OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 14 March 2006 [1]

I — Introduction

1. Under Article 6(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, [2] where there are a number of defendants domiciled in different Member States, the competent court of any of those States may hear the case provided that the claims are closely connected.

2. The Oberster Gerichtshof (Austrian Supreme Court) is required to interpret that provision in an appeal to settle a financial claim lodged against two defendants, one of whom is domiciled in Austria and the other in Germany. However, the claim brought against the first defendant who is involved in bankruptcy proceedings was ruled inadmissible at the outset and the action is therefore only being pursued against the second defendant.

3. The question in this case has been referred under Article 68 EC, in conjunction with Article 234 EC, and its purpose is to ascertain whether, in the circumstances described, the aforementioned right to choose jurisdiction may be invoked.

II — The legal framework

A — *Regulation No 44/2001*

4. Pursuant to Article 65 EC, the Council replaced the 1968 Brussels Convention [3] with Regulation No 44/2001, [4] the aim of which is to unify the rules governing the determination of which court has jurisdiction to settle a dispute in order to safeguard the operation of the internal market. [5]

1 — Original language: Spanish.

2 — OJ 2001 L 12, p. 1.

3 — Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (consolidated version at OJ 1998 C 27, p. 1).

4 — Article 68 of Regulation No 44/2001. However, the Brussels Convention continues to apply in Denmark (Article 1(3) of the regulation) and in the territories of the Member States included in the territorial scope of the convention but not in that of the regulation pursuant to Article 299 EC.

5 — Recitals 2 and 6.

5. The rules governing 'intra-Community litigation' must be 'highly predictable' and founded on the 'defendant's domicile ... save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor'.[6] However, '[i]n 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'.[7]

6. In accordance with those principles, Article 2(1) of Regulation No 44/2001 provides that, '[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

7. Articles 5, 6 and 7 set out a number of cases of 'special jurisdiction' within the context of that general principle. In accordance with Article 6,'[a] person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

...'

B — *Austrian law*

8. Paragraph 6 of the Konkursordnung (Insolvency Regulations; 'KO') provides:

'(1) Litigation intended to enforce or secure claims to assets forming part of a bankrupt's estate shall neither be commenced nor pursued after the commencement of bankruptcy proceedings.

(2) Litigation relating to preferential claims and to claims for the separation of assets not forming part of the bankrupt's estate may be commenced and pursued even after the commencement of bankruptcy proceedings, but only against the administrator of the bankrupt's estate.

(3) Litigation relating to claims which do not concern assets forming part of the bankrupt's

6 — Recital 11.
7 — Recital 12.

estate, in particular claims for personal performance by the debtor, may be commenced and pursued against or by the debtor while bankruptcy proceedings are in progress.'

9. That provision thus establishes a procedural bar precluding claims to assets forming part of a bankrupt's estate from being commenced or pursued after bankruptcy proceedings have been instituted, with the result that such claims must be ruled inadmissible.

10. The measures in question are similar to those in other legal systems and are aimed at unifying claims against an insolvent debtor with a view to speeding up enforcement. [8] A right to bring individual actions would give rise to numerous legal and practical difficulties.

11. The referring court explains that the bankruptcy administrator must examine the claims referred to in Paragraph 6(1) of the KO to decide whether to include them in the bankrupt's estate, without referring the matter to the courts. [9] However, where the inclusion of a claim is disputed, the claimant must sue those who contest the claim. [10] If the bankrupt does not expressly contest the claim at that stage of the examination, the creditor will obtain an enforcement order which is valid outside the scope of the bankruptcy proceedings. [11]

III — The facts, the main proceedings and the question referred for a preliminary ruling

12. On 30 January 2004, Reisch Montage AG brought an action in the Bezirksgericht Bezau (District Court, Bezau) (Austria), against Mr Mario Gisinger, who is domiciled in Austria, and against Kiesel Baumaschinen Handels GmbH, a company whose registered office is in Germany, claiming EUR 8 689.22 from them jointly and severally pursuant to an agreement concluded between the two defendants and Mr Günther Reisch, who assigned his claim to the applicant. [12]

13. By order of 24 February 2004, the Bezirksgericht Bezau dismissed the claim against Mr Gisinger since bankruptcy proceedings concerning his assets had been instituted on 23 July 2003. In a decision dated 15 April 2004, the court ruled that it lacked international and territorial jurisdiction.

8 — For example, the Spanish Bankruptcy Law (Law 22/2003 of 9 July 2003, BOE No 164 of 10 July 2003, p. 26905) also provides that civil courts are to refrain from hearing claims on which the bankruptcy courts must rule; where leave has been given to hear such a claim, the court concerned must make an order striking out the proceedings on the grounds of invalidity (Article 50).

9 — Paragraph 104 of the KO.

10 — Paragraph 110 of the KO.

11 — Paragraph 61 of the KO.

12 — The referring court states that the application does not contain any further details about that agreement.

14. That decision did not satisfy Reisch Montage AG and it appealed to the Landesgericht Feldkirch (Regional Court, Feldkirch) (Austria), which, in a ruling of 8 June 2004, held that the court first seised of the dispute had jurisdiction to hear the claim.

15. The defendant company appealed on a point of law to the Oberster Gerichtshof which stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Can a claimant rely on Article 6(1) of Regulation ... No 44/2001 when bringing a claim against a person domiciled in the forum state and against a person resident in another Member State, but where the claim against the person domiciled in the forum state is already inadmissible by the time the claim is brought because bankruptcy proceedings have been commenced against him, which under national law results in a procedural bar?'

IV — The procedure before the Court of Justice

16. Written observations were lodged within the period laid down in Article 20 of the Statute of the Court of Justice by the German and French Governments and by the Commission.

17. Since neither party requested a hearing at the conclusion of the written phase, at the general meeting of the Court on 14 February 2006 it was agreed that the appropriate point had been reached in the case for the submission of this Opinion.

V — Analysis of the question referred for a preliminary ruling

A — *Introduction*

18. First of all, I must point out that many of the provisions of Regulation No 44/2001 are the same as those of the Brussels Convention, which it replaced, and the academic writings and case-law relating to the latter may, therefore, be extrapolated in full.

19. That is the case with Article 2, which is identical in both texts, [13] and also with Article 6(1) into which Regulation No 44/2001 incorporated the clarification of the corresponding provision of the Brus-

13 — The only difference is that the reservations refer respectively to 'this Regulation' and 'this Convention'.

sels Convention which the Court set out in the judgment in *Kalfelis* [14] and subsequently upheld, [15] and which provides that there must be a connection between actions brought against more than one defendant.

B — *The rules on jurisdiction*

20. Article 2 is the starting point for the compulsory rules governing the determination of jurisdiction. [16] The two requirements of the article underpin the system: the rules apply where the defendant is domiciled in the Community [17] and is sued in the courts of the State where he resides, irrespective of his nationality. [18]

21. The provision embodies the adage *actor sequitur forum rei*, commonly accepted in comparative law, which favours the protection of the rights of the defendant for whom it is more difficult to mount a defence in the courts of a foreign country. [19] However, there are also advantages for the claimant since it is easier for him to enforce the judgment.

22. The jurisdiction of domicile is therefore the general rule but it is not the only rule because there are also other possible jurisdictions [20] which, in certain circumstances, exclude the jurisdiction of domicile by reference to the subject-matter of the dispute [21] or the wishes of the parties. [22]

23. In other cases, Article 2 must be read in conjunction with provisions which determine international and territorial jurisdiction by means of compulsory rules for the defendant and optional rules for the claimant, who is able to choose from a range of options. [23]

24. In that regard, Articles 5 and 6 of Regulation No 44/2001 provide for special

14 — Case 189/87 [1988] ECR 5565, in particular paragraphs 7 to 12.

15 — Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraphs 47 to 49.

16 — Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 72; Case C-159/02 *Turner* [2004] ECR I-3565, paragraph 24; and Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 37.

17 — In accordance with Article 4(1) of Regulation No 44/2001, '[i]f the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State'.

18 — See Guardans Cambó, I., in the collective work *Comentario al Convenio de Bruselas relativo a la competencia judicial y a la ejecución de resoluciones judiciales en materia civil y mercantil*, edited by Calvo Caravaca, A.L., Universidad Carlos III de Madrid/Boletín Oficial del Estado, Madrid, 1994, p. 62.

19 — Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by P. Jenard (OJ 1979 C 59, p. 1).

20 — Thus, Article 3(1) of Regulation No 44/2001 stipulates that '[p]ersons 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'; Droz, G.A.L., *Compétence judiciaire et effets des jugements dans le marché commun (Etude de la Convention de Bruxelles du 27 septembre 1968)*, Librairie Dalloz, Paris, 1972, p. 56.

21 — Article 22 of Regulation No 44/2001 opens with the phrase '[t]he following courts shall have exclusive jurisdiction, regardless of domicile ...'.

22 — In accordance with Articles 23 and 24 of Regulation No 44/2001, a court of a Member State may declare itself competent to settle a dispute even where the defendant is not domiciled in one of the Member States.

23 — Sections 2 to 5 of Chapter II. For example Articles 5, 6, 9 to 12, 16, 19 and 20 use the verb 'may'.

jurisdiction so that claims may be lodged with a court that is not based in the Member State where the debtor is domiciled. In such cases, regardless of national law, the court which is to hear the case is determined on the basis of its close connection with the dispute.

25. The provisions cited refer to a number of types of jurisdiction, such as *forum contractus,* [24] *forum delicti commissi,* [25] and the jurisdiction at issue in this case, *forum connexitatis*, which comprises a variety of procedural links, including the situation where there is more than one defendant. The principle of *forum connexitatis* addresses the ongoing desire of the Community legislature to bring together actions concerning the same matter in the jurisdiction which is closest to or which has the strongest connection with the dispute. [26]

C — Special jurisdiction where there is more than one defendant

26. The involvement of a number of individuals in proceedings gives rise to joinder of litigants, which may be active (if there is more than one claimant and one defendant), passive (if there is one claimant and more than one defendant) or mixed (if there is more than one claimant and more than one defendant).

27. Article 6(1) of Regulation No 44/2001 refers to the case of passive joinder, [27] although it could equally apply to mixed joinder. [28] In order to exercise the right to choose jurisdiction, there must be at least two debtors domiciled in different Member States [29] and the claims [30] must be connected in such a way that it is expedient to hear and determine them together.

28. The requirement of a connection is based on two reasons. The first is that it reduces the risk of contradictory judicial decisions; the second is that it prevents one

24 — Article 5(1)(a).

25 — Article 5(3) and (4).

26 — Desantes Real, M., *Competencia judicial internacional en la Comunidad Europea*, Bosch, Barcelona, 1986, p. 329.

27 — The Jenard report points out that analogous provisions appear in the laws of the signatory States to the Brussels Convention, with the exception of Germany, and also in many bilateral conventions. See also Loussouarn, I., *Droit international privé*, 2nd edition., Dalloz, Paris, 1980, p. 610.

28 — Since the regulation does not govern active joinder of litigants, the legal systems of the Member States prevail in that regard; Geimer, R. and Schütze, R.A., *Internationale Urteilsanerkennung*, Volume 1, Part 1, Munich, 1983, p. 385.

29 — The requirement that they must not have the same domicile is implicit; Tirado Robles, C., *La competencia judicial en la Unión Europea. Comentarios al Convenio de Bruselas*, Bosch, Barcelona, 1995, p. 64. Academic writers have argued that the provision does not apply where one or more of the joint defendants are domiciled outside the Community; Garau Sobrino, F.F., op. cit., *Comentario al Convenio de Bruselas ...*, p. 171.

30 — It is important not to confuse joinder of claims where there is more than one defendant under Article 6(1) with joinder of proceedings with the same cause of action under Articles 27 to 30 of Regulation No 44/2001.

of the debtors from being unlawfully removed from the jurisdiction of the courts of the State where he resides. [31]

D — *Consideration of the question referred for a preliminary ruling*

29. Two replies have been proposed to the question submitted by the referring court. The French Government and the Commission consider that it is possible to invoke special jurisdiction, while the German Government rejects that view. Both approaches must be examined.

1. The first approach

30. At first sight, the case before the Court appears to satisfy the requirements for application of Article 6(1) because there are two defendants and the claims are closely related since they are derived from a joint and several obligation, [32] as a result of which full settlement may be demanded from either debtor.

31. From a procedural point of view, in order to invoke special jurisdiction, provided that the claimant sues more than one debtor all of them will have the status of defendant regardless of any procedural or substantive obstacles which arise at that time or later.

32. That contention is borne out by no fewer than four arguments. First, after confirming the validity of the procedural connection, the court must establish that it has jurisdiction, which is not dependent on the admissibility of the action or on a substantive examination of the main issue of the case, namely the viability of the claim.

33. Second, Regulation No 44/2001 does not define the terms 'defendant' or 'joint defendant', [33] and merely requires a connection between claims without further clarification.

34. Moreover, third, under Article 30 of Regulation No 44/2001, a court is seised of a dispute 'at the time when the document

31 — Although the second reason is referred to in Article 6(2) — 'as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case' — it is not mentioned in Article 6(1) but it may be inferred from the spirit and the aim of the legislation, either as a result of the connection requirement (Jenard report) or in its own right (Droz, op. cit., p. 71, takes the view that the omission is the result of an oversight rather than deliberate silence). See also Gothot, P., and Holleaux, D., *La Convención de Bruselas de 27 de septiembre de 1968 (competencia judicial y efectos de las decisiones en el marco de la CEE)*, La Ley, Madrid, 1986, p. 69.

32 — The Jenard report cites the case of 'joint and several debtors' as an example of a connection.

33 — Droz, op. cit., p. 71.

instituting the proceedings or an equivalent document is lodged with the court'. According to the judgment in *Kalfelis*, that is also the opportune moment to determine whether the actions are related [34] and also, therefore, to verify whether the said document lists at least two defendants. [35]

35. Finally, if a claimant, either by withdrawal or discontinuance, abandons his claim against the party who is domiciled in the jurisdiction of the court seised of the proceedings under Article 6(1), the principle of *perpetuatio jurisdictionis* precludes the alteration of international jurisdiction with the result that the proceedings continue to be heard by the same court. [36] That rule applies where someone summoned to appear in the proceedings is excluded for other reasons.

2. The second approach

36. Like the other provisions which derogate from the general rule in Article 2, Article 6(1) is restrictive in nature [37] and must be interpreted strictly, [38] by reference to the aim pursued. In accordance with that rule, Article 6(1) may not be invoked in the case before the Court.

37. That assertion is bolstered by other arguments. First, the choice of jurisdictions provided for in cases where there is more than one defendant is not an aim in itself but rather it seeks to ensure procedural economy and to avoid conflicting judgments, objectives which will not be achieved if one of the claims brought is inadmissible.

38. Second, the advantage of not being required to mount a defence in a foreign court does not prejudice the opposing party or place on him an undue burden, such as, in this case, having to obtain information about bankruptcy proceedings in another jurisdiction.

3. The solution proposed

39. Neither of the two approaches outlined are appropriate to the facts described by the referring court. In addition, both approaches entail a number of risks which, as I will make clear below, are easily detected.

34 — Paragraph 12.

35 — Garau Sobrino, F.F., op. cit., *Comentario al Convenio de Bruselas* ..., p. 170, states that it is usually made clear that there are joint defendants when the application is lodged.

36 — Desantes Real, M., op. cit., p. 331.

37 — Weser, M., *Convention communautaire sur la compétence judiciaire et l'exécution des décisions*, Centre interuniversitaire de droit comparé, Brussels/Paris, 1975, p. 266.

38 — Case 33/78 *Somafer* [1978] ECR 2183, paragraph 7, makes clear the importance of avoiding a wide and multifarious interpretation of the exceptions to Article 2 of the Brussels Convention.

40. If a claim relating to a joint and several debt is lodged with a court of a Member State against at least two debtors, one of whom is domiciled in that Member State while the other is not, and the debtor who has given rise to the jurisdiction of that court died before the commencement of proceedings, from a procedural point of view, the first approach put forward clearly resolves the question but the outcome is unsatisfactory because conflicting decisions are avoided only since a deceased person cannot be sued (that situation would be altered to some extent if an action were brought against the heirs).

41. In the same situation, if the defendant whose domicile determines jurisdiction has assigned his debt without notifying the claimant, the uncertainties concerning his capacity to be sued and the consequences of the failure to notify would warrant a prior examination of those issues and, where applicable, a refusal to hear the dispute. It would be possible for a court in a different Member State, where another defendant is domiciled, to do likewise, and that might result in different decisions.

42. In my opinion, the difficulty lies in the fact that where, under national law, one of the claims must be ruled inadmissible at the outset, there are not a number of defendants in the true sense and, therefore, the prerequisite for the choice of jurisdiction is not satisfied. Nor does the choice of jurisdiction fulfil its function.

43. The presence of at least two defendants in the proceedings arises artificially. It is not necessary to dismiss the claim or to examine whether that step is necessary; instead, a legal requirement precludes the claim from being pursued in the first place.

44. Furthermore, if, at the outset, one of the defendants is disqualified from taking part in the proceedings, in a manner of speaking the possibility of conflicting decisions is avoided because there will be no decision from the court of the State where the disqualified party is domiciled.

45. On the other hand, the application of the rule in situations such as the one in the main proceedings alters the general principle in terms prohibited by the Court,[39] since, for merely artificial reasons, an individual is brought before the courts of a foreign country, thereby diminishing his rights of defence.

46. The solution proposed takes account of the requirement that provisions governing jurisdiction must be predictable, since the possibilities envisaged are precisely defined

39 — *Kalfelis*, paragraph 8, and *Réunion européenne and Others*, paragraph 47.

and do not impose new conditions for invoking special jurisdiction; instead, they simply delimit the existing ones.

47. Nor does the solution mean that national legal systems may indirectly have a bearing on the rules of jurisdiction to the detriment of their effectiveness. That is contrary to case-law, [40] which provides that Community provisions must override incompatible national provisions. [41] The effectiveness of Community provisions is not reduced and nor is there any conflict; the requirements operate in distinct spheres but overlap in certain areas.

48. I must also point out that Regulation No 44/2001 — like the Brussels Convention before it — does not unify national procedural laws and instead pursues a more modest aim, which is to indicate which court has jurisdiction to determine certain cases, in accordance with criteria which are distinct from the ones governing the admissibility of actions. [42]

49. Regulation No 44/2001 refers to national law several times, for example to determine a concept as fundamental as that of domicile. [43] The Court has, on a number of occasions, allowed recourse to provisions of national law to supplement Community provisions. [44]

50. Accordingly, Article 6(1) of Regulation No 44/2001 may not be invoked where a claim brought against a person domiciled in the country chosen as the forum State must be dismissed at the outset because the law precludes it from being heard.

51. A reply in those terms overcomes the difficulties inherent in both of the other two approaches discussed, remains within the boundaries of the system established by Regulation No 44/2001, and provides useful guidance to courts which are required to apply the provision.

40 — Case C-365/88 *Hagen* [1990] ECR I-1845, paragraph 20; Case C-77/04 *GIE Réunion européenne and Others* [2005] ECR I-4509, paragraph 35; and *Turner*, paragraph 29.

41 — Case 288/82 *Duijnstee* [1983] ECR 3663, paragraph 14. The Hoge Raad der Nederlanden asked the Court of Justice whether the obligation of a court to declare that it has no jurisdiction under Article 19 of the Brussels Convention continued to apply in the context of an appeal on a point of law in which, under national law, the court is restricted to examining the pleas put forward by the parties.

42 — *Hagen*, paragraph 17, and *GIE Réunion européenne and Others*, paragraph 34.

43 — Article 59 provides that, '[i]n order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law' (paragraph 1), and continues: '[i]f a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State' (paragraph 2).

44 — See the judgment in Case 129/83 *Zelger* [1984] ECR 2397, on the interpretation of Article 21 of the Brussels Convention, and, in broad terms, *Hagen*, paragraph 19, which refers to a number of other cases.

VI — Conclusion

52. In the light of the foregoing considerations, I propose that the Court of Justice, in reply to the question referred for a preliminary ruling by the Oberster Gerichtshof, should state as follows:

It is not possible to rely on Article 6(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 when bringing a claim against a person domiciled in the forum State and against another person domiciled in a different Member State where, on clear and lawful grounds, the claim against the former must be ruled inadmissible at the outset of the proceedings.