' for such a contract. For that reason, I shall also use that term in this Opinion, even though, as I point out in point 49 below, the concept of a licence agreement is defined more narrowly in some Member States.

II — Legislative background

A — *Regulation No 44/2001*

4. Recital 2 of Regulation No 44/2001 states:

'Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.'

5. Recital 12 of Regulation No 44/2001 is worded as follows:

'In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

6. Recital 19 of Regulation No 44/2001 states:

'Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol should remain applicable also to cases already pending when this Regulation enters into force.'

7. Chapter II of Regulation No 44/2001, entitled 'Jurisdiction', lays down provisions governing that matter.

8. In Section 1 of that chapter, entitled 'General provisions', Article 2(1) provides:

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

9. In that same section of Chapter II, Article 3(1) provides:

'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

10. In Section 2 of the chapter on jurisdiction, entitled 'Special jurisdiction', Article 5 is worded as follows:

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

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;

...

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

…'

B — *The Brussels Convention*

11. Article 5(1) 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; …'

III — Facts, procedure in the main proceedings and the questions referred for a preliminary ruling

12. It is apparent from the order for reference that the first of the two applicants in the main proceedings, Falco Privatstiftung, is a foundation established in Vienna (Austria), which manages the copyright of the deceased Austrian singer Falco. The second applicant is Mr Thomas Rabitsch, domiciled in Vienna, a former member of that singer's rock group. The defendant, Ms Gisela Weller-Lindhorst, who is domiciled in Munich (Germany), sold video (DVD) and audio (CD) recordings of a concert given by the singer and his group in 1993. The defendant signed a licence agreement with the applicants relating to the video recordings of that concert, under which she obtained the right to sell the recordings in Austria, Germany and Switzerland. Although the parties to the dispute agreed on a single edition of a promotional compact disc (CD) bearing an audio recording of the concert in question, the defendant did not sign any licence agreement with the applicants relating to the audio recordings. The purpose of the promotional CD was solely to advertise the video recording of the concert.

13. In the proceedings before the Handelsgericht Wien (Commercial Court, Vienna), the court of first instance, the applicants requested first that the defendant be ordered to pay royalties amounting to EUR 20 084.04 on the basis of partially known numbers of sales of the video recordings of the concert, and secondly that the defendant be ordered to provide an account of all the sales of video and audio recordings, to pay further royalties for video recordings on the basis of that account and to pay adequate compensation and damages for the audio recordings. The applicants requested payment of the above amounts on the video recordings on the basis of the licence agreement, whereas for the audio recordings they claimed infringement of their copyright in the recordings of the concert.

14. The court of first instance took the view that it had jurisdiction under Article 5(3) of Regulation No 44/2001, which governs jurisdiction in matters relating to tort, delict or quasi-delict. On the basis of that provision, it declared that it was competent to hear an action alleging infringement of copyright relating to the audio recordings, in that the latter were also sold in Austria. Given the close connection between the action for payment of royalties on the video recordings under the licence agreement and the action alleging infringement of copyright, the court of first instance ruled that it also had jurisdiction to hear the action based on that agreement.

15. In the appeal judgment, the Oberlandesgericht Wien (Higher Regional Court, Vienna) confirmed its jurisdiction with regard to the payment of appropriate compensation for damages for infringement of copyright under Article 5(3) of Regulation No 44/2001. In contrast, it ruled that it did not have jurisdiction to decide on the action for payment of royalties for the video recordings under the licence agreement and therefore dismissed the appeal to that extent. It asserted that judgment on that application should be given by the court having jurisdiction within the meaning of Article 5(1)(a) of Regulation No 44/2001, which governs jurisdiction in matters relating to a contract. In that regard, the appeal court emphasised that the main obligation arising out of the licence agreement is an obligation to pay a sum of money, which, under both Austrian and German law, is to be performed at the domicile of the debtor, for which reason jurisdiction to hear the action rests with the German courts. It also stated that jurisdiction cannot be determined on the basis of Article 5(1)(b) of Regulation No 44/2001, in that the licence agreement does not relate to the provision of services within the meaning of that provision. The applicants appealed against that judgment of the appeal court to the Oberster Gerichtshof (Supreme Court, Austria).

16. In the order for reference, the Oberster Gerichtshof states that Article 5(1)(b) of Regulation No 44/2001 does not contain a definition of the term 'services'. In view of the broad meaning attributed to that concept in the case-law on the freedom to provide services [5] and in Community law on value added tax, [6] the referring court asks whether the contract under which the owner of intellectual property rights grants to the counterparty to the contract the right to exploit that right (in other words, a licence agreement) may constitute a contract for the provision of services within the meaning of Article 5(1)(b) of Regulation No 44/2001.

5 — The referring court cites Case C-224/97 *Ciola* [1999] ECR I-2517 and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193.

6 — In that context, the referring court mentions Article 6(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) and Article 25 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

17. If the licence agreement could constitute a contract for the provision of services within the meaning of Article 5(1)(b) of Regulation No 44/2001, the referring court also asks where those services were performed under the said contract. In that connection, it indicates that the licence was granted to the defendant for two Member States (Austria and Germany) and one third country (Switzerland). The applicants, who granted the licence, have their central administrative offices and their personal domicile respectively in Austria, whereas the defendant, who obtained the licence, is domiciled in Germany.

18. The referring court maintains that there are two places that may be considered as being the place in which the provision of services takes place. First, that place may be any place within the Member State in which use of the right is authorised under the licence agreement and where that right is also actually used. Secondly, the place in which the services are provided may also be the place in which the central administrative offices or domicile of the person granting the licence is located. The referring court points out that in either case jurisdiction to hear the action lies with the Austrian courts. However, in its opinion, a decision to that effect may conflict with the Court's findings in *Besix*, [7] in which it stated that Article 5(1) of the Brussels Convention is not applicable where the place of performance of the obligation in question cannot be determined because the contested contractual obligation consists in an undertaking not to do something which is not subject to any geographical limit and is therefore characterised by a multiplicity of places for its performance. In such a case, jurisdiction can be determined only by application of the general criterion laid down in the first paragraph of Article 2 of the convention. [8]

19. In that context, the referring court also asks whether the court whose jurisdiction is recognised in that way is also competent to rule on royalties for the use of copyright in another Member State or in a third country.

20. If jurisdiction cannot be determined on the basis of Article 5(1)(b) of Regulation No 44/2001, the referring court considers that it is necessary, in accordance with Article 5(1)(c) of that regulation, to establish jurisdiction within the meaning of subparagraph (a) of Article 5(1). In that case, in keeping with the judgment in *De Bloos*, [9] the decisive factor for determining jurisdiction is the place of performance of the contested obligation, that is to say, the obligation which forms the subject of the dispute between the parties. As is evident from the judgment in *Tessili*, [10] the place of performance of the contested obligation is established by reference to the substantive law applicable to the contractual relationship under the rules of conflict of laws of the court before which the matter is brought. In that case, the Austrian courts would not have jurisdiction, since under both Austrian and German law the

7 — Case C-256/00 [2002] ECR I-1699.

8 — It is clear that the referring court implicitly assumes here that the case-law relating to Article 5(1) of the Brussels Convention is also applicable for the purposes of interpreting Article 5(1) of Regulation No 44/2001.

9 — Case 14/76 [1976] ECR 1497.

10 — Case 12/76 [1976] ECR 1473.

contested obligation to pay a sum of money must be performed at the domicile of the defendant, hence in Germany, and for that reason jurisdiction would lie with the German courts.

21. In those circumstances, by order of 13 November 2007, the Oberster Gerichtshof stayed proceedings and referred the following questions to the Court of Justice under Articles 68 EC and 234 EC for a preliminary ruling: [11]

'1. Is a contract under which the owner of an intellectual property right [12] grants the other contracting party the right to use that right (a licence agreement) a contract regarding "the provision of services" within the meaning of Article 5(1)(b) of [Regulation (EC) No 44/2001] [the Brussels I Regulation]?

2. If Question 1 is answered in the affirmative:

2.1. Is the service provided at each place in a Member State where use of the right is allowed under the contract and also actually occurs?

2.2. Or is the service provided where the licensor is domiciled or at the place of the licensor's central administration?

2.3. If Question 2.1 or Question 2.2 is answered in the affirmative, does the court which thereby has jurisdiction also have the power to rule on royalties which result from use of the right in another Member State or in a third country?

3. If Question 1 or Questions 2.1 and 2.2 are answered in the negative: Is jurisdiction as regards payment of royalties under Article 5(1)(a) and (c) of the Brussels I Regulation still to be determined in accordance with the principles which result from the case-law of the Court of Justice on Article 5(1) of [the Brussels Convention]?'

11 — [This footnote concerns only the Slovene version of this Opinion].

12 — [This footnote concerns only the Slovene version of this Opinion].

IV — Procedure before the Court

22. The order for reference was lodged at the Registry of Court of Justice on 29 November 2007. In the written procedure, observations were submitted by the parties to the main proceedings, the German, Italian and United Kingdom Governments and the Commission. At the hearing on 20 November 2008, the applicants in the main proceedings, the German Government and the Commission presented oral argument and answered the questions put by the Court.

V — Arguments of the parties

A — *The first question*

23. The *applicants in the main proceedings* and the *Commission* propose that the Court reply to the first question by stating that the licence agreement should be regarded as a contract for the provision of services within the meaning of Article 5(1)(b) of Regulation No 44/2001.

24. In support of their claim, the applicants in the main proceedings state that the concept of 'services' is defined broadly in both primary and secondary Community legislation, and in particular in Community law on value added tax [13] and in Directive 2006/123 on services. [14] In their view, the broad definition of that concept is also to be found in certain Commission documents. [15] They also claim that the defendant's main obligation is to produce and sell audiovisual recordings of a work, and hence consists in a provision of services; in their opinion, the obligation to pay royalties is merely a subsidiary obligation on the defendant. They claim that in the present case they too are obliged to provide services, consisting precisely in the granting of exclusive or non-exclusive usage rights.

13 — The applicants in the main proceedings make general references to such legislation, without mentioning specific provisions.

14 — Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

15 — The applicants in the main proceedings refer in this regard to Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (OJ 2005 L 276, p. 54) and to the communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee — The Management of Copyright and Related Rights in the Internal Market (COM(2004) 261 final).

25. The Commission emphasises that the concept of 'services' must be interpreted independently, irrespective of the definition given to it in the legal systems of the Member States. It points to the wider meaning of the term under primary Community legislation, which is essentially broader than the usual definitions under the civil law of the Member States in that it includes, for example, the renting of moorings to boat-owners from other Member States [16] or the leasing of motor vehicles to undertakings from other Member States. [17] The Commission contends that the granting of rights to the use of intellectual works can also be considered a provision of services. It also maintains that Community directives on value added tax cannot assist in interpreting Article 5(1)(b) of Regulation No 44/2001, since under Article 1(1) thereof that regulation does not apply to fiscal matters.

26. In support of its view, the Commission relies on a literal, historical and teleological interpretation of Regulation No 44/2001. In the submission of the Commission, the text of Regulation No 44/2001 provides no evidence to support the view that the concept of 'services' should be interpreted more narrowly that under primary law. As regards the historical interpretation, the Commission emphasises that Article 5(1) of Regulation No 44/2001 was amended by comparison with Article 5(1) of the Brussels Convention so that for the sale of goods and the provision of services the 'place of performance of the obligation' within the meaning of the regulation is the place where the characteristic obligation under the contract is performed. According to the Commission, this was intended to avoid, at least in part, the problems of interpretation of Article 5(1) of the Brussels Convention, under which jurisdiction is determined on the basis of the place of performance of the contested obligation, bearing in mind, however, that that place is identified on the basis of the substantive law applicable to the contract. Moreover, a broad interpretation of the concept of 'services' would, in the opinion of the Commission, avoid the difficulties associated with distinguishing the contracts that can be classified under subparagraph (a) from those that fall under subparagraph (b) of Article 5(1) of Regulation No 44/2001.

27. All the other parties propose that the Court reply to the first question in the negative, and rule that the licence agreement is not a contract for the provision of services within the meaning of Article 5(1)(b) of Regulation No 44/2001.

28. The *defendant in the main proceedings* maintains that the concept of a contract for the provision of services within the meaning of Article 5(1)(b) of Regulation No 44/2001 should be interpreted in such a way as to include all contracts the object of which is to obtain, against payment, a specified factual result and not, as in the different case of

16 — *Ciola*, cited in footnote 5.
17 — *Cura Anlagen*, cited in footnote 5.

employment contracts, the mere performance of a given activity. In her view, licence agreements cannot be classified as contracts for the provision of services.

29. With regard to the first question, the *German Government* takes as its starting point a literal and systematic interpretation of Article 5(1) of Regulation No 44/2001 and of the scope of that provision. As to the literal interpretation, it submits that the concept of 'services' in Article 5(1)(b) of Regulation No 44/2001 cannot be interpreted in the way in which it is defined in primary law or in the directives on value added tax. [18] In its opinion, that concept is defined in broad terms in primary law and in the cited directives because, in the case of the freedom to provide services, it covers activities that do not fall under the other fundamental freedoms and, in the case of the directives on value added tax, it is designed to ensure that an unduly restrictive interpretation of the concept does not exclude any economic activity from the scope of the directives.

30. With respect to the systematic interpretation, the German Government claims that the provisions of subparagraph (a) of Article 5(1) of Regulation No 44/2001 in combination with those of subparagraph (c) of that provision show clearly that there are contracts which relate neither to the sale of goods nor to the provision of services, and that subparagraph (b) of Article 5(1) cannot therefore be interpreted in such wide terms as to include all contracts that do not fall within the category of contracts for the sale of goods. From the proposal for the adoption of the Rome I Regulation [19] — under which the concept of services is to be interpreted in the same way as in Regulation No 44/2001 — it is evident that a licence agreement cannot be classified as a contract for the provision of services, in that the abovementioned proposal for a regulation contained a special provision governing the law applicable to contracts relating to intellectual or industrial property rights (Article 4(1)(f) of the proposal for the Rome I Regulation). The German Government maintains that it was for political reasons that that provision did not appear in the final text, and not because contracts relating to intellectual or industrial property rights could have been included among contracts for the provision of services.

31. With regard to the scope of Article 5(1)(b) of Regulation No 44/2001, the German Government maintains that in the case of a licence agreement it is not always appropriate to determine jurisdiction according to the place in which the services are provided, since contracts of this type may relate to intellectual property rights of various kinds. Moreover,

18 — In that context, the German Government cites Article 24(1) of Directive 2006/112 and the first sentence of Article 6(1) of Directive 77/388, both cited in footnote 6.

19 — Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (COM(2005) 650 final).

the licence may be granted for a number of countries or even for the entire world. In the view of the German Government, it is not possible to identify a typical licence agreement, on the basis of which the objective closeness of a particular jurisdiction can be established uniformly.

32. In the opinion of the *United Kingdom Government*, a broad interpretation of Article 5(1)(b) of Regulation No 44/2001 to include licence agreements would render subparagraphs (a) and (c) of that article superfluous, in other words, it would conflict with the systematic scheme and purpose of the regulation. The objective of the regulation's provisions on special jurisdiction is, according to the United Kingdom Government, to ensure that the power to hear a dispute lies with the court with a close link with the dispute. That government also submits that one of the main purposes of Regulation No 44/2001 is to make the rules on jurisdiction predictable, something that could not be ensured if Article 5(1)(b) of the regulation applied to licence agreements, since it would not be possible to determine the place in which the services had been provided under the agreement.

33. The *Italian Government* contends that a broad interpretation of Article 5(1)(b) of Regulation No 44/2001 would cause almost all contracts to come under that provision. Subparagraph (b) of Article 5(1) would therefore become a general provision, rather than being an exception, which would conflict with the purpose of that article. In addition, in the view of the Italian Government, the party granting the licence would be under no positive obligation that would make it possible to consider that the contract fell to be defined as a contract for the provision of services.

B — *The second question*

34. The *applicants in the main proceedings* maintain that the location of the licensor's domicile or central administration should be considered to be the place where the services were performed under the licence agreement. In their opinion, that assertion does not conflict with the judgment of the Court in *Besix*, [20] since the main proceedings relate not to an obligation to refrain from doing something, without any geographical limit, but to a licence agreement concluded for a geographically defined territory, that is to say, Austria, Germany and Switzerland. The applicants maintain that the service provided by the licensor under the licence agreement consists in the positive act of granting rights to the licensee. In the case of a licence granted for several countries, in particular, the location of the domicile or central administration of the contracting party required to perform the characteristic obligation of the contract becomes crucial for determining jurisdiction.

20 — Cited in footnote 7.

35. With regard to Question 2.3, the applicants submit that the court for the place in which the services under the contract were provided should also have the power to rule on royalties which result from use of the licence rights in other Member States or in third countries, in that the purpose of determining jurisdiction on the basis of the place of performance of the service is to concentrate jurisdiction in the hands of the court in that place.

36. In the opinion of the *Commission*, the place in which the services under the licence agreement were provided is the place where the domicile or registered office of the licensor is located. The Commission maintains that the *Besix* judgment [21] does not prevent jurisdiction for cases relating to licence agreements from being determined on the basis of Article 5(1)(b) of Regulation No 44/2001. It considers, in the first place, that the licensor's obligation does not consist merely in an undertaking not to do something, in that the licensor is under an obligation to grant the licence and to tolerate the licensee exploiting the rights conferred. Secondly, according to the Commission, it is necessary to determine jurisdiction on the basis of Article 5(1)(b) of Regulation No 44/2001 independently of the contested obligation to pay a sum of money. As to Question 2.3, the Commission asserts that the court of the Member State in which the licensor is domiciled or has its registered office also has the power to rule on royalties which result from use of the licence rights in another Member State or in a third country.

21 — Cited in footnote 7.

37. The *defendant in the main proceedings* and the *German* and *Italian Governments* make no observations with regard to the second question, given the reply they propose to the first.

38. The *United Kingdom Government* comments solely on Question 2.3, stating that if the Court replies to the first question in the affirmative the court with jurisdiction should also have the power to rule on royalties which result from use of the licence rights in another Member State or in a third country. Any other reply would entail the risk of conflicting judgments, in that different courts could rule on different aspects of the same dispute.

C — *The third question*

39. In the alternative, in the event that the Court replies to the first and second questions in the negative, the *applicants in the main proceedings* maintain, with regard to the third question, that Article 5(1)(a) of Regulation No 44/2001 is to be interpreted as meaning that jurisdiction is to be determined on the basis of the place of performance of the characteristic obligation of the contract and

not on that of the place of performance of the contested obligation. The applicants assert that Article 5(1)(a) of Regulation No 44/2001 should be interpreted independently and without regard to the rules of civil law in force in the individual Member States. They therefore propose that the Court state that the place where the licensor has his domicile or central administration should be regarded as the place of performance of the characteristic obligation within the meaning of the above provision.

40. The *Commission* does not comment on the third question, given the answer it proposes to the first and second questions.

41. In the opinion of the *German Government*, given that the Member States have harmonised the law applicable to contractual obligations, it is necessary to change the current case-law on the interpretation of Article 5(1)(a) of Regulation No 44/2001, under which the place of performance of the obligation at issue is to be determined on the basis of the rules of substantive law applicable to the contract or to the contested contractual obligation (*lex causae*); however, it is for the national court before which the matter has been brought to establish the substantive law applicable to the contractual relationship, in the light of the rules of conflict of laws of its legal system. The German Government proposes that this case-law be amended in such a way that, under Article 5(1)(a) of Regulation No 44/2001, the place of performance of the contested obligation falls to be determined independently, or that the obligation at issue in each case is always paramount.

42. The *Italian Government* maintains that, given the need for continuity of interpretation between the Brussels Convention and Regulation No 44/2001 as stated by the Court in the *Henkel* [22] and *Gantner Electronic* [23] cases with reference to Article 5(3), it is necessary to interpret Article 5(1)(a) of that regulation in the same way as Article 5(1) of the Brussels Convention.

43. The *United Kingdom Government* puts forward three arguments with regard to the third question. First, it states that the problems of interpreting Article 5(1)(a) of Regulation No 44/2001are the same as those that arose with regard to Article 5(1) of the Brussels Convention. Secondly, it is clear from the preamble to the proposal for Regulation No 44/2001 [24] that the case-law on Article 5(1) of the Brussels Convention also applies to Article 5(1)(a) of Regulation No 44/2001. Thirdly, the transposition of that case-law to Article 5(1)(a) of Regulation No 44/2001 is the best guarantee of legal certainty, given the settled nature of the case-law on the interpretation of the concept of 'the place of performance of the obligation in question' laid down in Article 5(1) of the Brussels Convention.

22 — Case C-167/00 [2002] ECR I-8111.
23 — Case C-111/01 [2003] ECR I-4207.
24 — Proposal for a Council regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final), p. 14.

VI — Appraisal

A — *Introduction*

44. The provisions of Regulation No 44/2001 on special jurisdiction in matters relating to a contract introduce a derogation from the general principle that jurisdiction is determined on the basis of the defendant's domicile, *actor sequitur forum rei*, [25] laid down in Article 2(1) of that regulation. With regard to cases relating to a contract, the derogation from the general principle and the determination of jurisdiction on the basis of special criteria are justified by the fact that in order to identify the court having jurisdiction there should be alternative grounds of jurisdiction based on a close link between the court and the action. [26] In addition, special jurisdiction in matters relating to a contract is necessary because it better ensures a balance between the interests of the applicant and those of the defendant, which would be impossible to achieve if only the abovementioned general criterion applied. [27] The applicant in a case relating to a contract can therefore choose whether to bring proceedings in the court of the domicile of the defendant or in the court which will have jurisdiction on the basis of the provisions on special jurisdiction in matters relating to a contract. [28]

45. The questions referred for a preliminary ruling in the present case turn on the interpretation of Article 5(1) of Regulation No 44/2001. That provision, which amended and reformulated Article 5(1) of the Brussels Convention, lays down rules on special jurisdiction in cases relating to a contract. Hence, for the first time since the regulation came into force on 1 March 2002, the Court will be called upon to interpret a provision adopted as a result of very long and complex negotiations. [29] At the same time, it is a provision on which it is legitimate to expect

25 — With regard to the general principle of *actor sequitur forum rei*, I take the liberty of adding that the purpose of the criterion of jurisdiction based on the domicile of the defendant is to protect the latter's rights, since his scope for mounting a defence would be reduced if he were sued in the courts of a Member State other than the one in which he is domiciled. See, for example, the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-103/05 *Reisch Montage* [2006] ECR I-6827, point 21. See also, by analogy, with reference to the Brussels Convention, Jenard, P., *Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters* (OJ 1979 C 59, p. 18).

26 — See recital 12 of Regulation No 44/2001.

27 — In that context, see Mankowski, P., in Magnus, U. and Mankowski, P. (eds), *Brussels I Regulation*, Sellier. European Law Publishers, Munich, 2007, p. 90, point 1.

28 — With regard to the applicant's right to choose, see Mankowski, P., in Magnus, U. and Mankowski, P. (eds), *Brussels I Regulation*, Sellier. European Law Publishers, Munich, 2007, p. 89, point 1.

29 — For further details on the negotiations and the options that were examined for the wording of Article 5(1) of Regulation No 44/2001, see Beaumont, P.R., 'The Brussels Convention Becomes a Regulation: Implications for Legal Basis, External Competence and Contract Jurisdiction', in Fawcett, J. (ed.), *Reform and Development of Private International Law. Essays in Honour of Sir Peter North*, Oxford University Press, New York, 2002, p. 15 et seq.; Kohler, C.,'Revision des Brüsseler und Luganer Übereinkommens', in Gottwald, P. (ed.), *Revision des EuGVÜ — Neues Schiedsverfahrensrecht*, Gieseking-Verlag, Bielefeld, 2000, p. 12 et seq.

many disputes about jurisdiction between parties to contracts. [30]

47. In order to answer that question, I shall first briefly describe the characteristics of a licence agreement and will then examine, in the context of the interpretation of the second indent of Article 5(1)(b) of Regulation No 44/2001, the essential features of the concept of 'services' within the meaning of that provision, while at the same time ascertaining whether a licence agreement can be treated as a contract for the provision of services within the meaning of that provision.

B — *The first question*

46. By its first question, the referring court asks essentially whether the second indent of Article 5(1)(b) of Regulation No 44/2001 is to be interpreted as meaning that a contract under which the owner of an intellectual property right grants the other contracting party the right to use that right (a licence agreement) [31] is a contract for the provision of services within the meaning of that provision. The purpose of the question is therefore to establish whether a licence agreement can be deemed to fall within the concept of a contract for the provision of services within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001.

1. Characteristics of a licence agreement

48. In the present case, the starting point must be the definition of a licence agreement offered by the referring court; it defines it as a contract under which the owner of an intellectual property right grants the other contracting party the right to use that right. However, since the judgments of the Court are binding on all national courts and *erga omnes*, [32] the definition of a licence agreement

30 — Rogerson, P., *Plus ça change? Article 5(1) of the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments*, Cambridge Yearbook of European Legal Studies, 2000, p. 383, states with regard to Article 5(1) of the Brussels Convention that this is one of the most frequently applied provisions of the convention, to which the parties in proceedings also refer the most. We can expect the same to be true of Article 5(1) of Regulation No 44/2001.

31 — As indicated in footnote 4 above, it is the referring court that described that contract as a 'licence agreement'.

32 — See Lenaerts, K., Arts, D., Maselis, I. and Bray, R., *Procedural Law of the European Union*, 2nd edition, Sweet & Maxwell, London, 2006, pp. 194 and 195, points 6-030 and 6-031; Van Raepenbusch, S., *Droit institutionnel de l'Union européenne*, 4th edition, Larcier, Brussels, 2005, p. 578.

offered by the law of the other Member States and by the provisions of Community law, if any, must also be taken into account.

49. Licence agreements are regulated differently in the various Member States; some treat them as a particular regulated type of contract and also provide an express definition of such a contract (the Czech Republic [33] and Slovenia, [34] for example), whereas other States, in the context of special provisions on intellectual property rights, regulate only the possibility of concluding a licence agreement, without expressly defining it (Austria, [35]

33 — Under Czech law, a licence agreement for granting the use of industrial property rights is governed by Articles 508 to 515 of the Obchodní zákoník (Commercial Code). Article 508 of that code provides that under the licence agreement the licensor grants the licensee the right to use an asset that is the subject of industrial property only to a stated extent and in an agreed framework, and in exchange the licensee undertakes to pay a fee in money or other material assets. Under Czech law, a licence agreement for the use of a work is governed by Articles 46 to 57 of the Zákon o dílech literárních, vedeckých a umelechkých (autorský zákon) (Law on literary, scientific and artistic work (Law on copyright)). Article 46(1) of that law provides that under a licence agreement the author may grant the licensee the right to use a work and that the licensee must pay remuneration to the author in that regard, unless it is agreed otherwise.

34 — Under Slovene law, licence agreements are governed by Articles 704 to 728 of the Obligacijskega zakonika (Code of Obligations). Article 704 of that code provides that under a licence agreement the licensor undertakes to grant the licensee, in whole or in part, the right to use a patented invention, a scientific discovery, technical skills, trade marks, designs or models, and the licensee agrees to pay the licensor a set fee. The legislation on copyright (Zakon o avtorski in sorodnih pravicah) (Law on copyright and associated rights) does not provide specifically for licence agreements, which are mentioned only in connection with computer programmes in Article 113(2) thereof, whereas the grant of rights to use copyright material is governed in the context of other contracts.

35 — For example, Paragraph 35 of Austria's Patentgesetz (Law on patents) allows the holder of a patent to transfer the right to exploit an invention to other persons. Paragraph 14(1) of the Markenschutzgesetz (Law on trade marks) lays down that a trade mark may be the subject of exclusive or non-exclusive licences for all or part of the goods or services for which it is registered. In Austrian academic writings, see Kucsko, G., *Geistiges Eigentum. Markenrecht, Musterrecht, Patentrecht, Urheberrecht*, Manz, Vienna, 2003, p. 469 (trade mark licence) and p. 929 (patent licence). Austria's Urheberrechtsgesetz (Law on copyright) does not provide explicitly for licence agreements for granting the right to use copyright material, but contracts of that kind have taken hold in practice. The term, referring to the grant of the right to use copyright material, is used in Austrian case-law, for example; in this regard, see, inter alia, the following judgments of the Oberster Gerichtshof: OGH 10.12.1985, 4 Ob 381/84; OGH 15.10.2002, 4 Ob 209/02t; OGH 29.4.2003, 4 Ob 57/03s. With regard to the granting of the right to use computer programmes under licence agreements, see in academic writings, for example, Holzinger, E., 'Rechtsgeschäftliche Übertragung von Software. Versuch einer systematischen Einordnung', *EDV & Recht*, No 4/1987, p. 10.

France, [36] Ireland [37] and Germany, [38] for example). I would stress that in the majority of cases the legislation of the Member States provides for licence agreements — as either regulated or unregulated contracts — solely with regard to industrial property rights, but less frequently also with regard to copyright; [39] in some countries, the granting of rights to use copyright material is governed by provisions on other contracts covered by the specific legislation on the subject. [40]

50. Community law on the protection of intellectual property does govern the possibility of granting licences, but it does not lay down provisions on the conclusion of a licence agreement and its characteristic features. [41] Licence agreements or the possibility of granting licences for intellectual property rights are also mentioned in international treaties governing intellectual property, but they leave it to the national law of signatory States to regulate the licence agreement itself; it is sufficient to mention in this regard, by way of example, the TRIPs Agreement [42] and the European Patent Convention. [43]

36 — In French law, the Code de la propriété intellectuelle (Code on intellectual property) provides, for example, in the second paragraph of Article L 613-8 that the rights deriving from a patent may be the subject of exclusive or non-exclusive licences. In French academic writings, see, for example, Marcellin, Y., *Le Droit Français de la Propriété Intellectuelle*, Cedat, Paris, 1999, p. 433 et seq., who states, with regard to the licensing of patents, that a licence is granted by means of a contract under which the inventor (the licensor) grants the right of use to the licensee while retaining ownership of the patent. The same author also states (at p. 436) that the licensee is obliged to pay the fees and to use the asset that is the subject of the licence. French law does not lay down specific provisions for the granting of licences relating to copyright. Instead, the granting of rights to use copyright material is governed by provisions on other contracts under the legislation on copyright. On this aspect, see Marcellin, op. cit., p. 68 et seq.

37 — For example, the first paragraph of Article 120 of the Irish Copyright and Related Rights Act 2000, permits the granting of rights to use copyright material. In academic writings on Irish law, see, for example, with regard to licence agreements relating to copyright, Clark, R., *Irish Copyright and Design Law*, Butterworths, Dublin, 2003, p. C/110 et seq.

38 — Paragraph 15(2) of Germany's Patentgesetz (Law on patents) governs patent licensing agreements; it permits the granting of patent licences by means of contracts and provides, inter alia, that the licence may be exclusive or non-exclusive. Paragraph 30 of the Markengesetz (Law on trade marks) provides that a trade mark may be the subject of exclusive or non-exclusive licences. Stumpf, H. and Groß, M., *Der Lizenzvertrag*, 8th edition, Verlag Recht und Wirtschaft, Frankfurt am Main, 2008, p. 41, point 16, state that a licence may also be granted for specific application skills (know-how). The German Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights) does not expressly mention licence agreements, but Paragraph 31 thereof governs the granting of rights of use (Einräumung von Nutzungsrechten). Nevertheless, in German academic writings we encounter, for example, the term 'licence' in the copyright field as well; see, for example, Schack, H., *Urheber und Urhebervertragsrecht*, 2nd edition, Mohr Siebeck, Tübingen, 2001, p. 245, points 539 and 540.

39 — Licence agreements relating to copyright are regulated by Czech and Irish law, for example (see footnotes 33 and 37 respectively).

40 — See, for example, Slovene and French law (see footnotes 34 and 36 respectively).

41 — For example, as regards copyright, recital 30 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) states that the rights in question may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights. Article 22(1) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) provides that a Community trade mark may be licensed for some or all of the goods or services for which it is registered and for the whole or part of the Community; a licence may be exclusive or non-exclusive. The future regulation on the Community patent will also contain provisions on licence agreements; Article 19 of the proposal for a Council regulation on the Community patent (COM (2000) 412 final) lays down that the Community patent can be licensed, in whole or in part, for all the territories of the Community or only part thereof, and that such licences may be exclusive or non-exclusive.

42 — Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Article 21 of the TRIPs Agreement provides that the Member States may set the conditions for the licensing of trade marks, but provides inter alia, in Article 28(2), that patent owners are to have the right to conclude licensing contracts. An electronic version of the agreement is to be found at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

43 — Convention on the Grant of European Patents (European Patent Convention — EPC) of 5 October 1973, text as amended by the act revising Article 63 of the EPC of 17 December 1991 and by decisions of the Administrative Council of the European Patent Organisation of 21 December 1978, 13 December 1994, 20 October 1995, 5 December 1996, 10 December 1998 and 27 October 2005 and comprising the provisionally applicable provisions of the act revising the EPC of 29 November 2000. Article 73 of the EPC governs the contractual licensing of patents and provides that a European patent application may be licensed for the whole or part of the territories of the Contracting States. An electronic version of the text of the convention can be consulted at http://www.epo.org/patents/law/legal-texts/html/epc/1973/e/ma1.html

51. From the legislation cited above and from the academic writings, it can be deduced that a licence agreement is a reciprocal contract, under which, in essence, the person granting the licence confers on the licensee the right to use particular intellectual property rights and, in exchange, the licensee pays licence fees to the licensor. By granting the licence, the licensor authorises the licensee to perform an activity which, in the absence of the licence, would be an infringement of intellectual property rights. [44] The licence may be limited in various ways; more specifically, it may be exclusive or non-exclusive, and it may impose limitations in terms of geographical area, period of time or the method of application. [45]

52. As regards the legal nature of a licence agreement, academic lawyers in the various Member States contend that it is an autonomous contract, [46] which must be kept distinct from other contracts; [47] some of the literature describes it as a contract *sui generis*. [48] For the purposes of the present dispute, the difference between a licence agreement and a leasing or rental contract takes on paramount importance. I shall dwell on the differences between these two categories of contract at greater length below when I address the question whether a licence agreement may be a contract for the provision of services. [49]

2. Interpretation of the second indent of Article 5(1)(b) of Regulation No 44/2001

53. The second indent of Article 5(1)(b) of Regulation No 44/2001 provides that the place of performance of the obligation is, in the case of the provision of services, the place in a Member State where, under the contract,

44 — In academic writings, see, for example, Tritton, G. et al., *Intellectual Property in Europe*, Sweet & Maxwell, London, 2008, p. 677, point 7-047; Bently, L. and Sherman, B., *Intellectual Property Law*, 2nd edition, Oxford University Press, New York, 2004, pp. 254 and 950.

45 — See Bently, L. and Sherman, B., *Intellectual Property Law*, 2nd edition, Oxford University Press, New York, 2004, p. 950. With regard to the various possible limitations, see in French academic writings Marcellin, Y., *Le Droit Français de la Propriété Intellectuelle*, Cedat, Paris, 1999, p. 434 et seq.

46 — In Austrian academic writings, see Kucsko, G., *Geistiges Eigentum. Markenrecht, Musterrecht, Patentrecht, Urheberrecht*, Manz, Vienna, 2003, p. 929. In German academic writings, see Busse, R. (ed.), *Patentgesetz. Unter Berücksichtigung des Europäischen Patentübereinkommens, des Gemeinschaftspatentübereinkommens und des Patentzusammenarbeitsvertrags. Kommentar*, De Gruyter, Berlin, New York, p. 297, point 53; Stumpf, H. and Groß, M., *Der Lizenzvertrag*, 8th edition, Verlag Recht und Wirtschaft, Frankfurt am Main, 2008, pp. 42 and 43, point 19. In Slovene academic writings, see Podobnik, K., in Juhart, M. and Plavšak, N. (eds), *Obligacijski zakonik (posebni del) s komentarjem, GV založba*, Ljubljana, 2004, comment on Article 704, p. 62.

47 — In Austrian academic writings, Kucsko, G., *Geistiges Eigentum. Markenrecht, Musterrecht, Patentrecht, Urheberrecht*, Manz, Vienna, 2003, p. 930, states that it is necessary to distinguish between a licence agreement and a contract for the transfer of specific know-how and between a licence agreement and a franchise agreement. In German academic writings, Stumpf, H. and Groß, M., *Der Lizenzvertrag*, 8th edition, Verlag Recht und Wirtschaft, Frankfurt am Main, 2008, pp. 43 to 45, points 20 to 24, state that a licence agreement must be distinguished from sales contracts, corporate contracts and leasing or rental contracts. See, in Slovene academic writings, Podobnik, K., in Juhart, M. and Plavšak, N. (eds), *Obligacijski zakonik (posebni del) s komentarjem*, GV založba, Ljubljana, 2004, comment on Article 704, p. 62.

48 — See, for example, in German academic writings Schulte, R., *Patentgesetz mit Europäischem Patentübereinkommen. Kommentar auf der Grundlage der deutschen und europäischen Rechtsprechung*, Carl Heymanns Verlag, Cologne, Berlin, Bonn, Munich, 1994, p. 219, point 16; in Austrian academic writings, see Kucsko, G., *Geistiges Eigentum. Markenrecht, Musterrecht, Patentrecht, Urheberrecht*, Manz, Vienna, 2003, p. 929; in Austrian case-law, see, for example, the judgment of the Oberster Gerichtshof OGH 15.10.2002, 4Ob 209/02t.

49 — See point 66 of this Opinion.

the services were provided or should have been provided. Hence, that provision does not define the concept of 'services' and nor has the Court hitherto clarified that concept when interpreting Regulation No 44/2001.

54. At the outset, I wish to state that the term 'services' in the context of Regulation No 44/2001 must be interpreted independently, without any reference to the meaning attributed to it in the legal systems of the Member States; to that end, it is necessary to take the broad scheme and purpose of the regulation as a starting point in order to ensure that it is uniformly applied in all [50] the Member States. [51] In addition, I must point out that in principle I agree with the argument of the parties in the present case that the concept of 'services' used in the second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted broadly, [52] but that it is necessary to ensure that that definition accords with the broad scheme and purpose of Regulation No 44/2001.

55. The general criterion for interpreting Regulation No 44/2001 must be continuity with the Brussels Convention. Article 5(1) of that convention did not specifically regulate jurisdiction over contracts for the provision of services, and for that reason the interpretation of that provision cannot be a basis for interpreting the concept of 'services' in the context of Regulation No 44/2001. Nevertheless, the Brussels Convention used the concept of a contract for the provision of services in subparagraph (3) of Article 13, which governed jurisdiction in matters concerning contracts concluded by con-

50 — As stated in recital 21of Regulation No 44/2001, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, that State did not participate in the adoption of the regulation, and is therefore not bound by it nor subject to its application. In conformity with recital 22 of Regulation No 44/2001, the Brussels Convention continues to apply in relations between Denmark and the Member States that are bound by that regulation.

51 — From the case-law on the Brussels Convention — which, in accordance with the principle of continuity, we must also take into account when interpreting Regulation No 44/2001 — it can be deduced that the concepts used in that regulation must be interpreted independently. See, for example, Case 150/77 *Bertrand* [1978] ECR 1431, paragraphs 14 to 16; Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, paragraph 13; Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 12; Case C-96/00 *Gabriel* [2002] ECR I-6367, paragraph 37; and Case C-27/02 *Engler* [2005] ECR I-481, paragraph 33. See also my Opinion of 11 September 2008 in Case C-180/06 *Ilsinger* (case pending before the Court), point 54.
In academic writings, with regard to the independent interpretation of the concepts used in Regulation No 44/2001, see, for example, Geimer, R., in Geimer, R. and Schütze, R.A., *Europäisches Zivilverfahrensrecht. Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht*, Beck, Munich, 2004, p. 176, who emphasises that the concept of 'services' must be interpreted uniformly in Community law, irrespective of the *lex causae* and hence of the law applicable to the contract. See also Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe. Règlement n° 44/2001, Conventions de Bruxelles et de Lugano*, 3rd edition, Librarie générale de droit et de jurisprudence, Paris, 2002, p. 148.

52 — Academic lawyers also incline towards a broad interpretation of the concept of 'services'. See, for example, Micklitz, H.-W., and Rott, P., 'Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001', *Europäische Zeitschrift für Wirtschaftsrecht*, No 11/2001, p. 328; Geimer, R., in Geimer, R. and Schütze, R.A., *Europäisches Zivilverfahrensrecht. Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht*, Beck, Munich, 2004, p. 176; Rauscher, T. (ed.), *Europäisches Zivilprozeßrecht. Kommentar*, 2nd edition, Sellier. European Law Publishers, Munich, 2006, p. 179, point 49; Mankowski, P., in Magnus, U. and Mankowski, P. (eds), *Brussels I Regulation*, Sellier. European Law Publishers, Munich, 2007, p. 131, point 90; Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe. Règlement n° 44/2001, Conventions de Bruxelles et de Lugano*, 3rd edition, Librarie générale de droit et de jurisprudence, Paris, 2002, p. 148.

sumers and relating to the provision of services, [53] so that the interpretation of that provision could also serve as a valid basis for interpreting Article 5(1) of Regulation No 44/2001. [54] However, when interpreting that provision of the Brussels Convention, the Court again did not provide an explicit definition of the concept of 'services'. [55]

56. Since the Court has not hitherto provided an interpretation of 'services', in order to interpret that concept it is necessary to take as a starting point, first, the usual meaning of the term 'services' and, secondly, the analogy with other sources of legislation.

53 — More precisely, subparagraph (3) of Article 13 of the Brussels Convention provided that in proceedings concerning contracts concluded by consumers jurisdiction is to be determined by the provisions in the section of the convention governing jurisdiction over consumer contracts if the contract is 'any other contract for the supply of goods or a contract for the supply of *services*, and (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and (b) the consumer took in that State the steps necessary for the conclusion of the contract'. Emphasis added.

54 — Rauscher, T. (ed.), *Europäisches Zivilprozeßrecht. Kommentar*, 2nd edition, Sellier. European Law Publishers, Munich, 2006, p. 179, point 49, points out that the interpretation of the term 'service(s)' used in subparagraph (3) of Article 13 of the Brussels Convention can also be taken into account when interpreting the same term in Article 5(1)(b) of Regulation No 44/2001.

55 — When called upon to interpret subparagraph (3) of Article 13 of the Brussels Convention — for example, in *Gabriel*, cited in footnote 51, paragraphs 38 to 40 and 47 to 51, and in *Engler*, cited in footnote 51, paragraph 34, the Court specified the prerequisites for its application; however, those cases did not relate to the provision of services but to the sale of goods.

(a) Abstract definition of the term 'services' used in the second indent of Article 5(1)(b) of Regulation No 44/2001

57. In my opinion, two aspects are of crucial importance for defining the concept of 'services'. In the first place, the usual meaning of the term 'services' requires that the person providing the service perform a particular activity; hence, the provision of services requires some activity or active conduct on the part of the person providing the service. [56] Secondly, as we shall see by analogy with the definition of that concept under primary law, [57] services must, in principle, be provided against payment. In any event, it must be borne in mind that the abstract definition of the concept in question permits us only to determine its outer limits; in each dispute it will be necessary to decide, on a case-by-case basis, whether a specific activity does or does not fall within the concept of 'services'.

56 — Thus, Mankowski, P., in Magnus, U. and Mankowski, P. (eds), *Brussels I Regulation*, Sellier. European Law Publishers, Munich, 2007, p. 131, point 90; Cavalier, G., 'Un contrat de concession exclusive n'est ni un contrat de vente ni une fourniture de services au sens de l'article 5, paragraphe 1, b) du règlement "Bruxelles I"', *Revue Lamy Droit des Affaires*, No 19/2007, p. 71. In that regard, we can also draw analogies with the interpretation of Article 5 of the Convention on the Law applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (the Rome Convention) (OJ 1980 L 266, p. 1); as to the interpretation of that article, Czernich, D., Heiss, H. and Nemeth, K., *EVÜ — Das Europäische Schuldvertragsübereinkommen: Übereinkommen über das auf vertragliche Schuldverhältnisse anzuwendende Recht. Kommentar*, Orac, Vienna, 1999, state that according to the German courts the 'services' mentioned in that article consist of services relating to activities ('tätigkeitsbezogene Leistungen').

57 — See point 61 of this Opinion.

58. On the basis of the abstract definition of the concept of 'services' described in the preceding point, in my opinion it can be established that a licence agreement cannot be defined as a contract for the provision of services within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001. Although a licence is granted against payment, the licensor does not in that context perform any action that consists in active conduct. He authorises the licensee to exploit the intellectual property right that is the subject of the licence; the active conduct required of the licensor consists in signing the licence agreement and in making the object to which the licence relates physically available so that it can be used. Those actions cannot, in my opinion, be defined as a 'service'. Hence, the granting of a licence cannot be regarded as a 'service' within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001.

59. Going beyond the abstract definition, in order to arrive at a more precise definition of the concept of 'services' used in the second indent of Article 5(1)(b) of Regulation No 44/2001 it is necessary also to consider the analogy with the meaning given to that concept in primary law in the context of the freedom to provide services and the reciprocal effects of the interpretation of the legislation adopted in the field of judicial cooperation in civil matters; but at the same time, it is also necessary to explain why it is not possible to draw an analogy with the definition of the concept in Community law on value added tax.

(b) Partial analogy with the definition of services in primary law

60. For a more precise definition of the concept of 'services' in Regulation No 44/2001, we can begin by drawing an analogy with the definition of that term in primary legislation on the freedom to provide services, while nevertheless bearing in mind that, in my opinion, that definition cannot be transposed unreservedly to Regulation No 44/2001.[58] In interpreting Regulation No 44/2001, pre-eminence must always be given to the broad scheme and purpose of that regulation, which, from the point of view of its content, is a source of legislation under private international law.

61. In the context of the freedom to provide services, the first paragraph of Article 50 EC defines services as being 'normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'. The second paragraph of Article 50 EC mentions only certain general categories of services (activities of an indus-

58 — See, to that effect, Rauscher, T. (ed.), *Europäisches Zivilprozeßrecht. Kommentar*, 2nd edition, Sellier. European Law Publishers, Munich, 2006, pp. 178 and 179, point 49; Czernich, D., in Czernich, D., Kodek, G.E. and Tiefenthaler, S., *Europäisches Gerichtsstands- und Vollstreckungsrecht EuGVO und Lugano-Übereinkommen. Kurzkommentar*, 2nd edition, LexisNexis ARD ORAC, Vienna, 2003, pp. 74 and 75, point 39. Mankowski, P., in Magnus, U. and Mankowski, P. (eds), *Brussels I Regulation*, Sellier. European Law Publishers, Munich, 2007, p. 130, point 89, argues that the scope of the term 'services' must be interpreted in the same way as in the context of the freedom to provide services where the general scheme of Regulation No 44/2001 does not provide otherwise.

trial character, activities of a commercial character, activities of craftsmen, activities of the professions), but the Court has interpreted that concept very broadly. [59] As pointed out by the parties in their observations, in the *Ciola* judgment the Court extended the concept of 'services' to include the renting of moorings to boat-owners who are resident in another Member State, [60] and in the *Cura Anlagen* judgment it did the same for the leasing of vehicles to undertakings established in other Member States. [61]

62. In my view, that broad definition of the concept of 'services' derived from primary law cannot, in the present case, be transposed without some limitation to the identical term used in the second indent of Article 5(1)(b) of Regulation No 44/2001, for a number of reasons.

63. First, as rightly pointed out by the German Government, the reason for such a broad definition of the concept of 'services' in primary law lies in the desire to encompass as wide a range of activities as possible within that concept, as part of the effort to create a common market. [62] However, that justification for a broad interpretation cannot be transposed to the interpretation of the second indent of Article 5(1)(b) of Regulation No 44/2001, in that contracts which are not defined as contracts for the provision of services can nevertheless be classified as contracts for the sale of goods within the meaning of the first indent of that provision, or as contracts for which jurisdiction is determined in accordance with Article 5(1)(a) of the regulation. It is true that the overall object of Regulation No 44/2001 — as stated in recital 2 thereof — is to promote the smooth operation of the internal market by unifying the rules on jurisdiction in civil and commercial matters, but the attainment of that objective cannot be ensured more effectively by resorting to an extended interpretation of the term 'services' contained in the second indent of Article 5(1)(b) of the regulation.

64. Secondly, by contrast with the concept of 'services' under primary law, the same term used in the second indent of Article 5(1)(b) of Regulation No 44/2001 cannot include the renting of immovable property, since under Article 22(1) of that regulation proceedings relating to tenancies of immovable property

59 — The concept includes, for example, medical and healthcare services (Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473 and Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685), financial services (Case C-384/93 *Alpine Investments* [1995] ECR I-1141), insurance services (Case C-118/96 *Safir* [1998] ECR I-1897), sporting activities (Joined Cases C-51/96 and C-191/97 *Deliège and Pacquée* [2000] ECR I-2549), lotteries (Case C-275/92 *Schindler* [1994] ECR I-1039, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031 and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891), the transmission of television signals (Case 155/73 *Sacchi* [1974] ECR 409), advertising (Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843) and other services.

60 — Cited in footnote 5.

61 — Cited in footnote 5.

62 — In the literature, see, for example Czernich, D. in Czernich, D., Kodek, G.E. and Tiefenthaler, S., *Europäisches Gerichtsstands- und Vollstreckungsrecht EuGVO und Lugano-Übereinkommen. Kurzkommentar*, 2nd edition, LexisNexis ARD ORAC, Vienna, 2003, pp. 74 and 75, point 39.

come under the exclusive jurisdiction of the courts of the Member State in which the property is situated, except for tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, in which case the courts of the Member State in which the defendant is domiciled also have jurisdiction. [63] Hence, where the renting or leasing of property is concerned it is never possible to determine jurisdiction on the basis of the second indent of Article 5(1)(b) of Regulation No 44/2001. In their written observations, the parties refer to *Ciola*, [64] in which the Court classified the renting of moorings as a service. The renting of moorings may be considered in the same way as the renting of immovable property, so that no analogy can be drawn between the present case and *Ciola*.

65. In the context of the analogy between the various meanings of the term 'services' in primary law and in Regulation No 44/2001, I am furthermore bound to observe that the parties also cite *Cura Anlagen*, [65] in which the Court also classified the leasing of vehicles to undertakings from other Member States as a 'service' under the freedom to provide services; that case therefore involved the renting of goods. On this point, I wish to note that the question referred for a preliminary ruling does not aim to establish whether the renting of goods can constitute a 'service' within the meaning of Regulation No 44/2001. However, even assuming that the leasing of goods can be classified as a 'service' within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001, that does not automatically mean that the granting of a licence must also be classified under that concept. Indeed, it is plain that there are significant legal differences between a leasing contract of the kind described above and a licence agreement, by reason of which the treatment of a licence agreement cannot be wholly identical to that given to a rental or leasing contract.

66. From the point of view of civil law, a licence agreement is an independent contract, and not merely a subcategory of leasing or

63 — Under Article 22(1) of Regulation No 44/2001, 'in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated [shall have exclusive jurisdiction]'; however, 'in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State'.

64 — Cited in footnote 5.

65 — Cited in footnote 5.

rental contracts.[66] The differences between these two types of contract start with their respective subject-matter. Whereas the subject-matter of a contract for the leasing or renting of goods is a movable object, that of a licence agreement is an intellectual property right. Consequently, the licence agreement is distinct from a leasing or rental contract mainly because the licence may be granted simultaneously to several unconnected persons,[67] who may be in different geographical locations and who can simultaneously use the subject-matter of the licence. This is not possible in the case of the leasing or renting of goods. The only type of contract that can be compared to leasing or renting, as far as the legal effects are concerned, is the exclusive licence. Under an exclusive licence, the licensor grants to the licensee the right to use a particular intellectual property right, but undertakes not to grant the licence to any other person and not to use the right himself.[68] However, that does not justify extending that approach to all licence agreements. Hence, the fact that it is impossible to draw a direct analogy between a licence agreement and a leasing or rental contract is a further argument in favour of the view that a licence agreement cannot be classified as a contract for the provision of 'services' within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001.

(c) Importance of a uniform interpretation of Regulation No 44/2001 and the Rome I Regulation

67. In defining the concept of 'services', it must be borne in mind that the interpretation that the Court will give to this term in the present case will also affect the definition of the same concept used in the context of Regulation No 593/2008 on the law applicable to contractual obligations[69] (the 'Rome I Regulation'). Recital 7 of that regulation states that 'the substantive scope and the provisions of this Regulation' should be consistent with Regulation No 44/2001. Recital 17 of the Rome I Regulation then

66 — In Austrian academic writings, see Kucsko, G., *Geistiges Eigentum. Markenrecht, Musterrecht, Patentrecht, Urheberrecht*, Manz, Vienna, 2003, p. 929, who argues that a licence agreement is a contract *sui generis*. In similar terms, see, in the Slovene academic writings, Podobnik, K., in Juhart, M. and Plavšak, N. (eds), *Obligacijski zakonik (posebni del) s komentarjem*, GV založba, Ljubljana, 2004, comment on Article 704, p. 62. As to the independent nature of licence agreements, in German academic writings see Busse, R. (ed.), *Patentgesetz. Unter Berücksichtigung des Europäischen Patentübereinkommens, des Gemeinschafts-patent-übereinkommens und des Patentzusammenarbeitsvertrags. Kommentar*, De Gruyter, Berlin, New York, p. 297, point 53; Stumpf, H. and Groß, M., *Der Lizenzvertrag*, 8th edition, Verlag Recht und Wirtschaft, Frankfurt am Main, 2008, pp. 42 and 43, point 19. I wish to point out that it is also apparent from the technical document 'Principles of European Law on Lease of Goods' produced by the Study Group on a European Civil Code that the provisions on lease contracts do not apply to the grant of rights to use intellectual property. See, to that effect, Lilleholt, K. et al., *Principles of European Law. Study Group on a European Civil Code. Lease of Goods (PEL LG)*, Sellier. European Law Publishers, Munich, 2008, p. 108, state that the provisions of those principles may well apply to the lease of a particular edition of a book, a DVD and the like, but have nothing to do with matters relating to intellectual property rights.

67 — In German academic writings, see Stumpf, H. and Groß, M., *Der Lizenzvertrag*, 8th edition, Verlag Recht und Wirtschaft, Frankfurt am Main, 2008, p. 44, point 23. Among Slovene academic writings, see Podobnik, K., in Juhart, M. and Plavšak, N. (eds), *Obligacijski zakonik (posebni del) s komentarjem*, GV založba, Ljubljana, 2004, comment on Article 704, p. 62.

68 — See, to that effect, Bently, L. and Sherman, B., *Intellectual Property Law*, 2nd edition, Oxford University Press, New York, 2004, pp. 255 and 950.

69 — Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (*OJ 2008 L 177, p. 6*).

provides that 'as far as the applicable law in the absence of choice [on the part of the parties to the contract] is concerned, the concept of "provision of services" and "sale of goods" should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation'.

68. Hence, in interpreting the term 'services' in the second indent of Article 5(1)(b) of Regulation No 44/2001, the Court will have to avoid giving it a meaning that conflicts with the meaning and purpose of the Rome I Regulation.

69. As pointed out by the German Government in its observations, the history of the adoption of the Rome I Regulation shows that the original proposal contained, in Article 4(1) relating to the applicable law in the absence of choice on the part of the parties, not only subparagraph (b) to determine the law applicable to a contract for the provision of services but also a subparagraph (f) on identification of the law applicable to a contract relating to intellectual or industrial property rights. [70] It is apparent from the *travaux préparatoires* that subparagraph (f) was not included in the final version of the Rome I Regulation because consensus was not reached within the Council on the question of which contractual party was obliged to provide the service characteristic of that type of contract, [71] not because it was necessary to classify such contracts in the category of contracts for the provision of services. If therefore, in interpreting the concept of 'services' in Regulation No 44/2001, the granting of licences were to be included within that term that would be to run counter to the meaning and purpose of the same concept used in the Rome I Regulation. This is therefore a further argument confirming that licence agreements are not contracts for the provision of 'services' within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001.

70 — Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (COM(2005) 650 final); see subparagraph (f) of Article 4(1) of the Commission's proposal, which was worded as follows: 'a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence'.

71 — As well as the Commission's proposal for a regulation, during the procedure for the adoption of the Rome I Regulation a proposal from the Swedish delegation was also discussed, which took into account the territorial element of the granting of rights to the use of intellectual property (see Council document No 5460/07 of 25 January 2007) and a proposal from the Presidency, which constituted a compromise between the Swedish and Commission proposals (see Council document No 6935/07 of 2 March 2007). It was decided definitively to delete subparagraph (f) of Article 4(1) of the proposal for a regulation (see Council document No 8229/07 of 17 April 2007). See also the communication of 21 November 2007 (A6-450/2007) from the European Parliament on the proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), in which the European Parliament proposed to delete subparagraph (f) of Article 4(1) of the proposal. The study group of the Max Planck Institute for Comparative and International Private Law also proposed to delete subparagraph (f) of Article 4(1) of the proposed regulation, given the range of contracts on intellectual property and the difficulty in identifying the contractual party required to provide the characteristic service under the contract; see the article of the Max Planck Institute for Comparative and International Private Law, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)', *RabelsZ*, No 2/2007, p. 265.

(d) Impossibility of drawing an analogy with the definition of services under Community legislation on value added tax

70. In my opinion, contrary to the claims of the applicants in the main proceedings and the Commission, the definition of the term 'services' in the Community directives on value added tax cannot, for several reasons, be transposed to the same concept that appears in Regulation No 44/2001.

71. First, it is clear that the definition of the term as used in the directives on value added tax is a negative definition, which by its very nature has an extremely wide scope. The first sentence of Article 6(1) of the Sixth Directive [72] and Article 24(1) of Directive 2006/112 [73] provide that 'any transaction which does not constitute a supply of goods' constitutes a provision of services. Hence, these directives consider as taxable transactions within the territory of the Community — apart from imports — only two categories of economic activity, namely the supply of goods and the provision of services, for which reason the scope of the term 'services' is necessarily broad in that context.

72. Regulation No 44/2001 does not, however, stipulate that jurisdiction is to be determined on the basis of the rules applicable to contracts for the provision of services whenever it is not a question of a contract for the sale of goods. On the contrary, Article 5(1)(a) of the regulation expressly lays down a rule for determining jurisdiction for contracts that relate neither to the sale of goods nor to the provision of services. Subparagraph (c) of Article 5(1) states expressly that if subparagraph (b) does not apply then subparagraph (a) applies. Hence, in the context of Regulation No 44/2001 there is no need to define the concept of 'services' in such broad terms, since jurisdiction can always be determined on the basis of Article 5(1)(a) whenever it cannot be ascertained on the basis of subparagraph (b) of Article 5(1).

73. Secondly, in Community legislation on value added tax the concept of 'services' is defined in broad terms because the scope of that directive is very wide [74] in order to cover all taxable economic activities. As explained above with reference to primary law, even in the context of Community directives on value added tax it is not possible to accept the argument that the rationale of a broad interpretation of the term 'services' could also be transferred, without limitation, to the interpretation of the same term in Regulation No 44/2001. It must be considered that the legal concepts relevant to a particular branch of law are always stated strictly in relation to

72 — Directive 77/388, cited in footnote 6.

73 — Cited in footnote 6.

74 — As to the extended scope of the Sixth Directive, see, for example, **Case 235/85** *Commission* v *Netherlands* [1987] ECR 1471, paragraph 6; Case C-186/89 *van Tiem* [1990] ECR I-4363, paragraph 17; and **Case C-358/97** *Commission* v *Ireland* [2000] ECR I-6301. In my Opinion of 9 December 2008 in Case C-572/07 *Tellmer Property* (case pending before the Court), point 27, I observe that the field of application of value added tax under the Sixth Directive is structured in very broad terms.

the field involved, so that a definition valid for one sector cannot be transposed directly to another. Since tax matters constitute a special sector with specific objectives, the definition of the term 'services' used in that sector cannot be applied in the context of Regulation No 44/2001.

(e) Positions adopted in academic writings

74. I also wish to point out that academic writings provide any number of examples of contracts for the provision of 'services' within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001: employment contracts, contracts for the transport of goods, agency contracts to conclude transactions, health services contracts, consultancy contracts, training contacts and the like. [75] However, licence agreements are never included among those examples. On the contrary, some authors expressly state that jurisdiction for licence agreements or contracts granting rights to intellectual property should be determined on the basis of Article 5(1)(a) of Regulation No 44/2001. [76]

3. Conclusion

75. In the light of the foregoing considerations, I propose that the Court reply to the first question by stating that the second indent of Article 5(1)(b) of Regulation No 44/2001 is to be interpreted as meaning that a contract under which the owner of an intellectual property right grants the other contracting party the right to use that right (a licence agreement) is not a contract for the provision of services within the meaning of that provision.

75 — Rauscher, T. (ed.), *Europäisches Zivilprozeßrecht. Kommentar*, 2nd edition, Sellier. European Law Publishers, Munich, 2006, p. 179, point 50; Czernich, D. in Czernich, D., Kodek, G.E. and Tiefenthaler, S., *Europäisches Gerichtsstands- und Vollstreckungsrecht EuGVO und Lugano-Übereinkommen. Kurzkommentar*, 2nd edition, LexisNexis ARD ORAC, Vienna, 2003, p. 75, point 40.

76 — Mankowski, P., in Magnus, U. and Mankowski, P. (eds), *Brussels I Regulation*, Sellier. European Law Publishers, Munich, 2007, p. 152, point 129, expressly mentions the licence agreement among the types of contract for which jurisdiction is to be determined on the basis of Article 5(1)(a) of Regulation No 44/2001. Takahashi, K., 'Jurisdiction in matters relating to contracts: Article 5(1) of the Brussels Convention and Regulation', *European Law Review*, No 5/2002, p. 534, states that Article 5(1)(a) continues to apply to contracts for the granting of intellectual property rights. See Berlioz, P., 'La notion de fourniture de services au sens de l'article 5-1 b) du règlement "Bruxelles I"', *Journal du droit international (Clunet)*, No 3/2008, points 85 to 95, who states in general that a contract granting rights cannot be a contract for the provision of services within the meaning of Article 5(1)(b) of Regulation No 44/2001.

C — *The second question*

76. The second question is raised by the national court only in the alternative in the event that the Court replies in the affirmative to the first question, in other words, if the second indent of Article 5(1)(b) of Regulation No 44/2001 has to be interpreted as meaning that a licence agreement is a contract for the provision of services within the meaning of that provision.

77. Since in my opinion the first question should be answered in the negative, it is not necessary to reply to the second, which is submitted only in the alternative.

D — *The third question*

78. The third question should be understood to mean that the national court seeks to know whether Article 5(1)(a) and (c) of Regulation No 44/2001 should be interpreted as meaning that jurisdiction to hear disputes relating to licence agreements within the meaning of Article 5(1) is to be determined in accordance with the principles which result from the case-law of the Court on Article 5(1) of the Brussels Convention. In other words, the referring court asks whether in interpreting Article 5(1)(a) of Regulation No 44/2001 it is necessary to ensure continuity with the interpretation of Article 5(1) of the Brussels Convention.

79. Regulation No 44/2001 governs jurisdiction in contractual matters in a different way from the Brussels Convention; in that regard, Article 5(1) of the regulation was amended and reworded with respect to Article 5(1) of the Brussels Convention. From a substantive and systematic point of view, the amendments can be seen as merely taking into account the interpretation provided by the Court with regard to the said provision of the Brussels Convention, and above all as taking heed of the criticism of that interpretation. For that reason, I shall describe below the substance of the interpretation of Article 5(1) of the Brussels Convention, the reasons for amending that provision and the scope of the amendments, before moving on to an interpretation of Article 5(1)(a) and (c) of Regulation No 44/2001.

1. Amendment of the rules on jurisdiction in contractual matters: from the Brussels Convention to Regulation No 44/2001

(a) Interpretation of Article 5(1) of the Brussels Convention

80. The first sentence of Article 5(1) of the Brussels Convention provides that in matters relating to a contract, a person domiciled in a Contracting State may, in another Contracting State, be sued in the courts for the place of performance of the obligation in question. [77] The Court clarified the concept of 'place of performance of the obligation in question' in two judgments of 1976, *De Bloos* [78] and *Tessili*, [79] which were delivered on the same day and in which it answered two key questions on the interpretation of that provision, specifically: the obligation to be taken into account for determining jurisdiction within the meaning of that provision, and the criteria of closeness for establishing the place of performance of the obligation. In *De Bloos*, the Court ruled that the term 'obligation' used in that provision referred to the obligation which corresponds to the contractual right on which the applicant's action is based, [80] that is to say, the contested obligation that is the subject of the action between the parties to the contract. In *Tessili*, the Court then pointed out that the place of performance of the contested contractual obligation is to be determined on the basis of the law applicable to the legal relationship in question in accordance with the rules of private international law of the court hearing the case. [81] As grounds for that ruling, the Court stated that a more precise interpretation of the provision in question is not possible, given the differences between the national legislations of the Member States in matters relating to contracts and the absence, in the present state of Community law, of any unification of the substantive law to be applied to contractual obligations. [82]

81. Hence, in order to determine jurisdiction, the court before which an action has been brought must, in accordance with the above interpretation of the case-law, carry out a three-part analysis, which Advocate General Ruiz-Jarabo Colomer in his Opinion in the *GIE Groupe Concorde* case rightly described as complicated. [83] The court must first ascertain the contractual obligation that is the subject of dispute between the parties to the contract. It must then determine, on the basis of its own rules of private international law, the substantive law applicable to the legal relationship between the parties (*lex causae*). Finally, it must determine, by reference to that law, the place of performance of the contested contractual obligation.

77 — The second sentence of Article 5(1) of the Brussels Convention also enabled jurisdiction to be determined for individual contracts of employment. Under Regulation No 44/2001 that jurisdiction is governed in a separate section (Articles 18 to 21).

78 — Cited in footnote 9.

79 — Cited in footnote 10.

80 — *De Bloos*, cited in footnote 9, paragraph 13.

81 — *Tessili*, cited in footnote 10, paragraph 13.

82 — *Tessili*, cited in footnote 10, paragraph 14.

83 — See the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-6307, point 28.

(b) Reasons for amending Article 5(1) of the Brussels Convention

82. The above interpretation of Article 5(1) of the Brussels Convention caused many practical difficulties for national courts in determining jurisdiction, leading to pointed criticism in academic writings and proposals for amendment to the case-law by advocates general. The criticisms were directed at various aspects of that interpretation.

83. First of all, as to the complication of the rules laid down in the case-law, the identification of the court with jurisdiction is inordinately difficult in practice, in that it encumbers the proceedings even before the court has begun to assess whether the action is well founded. [84] Secondly, the determination of jurisdiction on the basis of the rules stemming from the interpretation in question is highly unpredictable for the litigants, as the *lex causae* of the various Member States may identify a different place of performance for the same type of obligation. [85] Hence, the place of performance of the contested obligation — and hence the court with jurisdiction — will differ from case to case, depending on the law applicable to the contractual relationship. Thirdly, the determination of jurisdiction on the basis of the above rules may give jurisdiction to different courts if several actions are brought on the basis of a single contractual relationship. [86] Fourthly, the determination of

84 — See, to that effect, Kropholler, J., *Europäisches Zivilprozeßrecht. Kommentar zu EuGVO und Lugano-Übereinkommen*, 7th edition, Verlag Recht und Wirtschaft, Heidelberg, 2002, p. 131, point 17. See also Hill, J., 'Jurisdiction in Matters Relating to a Contract under the Brussels Convention', *International and Comparative Law Quarterly*, No 3/1995, p. 606, who states that, where the parties have not chosen the law applicable to the contractual relationship, even identifying that law is a difficult task.

85 — See the Opinion of Advocate General Bot in Case C-386/05 *Color Drack* [2007] ECR I-3699, point 61 et seq. The unpredictability is particularly blatant where the dispute relates to an obligation to pay a sum of money, for which the law of some Member States requires performance in the domicile of the debtor, whereas that of other States designate the domicile of the creditor for that purpose; the application of different systems of law also changes the court having jurisdiction; in that regard, see Hill, J., 'Jurisdiction in Matters Relating to a Contract under the Brussels Convention', *International and Comparative Law Quarterly*, No 3/1995, p. 606. I must also point out that, where the law applicable to the contractual obligation lays down that the debtor must perform the obligation to pay a sum of money at the domicile of the creditor, this may work to the advantage of the latter, as he has the possibility of bringing proceedings in the courts of his own country.

86 — See, to that effect, the Opinion of Advocate General Bot in *Color Drack*, cited in footnote 85, point 55 et seq. The Advocate General states in point 58 that that disadvantage is well illustrated by the judgment in Case C-420/97 *Leathertex* [1999] ECR I-6747, in which jurisdiction had to be determined on the basis of an agency contract; a Belgian company (the agent) had sued an Italian company (the principal) for the payment of arrears of commission and compensation in lieu of notice of termination of the contract; the Belgian courts had jurisdiction to hear the action for payment of compensation in lieu of notice, while the action for the payment of commission fell under the jurisdiction of the Italian courts. In academic writings, see, for example, Hill, J., 'Jurisdiction in Matters Relating to a Contract under the Brussels Convention', *International and Comparative Law Quarterly*, No 3/1995, p. 601; Beaumont, P.R., 'The Brussels Convention Becomes a Regulation: Implications for Legal Basis, External Competence and Contract Jurisdiction', in Fawcett, J. (ed.), *Reform and Development of Private International Law. Essays in Honour of Sir Peter North*, Oxford University Press, New York, 2002, p. 16; Gaudemet-Tallon, H., *Les Conventions de Bruxelles et de Lugano. Compétence internationale, reconnaissance et exécution des jugements en Europe*, 2nd edition, Montchrestien, Paris, 1996, p. 117.

jurisdiction in accordance with these principles does not necessarily lead to the court with the closest link with the dispute being declared to have jurisdiction. [87]

84. Nevertheless, the Court did not wish to abandon the case-law on Article 5(1) of the Brussels Convention that it had developed in *De Bloos* and *Tessili*; indeed, despite the many criticisms and promptings from advocates general for amendment of the case-law, [88] it subsequently reaffirmed it on several occasions, for example in the *GIE Groupe Concorde* [89] and *Leathertex* judgments. [90] In the *Besix* judgment, the Court then expressly stated that it is not possible to give an autonomous interpretation of the 'place of performance' without calling in question the case-law established since *Tessili*. [91]

(c) The reaction to criticism: Article 5(1) of Regulation No 44/2001

85. During the passage of Regulation No 44/2001, the Community legislature took account of the above criticism and decided on a partial amendment of the rules on jurisdiction in matters relating to contracts. In the course of the *travaux préparatoires*, the criteria and substance of the amendment were the subject of extremely heated debate. [92] After long negotiations, Article 5(1) of Regulation No 44/2001 was finally worded in such a way that subparagraph (b) governing two categories of contract — for the sale of goods and for the provision of services — provided that the place of performance of the contested obligation is to be determined independently taking account of the characteristic obligation under the contract, whereas subparagraph (a) retained the wording of the first sentence of Article 5(1) of the Brussels Convention for all other categories of contract.

2. Interpretation of Article 5(1)(a) and (c) of Regulation No 44/2001

86. It is apparent from Article 5(1)(c) of Regulation No 44/2001 that, for the purpose of determining jurisdiction, if subparagraph (b) does not apply then subparagraph (a) applies. Since when examining the first

87 — In academic writings, see, for example, Hill, J., 'Jurisdiction in Matters Relating to a Contract under the Brussels Convention', *International and Comparative Law Quarterly*, No 3/1995, p. 601; Kropholler, J. and von Hinden, M., 'Die Reform des europäischen Gerichtsstands am Erfüllungsort (Art. 5 Nr. 1 EuGVÜ)', in Schack, H. (ed.), *Gedächtnisschrift für Alexander Lüderitz*, Beck, Munich, 2000, p. 402. In view of the absence of a link between the court that would have had jurisdiction in accordance with the *De Bloos* and *Tessili* case-law and the subject of the dispute, the French Cour de cassation (Court of Cassation) has already moved away from those principles, determining jurisdiction on the basis of the place of performance of the characteristic obligation under the contract; in that regard, see Mourre, A., 'À propos de l'application de l'art. 5-1 de la Convention de Bruxelles aux litiges nés de la rupture d'un contrat de représentation', *Gazette du Palais*, No V/1994, p. 849 et seq.

88 — See the Opinion of Advocate General Lenz in **Case C-288/92** *Custom Made Commercial* [1994] ECR I-2913; the Opinion of Advocate General Léger in *Leathertex*, cited in footnote 86; and the Opinion of Advocate General Bot in *Color Drack*, cited in footnote 85.

89 — Cited in footnote 83.

90 — Cited in footnote 86.

91 — *Besix*, cited in footnote 7, paragraph 36. In this regard, I would point out that the *Besix* judgment was delivered after Regulation No 44/2001 was published and immediately before it came into force on 1 March 2002.

92 — See, to that effect, Kohler, C., 'Revision des Brüsseler und Luganer Übereinkommens', in Gottwald, P. (ed.), *Revision des EuGVÜ — Neues Schiedsverfahrensrecht*, Gieseking-Verlag, Bielefeld, 2000, p. 12.

question I ascertained that in the present case jurisdiction cannot be determined on the basis of subparagraph (b) of Article 5(1), it must be established according to subparagraph (a) thereof. Article 5(1)(a) provides that a person domiciled in a Member State may, in another Member State, be sued, 'in matters relating to a contract, in the courts for the place of performance of the obligation in question'. In my opinion, the starting point for an interpretation of that provision should be the correspondence between Article 5(1)(a) of Regulation No 44/2001 and the first sentence of Article 5(1) of the Brussels Convention, the continuity between Regulation No 44/2001 and the convention and the relevance of the historical interpretation.

87. It should be noted first of all that the wording of Article 5(1)(a) of Regulation No 44/2001 is identical in every way with that of the first sentence of Article 5(1) of the Brussels Convention. That fact, in conjunction with the *principle of continuity* of interpretation between Regulation No 44/2001 and the Brussels Convention, means that, in my view, Article 5(1)(a) of the regulation must be interpreted in the same way as Article 5(1) of the convention.

88. The importance of the principle of continuity in the interpretation of Regulation No 44/2001 is apparent from recital 19 of the regulation, which states that continuity between the Brussels Convention and the regulation should be ensured and that the Court of Justice is also required to ensure such continuity. In its case-law, the Court has already emphasised the importance of interpreting the two abovementioned pieces of legislation in an identical fashion.

89. The importance of a uniform interpretation of the Brussels Convention and Regulation No 44/2001 was highlighted by the Court in *Henkel*, [93] in which, admittedly, it interpreted not the regulation but the convention, which was applicable to that case *ratione temporis*. The judgment was delivered after Regulation No 44/2001 had come into force. [94] The Court based its interpretation of Article 5(3) of the Brussels Convention partly on the more clearly formulated wording of Article 5(3) of Regulation No 44/2001 [95] and pointed out that in the absence of any reason for interpreting the two provisions differently, Article 5(3) of the Brussels Convention should be given a scope identical to that of the equivalent provision of Regulation No 44/2001. [96] It also stated that this is all the more necessary given that that regulation replaced the Brussels Convention in relations between Member States with the exception of Denmark. [97]

93 — Cited in footnote 22.

94 — The *Henkel* judgment was delivered on 1 October 2002, and Regulation No 44/2001 came into force on 1 March 2002.

95 — Article 5(3) of the Brussels Convention enshrined jurisdiction 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred', whereas Article 5(3) of Regulation No 44/2001 determines jurisdiction 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred *or may occur*'. Emphasis added.

96 — *Henkel*, cited in footnote 22, paragraph 49.

97 — Ibid.

90. In *Reisch Montage*, [98] the Court did not make express reference to the principle of continuity of interpretation, but it based its interpretation of Regulation No 44/2001 on the case-law relating to the Brussels Convention. [99] It took a similar position in *Freeport*, [100] *ASML Netherlands*, [101] *FBTO Schadeverzekeringen* [102] and *Hassett and Doherty*. [103] Nevertheless, the advocates general in numerous cases have expressly drawn attention to the importance of continuity between the Brussels Convention and Regulation No 44/2001. [104]

91. In its case-law to date, the Court has decided to move away from the principle of continuity and to adopt an interpretation of Regulation No 44/2001 that differs from that of the Brussels Convention, for example in the *Glaxosmithkline* judgment [105] relating to jurisdiction over individual contracts of employment. Under the Brussels Convention, jurisdiction for such contracts was governed by Article 5(1), whereas Regulation No 44/2001 devotes a special section to this issue (Articles 18 to 21). As ground for the different interpretation of the new provisions, the Court relied on the appreciable amendments introduced by the regulation, which were further confirmed by the *travaux préparatoires* relating to the regulation. [106]

92. In the *Ilsinger* case, [107] in which judgment has not yet been delivered, I proposed that with regard to jurisdiction over consumer contracts the Court should interpret Article 15(1)(c) of Regulation No 44/2001 differently from subparagraph (3) of Article 13 of the Brussels Convention by reason of the partial difference in wording between the provision of the regulation and the latter article of the convention.

93. However, in the present case the prerequisites for an interpretation of Article 5(1)(a) of Regulation No 44/2001 that differs from the interpretation of Article 5(1) of the Brussels Convention are not met, not only because the two provisions are identically worded, as I have already mentioned, but also because it can be seen from an historical analysis of the legislative texts that this corresponds to the express intention of the Community legislature.

98 — Cited in footnote 25.
99 — Ibid., paragraphs 22 to 25.
100 — Case C-98/06 [2007] ECR I-8319, paragraphs 39, 45 and 53.
101 — Case C-283/05 [2006] ECR I-12041, paragraph 24.
102 — Case C-463/06 [2007] ECR I-11321, paragraph 28.
103 — Case C-372/07 [2008] ECR I-7403, paragraphs 19 and 22.
104 — See, for example, the Opinion of Advocate General Léger in *ASML Netherlands*, cited in footnote 101, point 10; the Opinion of Advocate General Bot in *Color Drack*, cited in footnote 85, point 7; the Opinion of Advocate General Mengozzi in *Freeport*, cited in footnote 100, point 4; and the Opinion of Advocate General Kokott of 4 September 2008 in Case C-185/07 *Allianz and Generali* (case pending before the Court), point 28.
105 — Case C-462/06 [2008] ECR I-3965.
106 — Ibid., paragraphs 15 and 24.
107 — See my Opinion in *Ilsinger*, cited in footnote 51.

94. The *historical interpretation* shows that the wording of Article 5(1)(a) of Regulation No 44/2001, as finally adopted, is the result of a compromise between those who intended to maintain the rules on the determination of jurisdiction developed by the Court in its case-law in *De Bloos* and *Tessili* and those who wished to change that case-law. Among the contrasting proposed wordings of the above provision — which ranged from confirmation of the status quo to the determination of jurisdiction on the basis of the place of performance of the characteristic obligation for all contracts [108] — a compromise solution finally prevailed which provided for jurisdiction to be determined on the basis of the place of performance of the characteristic obligation for two categories of contract, that is to say, contracts for the sale of goods and those for the provision of services, but retained the existing rules for all remaining contracts. That compromise, which in fact divided Article 5(1) of Regulation No 44/2001 into two parts, is precisely the means by which it was possible to reform that provision. [109]

95. The will of the legislature is therefore clear: to make independent provision for the place of performance of the obligation for contracts for the sale of goods and the provision of services, and to maintain the rules on the determination of jurisdiction resulting from the Court's interpretation of Article 5(1) of the Brussels Convention for other types of contract. [110] If the legislature had wished that jurisdiction for all contracts be determined, for example, on the basis of the place of performance of the characteristic obligation of the contract, it would have worded Article 5(1) of Regulation No 44/2001 accordingly. In the light of the current text of that provision, however, it is abundantly clear from some language versions that for the purposes of determining jurisdiction the decisive factor is the obligation giving rise to the proceedings between the parties. [111]

96. In truth, this compromise solution is not flawless. By amending the rules on the determination of jurisdiction only for contracts for the sale of goods and the provision of services, Regulation No 44/2001 removed for these two types of contract the disadvantages deriving from the rules developed in the case-law of the Court in *De Bloos*

108 — On the various options for amending that provision, see Kohler, C., 'Revision des Brüsseler und Luganer Übereinkommens', in Gottwald, P. (ed.), *Revision des EuGVÜ — Neues Schiedsverfahrensrecht*, Gieseking-Verlag, Bielefeld, 2000, p. 12 et seq. Council document No 5202/99 of 19 January 1999 'Revision of the Brussels and Lugano Conventions — Draft Convention' shows that one of the possible wordings of the first sentence of Article 5(1) of the new regulation was the following: 'in matters relating to a contract, in the courts for the place of performance of the obligation which is *characteristic* of the contract' (Emphasis added); another option was to maintain the status quo. Beaumont, P.R., 'The Brussels Convention Becomes a Regulation: Implications for Legal Basis, External Competence and Contract Jurisdiction', in Fawcett, J. (ed.), *Reform and Development of Private International Law. Essays in Honour of Sir Peter North*, Oxford University Press, New York, 2002, pp. 16 and 17, states, for example, that the United Kingdom had expressed a preference for maintaining the status quo.

109 — Thus Mankowski, P., in Magnus, U. and Mankowski, P. (eds), *Brussels I Regulation*, Sellier. European Law Publishers, Munich, 2007, p. 153, point 131.

110 — That intention is also clear from the preamble of the proposal for a Council regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, cited in footnote 24, p. 15.

111 — The Italian version of Article 5(1)(a) of Regulation No 44/2001 states that in matters relating to a contract, jurisdiction lies with the court for the place where the obligation that is the subject of the proceedings was or should have been performed ('in materia contrattuale, davanti al giudice del luogo in cui l'obbligazione dedotta in giudizio è stata o deve essere eseguita'), while according to the German version, if the proceedings relate to a contract or rights deriving from a contract, jurisdiction lies with the court for the place where the obligation was or should have been performed ('wenn ein Vertrag oder Ansprüche aus einem Vertrag den Gegenstand des Verfahrens bilden, vor dem Gericht des Ortes, an dem die Verpflichtung erfüllt worden ist oder zu erfüllen wäre').

and *Tessili*; however, the disadvantages remain for all other types of contract, jurisdiction for which is determined on the basis of Article 5(1)(a) of the regulation. Apart from that, the amendment of the rules for determining jurisdiction creates two new difficulties.

97. First, the wording of Article 5(1) of Regulation No 44/2001 has raised the problem of distinguishing those contracts for which jurisdiction is determined on the basis of subparagraph (b) — in other words, contracts for the sale of goods and the provision of services — from contracts for which jurisdiction is determined on the basis of subparagraph (a) of that provision. The present dispute shows clearly that such delimitation is not easy, so that it will be necessary in each case to establish the category into which a particular contract falls. [112]

98. Secondly, maintaining the interpretation of subparagraph (a) of Article 5(1) of Regulation No 44/2001 as it derives from the *De Bloos* and *Tessili* case-law will lead to inconsistency in the interpretation of subparagraphs (a) and (b) of that provision, since jurisdiction is determined, in the instances provided for in subparagraph (b), on the basis of the place of performance of the characteristic obligation, whereas in the cases covered by subparagraph (a) determination will be based on the place of performance of the contested obligation.

99. Because of the abovementioned disadvantages, which are perpetuated or directly created by amendment of the rules on jurisdiction in matters relating to a contract, a new and different interpretation of subparagraph (a) of the provision in question may perhaps be desirable, [113] but this would circumvent or certainly contradict the clear intent of the legislature. In so doing, the Court would be abrogating the role of the legislature and exceeding the limits of its jurisdiction. Hence, in my opinion, as far as subparagraph (a) of Article 5(1) of Regulation No 44/2001 is concerned, the interpretation developed by the Court in *De Bloos* and *Tessili* with regard to Article 5(1) of the Brussels Convention must be upheld.

100. As indicated by the referring court, in the present case the determination of jurisdiction on the basis of the interpretation deriving from the *De Bloos* and *Tessili* case-law will in practice mean that the power to hear the action for the payment of licence fees for video

112 — For many contracts, it is not evident prima facie whether they should be treated according to the rule laid down in subparagraph (a) or that contained in subparagraph (b) of Article 5(1); leasing or rental contracts and loan contracts come to mind. Moreover, even within subparagraph (b) of the provision in question the demarcation between contracts for the sale of goods and contracts for the provision of services will not always be clear-cut; for example, Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe. Règlement n° 44/2001, Conventions de Bruxelles et de Lugano*, 3rd edition, Librarie générale de droit et de jurisprudence, Paris, 2002, p. 147, mentions franchise agreements in that context. It is none the less true that, given the uniform criterion for determining jurisdiction under subparagraph (b) of Article 5(1) of the regulation, delimitation between contracts for the sale of goods and those for the provision of services will not give rise to problems.

113 — Thus Mankowski, P., in Magnus, U. and Mankowski, P. (eds), *Brussels I Regulation*, Sellier. European Law Publishers, Munich, 2007, p. 158, point 138.

recordings of the concert in question under the licence agreement will lie with the court for the place where the licensee is domiciled, in other words, with the German court.

3. The relevance of *Besix* to the present case

101. Finally, it remains for me to examine whether in the present case the interpretation of Article 5(1) of the Brussels Convention provided by the Court in *Besix* [114] prevents jurisdiction from being determined in accordance with Article 5(1)(a) of Regulation No 44/2001. As I have concluded that Article 5(1)(a) of Regulation No 44/2001 is to be interpreted in the same way as Article 5(1) of the Brussels Convention, the findings of the *Besix* judgment must also be taken into account in the present case. In that judgment, the Court ruled that jurisdiction is not to be determined in accordance with the latter provision where the place of performance of the obligation that is the subject of the action cannot be determined because the contested contractual obligation consists in an undertaking not to do something which is not subject to any geographical limit and is therefore characterised by a multiplicity of places for its performance. [115] In such a case, jurisdiction is determined on the basis of Article 2(1) of the convention.

102. However, in my opinion, the present case is not comparable to the situation that was the subject of the *Besix* case. In *Besix*, the place of performance of the *contested* obligation could not be determined, whereas in the present case, which involves an obligation to pay a sum of money by way of licence fees for video recordings, it is possible to determine the place of performance. Since, in accordance with the *De Bloos* case-law, the obligation at issue is decisive for determining jurisdiction, it is of little importance whether it is possible to establish the place of performance of the obligation to issue the licence, which is the *characteristic* obligation of the contract in the present case but is not the subject-matter of the dispute.

4. Conclusion

103. In the light of the foregoing considerations, I propose that the Court should reply to the third question referred for a preliminary ruling by stating that Article 5(1)(a) and (c) of Regulation No 44/2001 is to be interpreted as meaning that jurisdiction to hear disputes arising out of a licence agreement within the meaning of Article 5(1) that provision is to be determined in accordance with the principles which result from the case-law of the Court on Article 5(1) of the Brussels Convention.

114 — Cited in footnote 7.
115 — *Besix*, cited in footnote 7, paragraph 55.

VII — **Conclusion**

104. In the light of all of the foregoing, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Oberster Gerichtshof:

(1) The reply to the first question is that the second indent of 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 to be interpreted as meaning that a contract under which the owner of an intellectual property right grants the other contracting party the right to use that right (a licence agreement) is not a contract for the provision of services within the meaning of that provision.

(2) The reply to the third question is that Article 5(1)(a) and (c) of Regulation No 44/2001 is to be interpreted as meaning that jurisdiction to hear disputes arising out of a licence agreement within the meaning of Article 5(1) is to be determined in accordance with the principles which result from the case-law of the Court on Article 5(1) of the Brussels Convention.