OPINION OF ADVOCATE GENERAL LÉGER

delivered on 8 October 1997 *

1. The Bundesgerichtshof (Federal Court of Justice), seeks a preliminary ruling, under Article 3 of the Protocol of 3 June 1971, [1] on the interpretation of points 1 and 3 of the first paragraph of Article 13, Article 24, the second paragraph of Article 28, and the second paragraph of Article 34 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [2] as amended by the accession agreements of 1978 [3] and 1982 [4] (hereinafter 'the Convention' or 'the Brussels Convention').

Legal framework: the relevant provisions of the Brussels Convention

2. It will be recalled that the Brussels Convention establishes a unified system for the determination of jurisdiction (Title II), accompanied by a simplified mechanism for the recognition and enforcement of judgments given by the courts of the Contracting States (Title III) within the scope of the matters covered by the Convention (Title I).

3. It is clear that, by way of derogation from the first paragraph of Article 2, which grants general jurisdiction to the courts of the State where the defendant is domiciled, in the situations restrictively set out by Sections 2 to 6 of Title II, the defendant may, in the case of special jurisdiction, by reason of the close ties linking a given court to a dispute (Section 2: Articles 5 to 6a), or shall, in the case of exclusive jurisdiction (Section 5: Article 16) or of voluntary prorogation of jurisdiction (Section 6: Articles 17 and 18), be sued, where appropriate, in the courts of another Contracting State.

4. The rules contained in Sections 3 and 4 of Title II operate as systems of jurisdiction separate from that established by Article 2

* Original language: French.

1 — Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 50).

2 — OJ 1978 L 304, p. 36.

3 — Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1978 L 304, p. 1, and the amended text of the Convention of 27 September 1968, cited above, p. 77).

4 — Convention of 25 October 1982 on the accession of the Hellenic Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1982 L 388, p. 1).

and its exceptions. [5] These are protective rules for parties considered to be weak, governing jurisdiction in matters relating to insurance and consumer contracts respectively.

5. The benefit of the protective rules provided for in Section 4 of Title II is subject to two cumulative conditions being satisfied. In the first place, the person who relies on them has to be a 'consumer' within the meaning of the first paragraph of Article 13, that is to say a person acting 'for a purpose which can be regarded as being outside his trade or profession'. Secondly, the contract concluded by the consumer has to be one of those set out in points 1 to 3 of this provision. The following types are envisaged:

'1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

3. 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.'

6. Where these conditions are satisfied, the consumer may only be sued, in accordance with the second paragraph of Article 14, in the courts of the Contracting State in which he is domiciled.

7. In setting out the relevant provisions of the Convention concerning jurisdiction Article 18 should also be mentioned, which permits the prorogation of jurisdiction as a

5 — This results from Article 7 and the first paragraph of Article 13 of the Convention according to which jurisdiction in matters relating to insurance or consumer contracts is determined by Sections 3 and 4 alone 'without prejudice to the provisions of Articles 4 and 5.5.'

consequence of the mere appearance of the defendant. This article provides as follows:

'Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or whether another court has exclusive jurisdiction by virtue of Article 16.'

The principle is thus that the appearance of the defendant has an attributive effect on jurisdiction: a court which in principle lacks jurisdiction becomes competent when the defendant appears.

However, this provision does not apply in two situations. Where the dispute relates to a matter closely linked with the territory of a Contracting State, such as rights *in rem* in immovable property, the exclusive jurisdiction under Article 16 prevents the application of Article 18. Moreover, the appearance of the defendant does not confer jurisdiction if it seeks to challenge the jurisdiction of the court seised. That is the case where the defendant appears solely to contest the jurisdiction without challenging the substance. That is also the case where the defendant appears to contest both the jurisdiction *and* the substance. [6] In the latter case, the defence on the substance must, however, be presented in the alternative to avoid the application of Article 18. [7]

8. The final provision of Title II of interest to the present proceedings is Article 24, which allows a court not having jurisdiction over the substance of the matter to take 'provisional, including protective, measures', within the scope of the matters covered by the Convention, where the plaintiff chooses to apply to it rather than to the courts of another Contracting State, having jurisdiction as to the substance of the matter. That article reads as follows:

'Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'

9. Title III, which concerns the recognition and enforcement of judgments, seeks to ensure the 'free movement of judgments' in the common market. [8] In keeping with this objective, Articles 31 and following put in place a summary enforcement procedure, more simplified than ordinary enforcement

6 — Case 150/80 *Elefanten Schuh* v *Jacqmain* [1981] ECR 1671, paragraph 17.

7 — Case 27/81 *Rohr* v *Ossberger* [1981] ECR 2431, paragraph 8; Case 25/81 *W.* v *H.* [1982] ECR 1189, paragraph 13; and Case 201/82 *Gerling* v *Amministrazione del Tesoro dello Stato* [1983] ECR 2503, paragraph 21.

8 — Case 145/86 *Hoffmann* v *Krieg* [1988] ECR 645, paragraph 10.

proceedings, which seeks to limit the requirements to which the enforcement of decisions given in one Contracting State may be subjected to in another Contracting State.

10. Thus, the first part of the procedure is not adversarial (Article 34, first paragraph).

11. Moreover, the principle is that enforcement is granted without the need for the court applied to to review the jurisdiction of the Court of the State of origin (Article 28, third paragraph). [9]

12. It is only on an exceptional basis that such review is carried out, in particular where certain rules of jurisdiction are at issue. That is why, under the second paragraph of Article 34, 'The application may be refused only for one of the reasons specified in Articles 27 and 28.'

In particular, under the first paragraph of Article 28, enforcement may not be given to judgments given in disregard of the provisions on jurisdiction in matters relating to insurance (Section 3, Articles 7 to 12a), or of those concerning consumer contracts (Section 4: Articles 13 to 15), or of the rules relating to exclusive jurisdiction contained in Article 16 (Section 5).

Within this examination of the grounds of jurisdiction set out in the first paragraph of Article 28, 'the court or authority applied to shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction' (Article 28, second paragraph).

13. Finally, according to the third paragraph of Article 34, 'Under no circumstances may the foreign judgment be reviewed as to its substance'.

Factual and procedural background

14. The dispute in the main proceedings concerns the enforcement of a contract between the creditor, Intership Yachting Sneek BV, a company incorporated under Dutch law and having its registered place of business in the Netherlands town of Sneek, and the debtor, Mr Mietz, who is domiciled in Lüchow, Germany, where he runs a construction business and trades in construction materials.

9 — This absence of review is justified by the existence of strict rules of jurisdiction and the confidence placed in the court of the State in which judgment is given, which has to cover the application by the court of the State in which judgment is given of the Convention rules (Report on the Convention of 27 September 1968 concerning jurisdiction and the enforcement of decisions in civil and commercial matters (OJ 1979 C 59, p. 1), known as the 'Jenard Report', p. 46).

15. The parties agreed that the debtor would purchase an Intership boat of type 1.150 G. It was agreed that the boat would be subject to substantial modifications [10] before its final delivery. The total purchase price of DEM 250 000 was payable in five successive instalments, all due before final delivery. [11] This agreement was set down in writing in a document called a 'contract of sale' signed at Sneek, Netherlands.

16. Following partial failure by the debtor to make certain payments, the creditor, through the procedure of 'kort geding', [12] in which both sides were heard, obtained on 12 May 1993 a provisionally enforceable judgment from the President of the Arrondissementsrechtbank (District Court) of Leeuwarden, a Dutch court with interim jurisdiction, ordering the recovery of part of the debt (almost two thirds of the total amount payable).

17. Enforcement of this judgment having been granted in Germany by the Landgericht (Regional Court), Lüneburg, the debtor lodged an appeal before the Oberlandesgericht (Higher Regional Court).

18. In support of this appeal, the debtor contested, for the first time, [13] the jurisdiction of the Dutch court of origin, which he claimed had disregarded the consumer protection provisions of Articles 13 and 14 of the Convention granting jurisdiction to the courts of his place of domicile, Germany. Consequently, the court applied to, in examining the jurisdiction of the court of origin, could not, where it found an infringement of these provisions, grant the enforcement sought in Germany, in conformity with the second paragraph of Article 34, which refers back to the first paragraph of Article 28.

19. In order to claim the benefit of the provisions of Title II, Section 4, he put forward the following two arguments.

On the one hand, the boat ordered was only intended for strictly private use, so that his capacity as a 'consumer' under the first paragraph of Article 13 was established.

On the other hand, the transcription in Sneek (Netherlands) of the earlier agreement was purely formal, the contract having been orally

10 — According to the referring court, the alterations were: two 72 HP Solé-Mazda engines; double keel, stainless steel railings, convertible covering with tinted glass, 4 000 kW Volvo diesel heating system, ventilation outlet above the kitchen, descending spiral stairway, front dining area altered to seat four people and a kitchen with white tiling (order for reference, II, first paragraph).

11 — These five instalments were divided in the following manner: 15% on signing of the contract, 20% on commencement of construction, 30% on the fitting of the engine, 15% on commencement of the wood work and 20% at the first sailing.

12 — This procedure is provided for in Articles 289 to 297 of the Dutch Civil Procedure Code.

13 — This point can be particularly inferred from the order for reference, II, third paragraph. The Bundesgerichtshof seems to indicate by this that the challenge to the jurisdiction had not been raised before the court of origin. It will be recalled that, as the procedure before the court of the State to which request is made is not adversarial (Article 34, first paragraph), the debtor could not have put this argument before the Landgericht Lüneburg.

concluded in Germany prior to signature in the Netherlands. [14] It was at a visit to the creditor's exhibition stand at the Bootsmesse (Pleasure Boat Show) in Düsseldorf, Germany, that the debtor indicated his intention to buy the boat there on display; this not being possible, it was agreed between the parties that a boat of the same model would be built for him, incorporating the alterations specified by the debtor.

This second argument appears to seek to demonstrate that the disputed contract falls within the scope of point 3 of the first paragraph of Article 13 of the Convention.

20. The Oberlandesgericht dismissed the appeal and, as a result, refused not to grant enforcement of the Netherlands judgment for failure to observe the consumer protection rules in Section 4 of Title II.

21. Mr Mietz brought an appeal on a point of law before the Bundesgerichtshof.

14 — According to the order for reference, the recording of such a contract under German law seems to be purely a matter of form.

The questions referred for a preliminary ruling

22. The court has set out in its order of referral the object and content of its inquiries which form the basis of the questions submitted to this court. It asks whether there is any reason that would justify it in refusing to grant enforcement of the judgment obtained in the Dutch court of origin.

23. Its first two questions examine the arguments put forward by the debtor and seek to determine whether the case before it is of a kind which deserves special protection, either because the disputed agreement constitutes a 'sale of goods on instalment credit terms' (Article 13, first paragraph, point 1) or a 'contract for the supply of goods or a contract for the supply of services' concluded by a consumer (Article 13, first paragraph, point 3).

24. In the context of the examination of point 3 of the first paragraph of Article 13, the referring court wants to know whether it can take into account matters put forward by the debtor which were not considered in the judgment given in the court of origin. These concern matters of fact raised before the Oberlandesgericht seeking to establish that the conditions required under (a) and (b) of this provision are satisfied (in particular, in this case, the fact that the contract was orally concluded at the Bootsmesse in Düsseldorf). The Bundesgerichtshof observes that, by virtue of

the second paragraph of Article 28, in carrying out a review of the jurisdiction of the court of the State of origin under the rules of Section 4 of Title II, the court of the State to which request is made is 'bound by the findings of fact on which the court of the State of origin based its jurisdiction'. In so far as the Dutch court did not base its jurisdiction on findings of fact, the referring court asks whether the wording of the second paragraph of Article 28 prevents it from taking account of these new matters.

Those considerations form the basis of the third question. [15]

25. The national court points out that, if the answers to these first three questions ruled out the application of the first paragraph of Article 28, it could not review the jurisdiction of the court of origin, and consequently could not oppose enforcement of the disputed decision. It would thus have to reject the appeal. [16]

26. Hence its fourth question, for which an answer is only sought if the first paragraph of Article 28 applies. In this case, if enforcement in principle could not be granted by reason of the misapplication by the court of origin of the rules contained in Section 4 of Title II, the referring court proposes to examine the question of enforcement from a different perspective, that of Article 24 of the Convention. Thus it asks whether a measure granted by way of a procedure of 'kort geding' is a 'provisional, including protective, measure' within the meaning of Article 24. In such a case, the Bundesgerichtshof thinks that 'Articles 13 and 14 of the Brussels Convention would, from the outset, not preclude recognition'. [17]

27. The wording of the four questions which have been submitted is as follows:

'1. Is there a sale of goods on instalment credit terms within the meaning of point 1 of the first paragraph of Article 13 of the Brussels Convention in the case where, in a document described by the parties as a "contract of sale", one of the parties undertakes to manufacture a specific type of motor yacht with nine specified alterations and to transfer it to the other party, and the latter is required

15 — The Bundesgerichtshof points out (III, point 3, third paragraph of the order for reference) that 'those submissions have not been contested in the proceedings for recognition, with the result that, under Paragraph 138(3) of the Code of Civil Procedure, they might have to be regarded as true, with the consequence that the courts of the State of origin lacked jurisdiction. But even if it were still necessary to adduce evidence in that regard, the present court, as a court of appeal on a point of law, would not be in a position to do so. It would then have to set aside the contested decision of the Oberlandesgericht by a decision terminating the proceedings and refer the case back to the Oberlandesgericht for the taking of evidence.'

16 — Order for reference, III, point 3, first paragraph.

17 — Ibid., III, point 3, second paragraph.

to pay DEM 250 000 for it in five instalments?

If the first question is answered in the negative:

2. Is the contract described in the first question a contract for the supply of goods within the meaning of point 3 of the first paragraph of Article 13 of the Brussels Convention?

3. Under the second paragraph of Article 34 of the Brussels Convention, in conjunction with the second paragraph of Article 28 thereof, must account also be taken of new facts which, according to the debtor, establish that the court of the State of origin has infringed the provisions of Section 4 of Title II of that Convention?

If either the first or the second and third questions are answered in the affirmative:

4. Does the possibility provided for in Articles 289 to 297 of the Netherlands Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure) for obtaining a judgment ordering payment of contractual consideration through application for an immediate interim order by way of an abbreviated procedure ("kort geding") constitute a provisional measure within the meaning of Article 24 of the Brussels Convention?'

Answers to the questions

Position on the suggestion to deal first with Article 18 of the Convention

28. As stated above, within the system of the Convention, Article 18 provides for voluntary or implied submission to jurisdiction. The Commission relies on this provision and argues, first of all, [18] that the questions referred would be without purpose if the debtor had entered an appearance before the court of origin without any reservation. The United Kingdom Government has, in essence, put forward the same argument. [19]

29. However, it seems to me that a number of arguments prevent the adoption of such an approach.

18 — IV, first paragraph, of its observations.

19 — See paragraph 10 of its observations.

30. First of all, in my opinion, there is insufficient information before us in the present case to allow us to form an opinion as to the applicability of Article 18.

That provision allows submission to jurisdiction only in so far as the defendant's appearance is entered solely to make submissions as to the substance of his defence. [20] However, as the parties have not taken part in the proceedings before this Court, we cannot be certain in this regard. The order for reference only permits vague assumptions. The Bundesgerichtshof has stated that the debtor contested the jurisdiction of the court of origin only at the stage of the appeal against the decision of enforcement, [21] from which one can deduce that the debtor did not contest the jurisdiction of the Dutch court during the proceedings before that court, and limited himself to submissions as to the substance of his defence. However, it is conceivable that the debtor's submissions as to the substance of the case before the president of the Arrondissementsrechtbank te Leeuwarden were merely ancillary to a challenge to jurisdiction. In that case, in accordance with the abovementioned case of *Elefanten Schuh*, his appearance could not be deemed to amount to submission to jurisdiction.

31. A further difficulty would arise if it were decided to apply Article 18 to the present matter: does this provision allow submission to jurisdiction irrespective of the rules of jurisdiction for the protection of consumers in Section 4 of Title II? If the contract at issue were to be regarded as within the types provided for in Article 13, this question would certainly have to be resolved as a preliminary point.

An argument based on the wording of Article 18 favours its applicability in such a case: the only limitation resulting from the wording of this provision is the existence of exclusive jurisdiction by virtue of Article 16. Conversely, Article 18 seems to allow the parties to submit to jurisdiction of the court of a State regardless of any other rules of jurisdiction. In particular, the wording of Article 18 appears to show that nothing prevents, by virtue of that implied consent, jurisdiction being conferred in consumer contract matters on a court other than that indicated by the second paragraph of Article 14. [22]

The case-law of this Court may also be interpreted as being in favour of this argument. This Court has not been reluctant to bring into operation the effect of submission to jurisdiction when the jurisdiction which was departed from resulted from a clause conferring jurisdiction pursuant to Article 17: '... Article 18 of the Convention applies even where the parties have by agreement designated a court which is to have jurisdiction within the meaning of Article 17'. [23] If it is

20 — See point 7 of the present Opinion.

21 — Order for reference, II, third paragraph.

22 — See, in this regard, Gaudemet-Tallon, H.: *Les conventions de Bruxelles et de Lugano*, L. G. D. J., 1996, paragraph 145; Gothot, P. and Holleaux, D.: *La convention de Bruxelles du 27.9.1968*, Jupiter, 1985, paragraph 193, and the Jenard Report: '*the only cases*...where jurisdiction by submission will not be allowed are those in which the courts of another State have exclusive jurisdiction by virtue of Article 16' (p. 38, emphasis added).

23 — *Elefanten Schuh*, paragraph 11; Case 48/84 *Spitzley* v *Sommer Exploitation* [1985] ECR 787, paragraph 26.

considered that the defendant's wishes at the time of the proceedings can derogate from the previous wishes of the parties, his appearance should also permit derogations from the Convention rules which are favourable to him. The defendant is free, as it were, not to take advantage of the protection which is afforded to him.

However, another argument based on the wording of the Convention can be made against this proposition. By virtue of the fourth paragraph of Article 17, the rules of jurisdiction in matters of insurance and consumer contracts are expressly withdrawn from the intention of the parties. [24] In such matters, the choice of forum cannot come into operation; [25] the parties are, in a way, obliged to benefit from the protective rules provided for in their favour, without being able to depart from them by a demonstration of intent. It is true that such a limitation does not appear in the wording of Article 18. However, their observation alone could be considered insufficient to establish that, although the parties cannot depart from the protective rules by choosing a forum at the time of conclusion of the contract, their mere appearance results in de facto loss of the benefit of the protection provided for. Yet, it seems to me that, in admitting contractual prorogation of jurisdiction 'after the dispute has arisen', point 1 of Article 15 covers not only clauses conferring jurisdiction under Article 17 but also implied submission to jurisdiction under Article 18.

32. The purpose of the above exposition on this latter point is not to resolve the difficulty raised, but simply to highlight it. If the course suggested by the Commission and the United Kingdom Government were to be followed, it would first of all have to be decided whether the defendant's appearance in itself can override the Convention's protective rules provided for in his favour. I now turn to the last aspect of this examination of the applicability of Article 18 to the present case.

33. We have already seen two of the difficulties which this question raises: on the one hand, the examination to be undertaken might become, for want of factual elements in our possession, hypothetical or academic, on the other hand, it needs to be demonstrated, first of all, that voluntary appearance allows derogation from the rules of jurisdiction provided for in the second paragraph of Article 14.

34. But, above all, we must remember that we find ourselves at the stage of enforcement proceedings. We saw the importance within the system of the Convention of the fact that the court of enforcement cannot, in principle, examine the jurisdiction of the court of origin. [26] The only exceptions which are likely

24 — That provision reads: " Agreements ... conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 12 or 15... ".

25 — Points 1 and 2 of Article 15 only provide for two situations where such clauses are lawful: in the first place, clauses agreed after the dispute has arisen, since the consumer is then aware of what he is agreeing to, and, secondly, clauses which allow the consumer to bring proceedings in the courts other than those having jurisdiction under Section 4 of the Convention. However, point 3 of Article 15 allows parties domiciled or habitually resident in the same Contracting State at the time of conclusion of the contract to confer jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.

26 — See paragraph 11 of the present Opinion.

to be of interest in the present case deal with the grounds of jurisdiction provided for in Sections 3, 4 and 5 of Title II.

35. Therefore, the referring court can only examine the jurisdiction of the Dutch court of origin from the point of view of the rules provided for under those sections, to the exclusion of any other. Thus it can satisfy itself, as suggested by the debtor, that the rules of jurisdiction in the field of consumer protection have not been misapplied. On the other hand, the system of enforcement put in place does not entitle it to verify whether the court of origin has properly applied the rules of jurisdiction provided for in Article 18. Even if the Dutch court had, in applying this provision, assumed jurisdiction by virtue of the defendant's appearance, the court applied to would not be entitled to review the proper application of this provision. Yet, this would be the case if the court applied to was allowed to examine the question of the application of Article 18 by the court of origin. In so doing, the court applied to would carry out an analysis which could only be considered as a review, in a certain sense, of the jurisdiction of the court of origin in the light of Article 18. It would in fact have to resolve the two types of difficulties I mentioned above. Was the purpose of the defendant's appearance solely to challenge the substance of the case without contesting jurisdiction? If so, does Article 18 allow the wishes of the parties to prevail over the protective rules of the Convention? Even if the court applied to considered it had to answer these two questions in the affirmative, it would have to have carried out, beforehand, an analysis on the proper application of this provision by the court of origin, in order to reach that conclusion.

36. Given that the Convention does not entitle a review of the jurisdiction of the court of origin by the court applied to in the light of the Convention rules except in certain very specific instances, and that the jurisdiction provided for under Article 18 is not one of these instances, I think that the Court cannot ask the referring court to refrain from verifying that Articles 13 to 15 were complied with by suggesting that Article 18 should prevail.

37. As a result, I propose that the Court answer the national court's questions without examining beforehand the application of Article 18 in this instance.

The questions concerning the consumer protection rules

38. The first three questions seek to determine whether the consumer protection rules (Section 4 of Title II) were misapplied by the Dutch court of origin, in which case the referring court cannot grant the enforcement sought.

39. I have no doubt as to the personal application of these rules to the present case.

40. The first paragraph of Article 13 of the Convention defines a 'consumer' as someone acting 'for a purpose which can be regarded as outside his trade or profession'. [27]

41. This Court has concluded that '...only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically'. [28]

42. This is very much the case here. The debtor acted not in a professional capacity, but as a private individual. The acquisition of the boat at issue was actually to satisfy his own private consumption needs. In particular, it was totally separate from the business activity of the debtor, who runs a construction business and trades in construction materials.

43. The hesitation of the referring judge to consider the debtor as a 'consumer' under the first paragraph of Article 13, by reason of the size of the transaction, [29] seems to me to be without foundation. In fact, '... in order to determine whether a person has the capacity of consumer ... reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned.' [30] The status of consumer is thus not reserved only to those persons who are economically weak or disadvantaged.

44. Mr Mietz's capacity as a consumer in the disputed transaction thus not being in any doubt, it must be considered whether this transaction falls within the scope of Section 4 of Title II, since these provisions 'affect only ... a consumer ... who is bound by one of the contracts listed in Article 13'. [31]

The first question: Article 13, first paragraph, point 1

45. Can the disputed transaction be considered as a 'sale of goods on instalment credit terms' within the meaning of point 1 of the

27 — This is also the definition contained in Article 5 of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1, hereinafter the 'Rome Convention'), and in Article 2 of Council Directive 93/13/EEC of 5 April 1993, concerning unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

28 — See, most recently, Case C-269/95 *Benincasa* v *Dentalkit* [1997] ECR I-3767, paragraph 17.

29 — At III, fourth paragraph, of the order for reference: 'It could nevertheless be questioned whether someone who buys something at a price of DEM 250 000 for recreational use needs the special protection of the rules on jurisdiction over consumer contracts.'

30 — *Benincasa*, paragraph 16.

31 — Case C-89/91 *Shearson Lehman Hutton* v *TVB* [1993] ECR I-139, paragraph 22.

first paragraph of Article 13? All the interveners in the present case have given a negative response to this first question. I propose that their analysis should be followed.

46. The disputed contract was treated as a 'works contract' [32] by the President of the Arrondissementsrechtbank te Leeuwarden on the basis of Dutch law, whereas it might be a 'mixed commercial and sale contract' [33] in German law. [34] The parties, for their part, have called it a 'contract of sale'. The referring court also expresses an opinion that there is a sale of goods on instalment credit terms within the meaning of point 1 of the first paragraph of Article 13 only when a ready-made item or an item manufactured for stock for general use is handed over. [35]

47. In this context, this Court has emphasised that the need for 'eliminating obstacles to legal relations and to the settlement of disputes in the context of intra-Community relations in matters of the sale of goods on instalment credit terms' leads to 'consider that concept as being *independent and therefore common* to all the Member States'. [36]

48. As a result, neither the parties' own designation in the particular case nor the solutions adopted under differing national laws can prevail.

49. In the absence of a definition in the text of the Convention, [37] the Court has considered '...that the sale of goods on instalment credit terms is to be understood as a transaction in which the price is discharged by way of several payments or which is linked to a financing contract.' [38]

50. An operation by which the creditor agrees to transfer title in goods under construction to the debtor, in return for payment in a series of five instalments, could satisfy the above definition, were it not for a factor which seems to me to be decisive in the present case, but did not have to be examined in the *Bertrand* judgment.

32 — Also called 'business contract' or 'industrial contract'.

33 — That is to say including the provision of labour, as well as materials.

34 — Order for reference, III, fifth paragraph.

35 — Ibid., III, sixth paragraph.

36 — Case 150/77 *Bertrand* v *OTT* [1978] ECR 1431, paragraph 14 (emphasis added).

37 — The Jenard Report also limits itself to stating that Section 4 of Title II 'relates to the sale of goods where the price is payable in a series of instalments, and to the sale of goods where the sale is contractually linked to a loan (Abzahlungsgeschäfte)', p.33. The Report on the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p.118), known as the 'Schlosser Report', does not clarify the matter any further but refers to Article 5 of the Rome Convention (p. 118).

38 — *Bertrand*, ibid., paragraph 20.

51. This is because the series of instalments, in the case we are dealing with, all take place *before* the delivery of the goods contracted for.

52. However, as stated in the abovementioned *Bertrand* judgment, '...a restrictive interpretation of the second paragraph of Article 14, in conformity with the objectives pursued by Section 4, entails the restriction of the jurisdictional advantage...to buyers who are in need of protection, their economic position being one of weakness in comparison with sellers'. [39] In this sense, a buyer who is granted credit by the seller is indeed in a position of weakness. However, this is certainly not the case where the buyer is billed for the total price *before* the delivery of the good, even if the obligation to pay is spread out over several instalments. Such a buyer cannot be regarded as having been '...induced to purchase by the system of payment by instalments, in so far as payment in a lump sum would have been the cause of economic difficulties for him'. [40] In reality, in a situation such as the present, the buyer does not require any special protection.

53. Therefore, I am of the opinion that the disputed transaction cannot be considered as a sale of 'goods on instalment credit terms' within the meaning of point 1 of the first paragraph of Article 13 of the Convention in the absence of 'payments made *after* delivery'. [41]

54. Thus, enforcement of the Dutch court's judgment cannot be refused on the ground of misapplication of the applicable rules on contracts of this kind.

The second and third questions: Article 28, second paragraph and Article 13, first paragraph, point 3

55. If it does not fall within the scope of point 1 of the first paragraph of Article 13 of the Convention, can the transaction at issue nevertheless be regarded as falling under point 3 of the first paragraph of Article 13? That is the purpose of the second question.

56. Before examining this point, it seems necessary to first consider the third question. In order to decide whether the disputed contract falls within the scope of point 3 of the first paragraph of Article 13, and in particular whether the conditions provided for in (a) and (b) of this provision are satisfied in this instance, it must be shown that the court of the State applied to is entitled to base its assessment on matters put forward by the

39 — Paragraph 21.

40 — Opinion of Advocate General Capotorti in *Bertrand*, at p. I-1450, paragraph 3.

41 — Gothot, P., and Holleaux, D., op. cit., point 135, paragraph 2, emphasis added.

debtor which were not mentioned by the court of the State of origin in its decision. As a result, if the answer to the third question is in the negative, the second does not call to be answered.

57. According to the second paragraph of Article 28 of the Convention, 'In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction'.

58. That provision, according to the Jenard Report, '...avoids recourse to time-wasting duplication in the exceptional cases where re-examination of the jurisdiction of the court of origin is permitted'. [42]

59. It seems to me that if we do not allow the court applied to to disregard the findings of fact made by the court of origin, we cannot equally accept that it should receive new matters of fact which had not been put before the court of origin. The justification is the same in both cases: it is a question of avoiding all delaying tactics. Such an objective could be jeopardised if the court of the State applied to had to take into account new submissions of the debtor, capable of calling into question the jurisdiction of the court first seised, in order to prevent the enforcement sought, when the debtor could have submitted those arguments in the original proceedings. If the production of new arguments of fact before the court applied to were to be admitted, it would be open to any defendant seeking to disrupt the course of the fast procedure provided for in the Convention deliberately not to put forward certain essential arguments until the enforcement stage, in order to prevent enforcement of the judgment.

60. Although the Court has not yet had the opportunity to rule on such a situation under the second paragraph of Article 28, the case-law concerning the third paragraph of Article 34 gives useful indications which can be applied by analogy to the present case.

61. In the *Van Dalfsen and Others* case, [43] faced with '...the question whether the court with which the appeal is lodged may take into consideration, in a decision concerning an application for a stay of proceedings under the first paragraph of Article 38 of the Convention, arguments unknown to the foreign court at the time of its judgment because the appellant had failed to put them before it', [44] the Court ruled that, by reason of the prohibition of review as to the substance set out in the third paragraph of Article 34, a court of appeal can take into account, in its decision

42 — Page 46.

43 — Case C-183/90 [1991] ECR I-4743, paragraph 34.

44 — Paragraph 34.

concerning a request for a stay of proceedings under Article 38, '...only such submissions as the appellant was unable to put before the court of the State where the judgment was given'. [45]

62. In my opinion, in the same way as the court applied to can take into consideration, in its decision concerning a request for a stay of proceedings under Article 38, 'only such submissions as the appellant was unable to put before the court of the State where the judgment was given', similarly, the court applied to can take into account, in its decision concerning enforcement, only the arguments which could not have been relied on before the court of origin.

This is clearly not the case here: Mr Mietz was perfectly able to put forward before the Dutch court of origin the matters of fact which he alleged in the course of the proceedings in the State applied to.

63. Consequently, I think that the matters put forward by the debtor before the courts of that State, seeking to establish that the disputed contract was one of those referred to in point 3 of the first paragraph of Article 13, in that it consisted of a contract for the supply of goods or a contract for the supply of services, concluded as a result of advertising taking place in the State of domicile of the consumer (the Bootsmesse in Düsseldorf) and with the consumer having taken in that State the steps necessary for the conclusion of the contract (contract concluded orally during the Bootsmesse), cannot be admitted by the court applied to, since they could have been put before the court of origin.

64. In view of the answer proposed to be given to the third question, the second does not need to be answered. Since the court applied to cannot take into account the matters of fact put forward in support of the application of point 3 of the first paragraph of Article 13, it cannot review the jurisdiction of the court of origin under that provision.

65. Thus it is only in the alternative that I offer the following observations on the second question submitted to the Court.

66. In this regard, were it not for the inability of the German court in the present case to take into account the factual elements put forward by the debtor, this question would have to be given a positive reply in my opinion.

67. Firstly, as noted above, the disputed contract at issue was concluded by a consumer within the meaning of Article 13.

45 — Paragraph 37 and operative part.

68. Secondly, the subject of the contract, according to the information provided by the referring court, being the delivery of a boat to which a number of substantial modifications were to be made, the condition requiring, under point 3 of the first paragraph of Article 13, the contract to be 'for the supply of goods or ... for the supply of services' appears to be satisfied in the present case.

69. Finally, point 3 of the first paragraph of Article 13 requires that two cumulative conditions are satisfied, [46] to ensure a sufficiently close connection between the contract and the country of domicile of the consumer. [47]

70. The first of these conditions requires that the conclusion of the contract was preceded by a 'specific invitation addressed to him or by advertising' in that State. The Report by Professors M. Giuliano and P. Lagarde on the Rome Convention, [48] to which the Schlosser Report refers, [49] states that this includes all forms of advertising in the State where the consumer is domiciled, or a special offer addressed to him. [50] In the present case, a display on a stand during a pleasure boat fair in Düsseldorf certainly amounts to a form of advertising in the State where the consumer is domiciled. [51] It would in any event be for the court seised to satisfy itself as to the correctness of this factual element.

71. The second condition requires that the consumer has taken in his State of domicile 'the steps necessary for the conclusion of the contract'. The aforementioned Giuliano-Lagarde Report states that this expression avoids the problem of determining the *place* where the contract was concluded, and includes any written document (or any action) indicating the intention of the consumer to follow up the special offer or advertising. [52] Likewise, if it were established, as Mr Mietz claims, that he indicated his intention to purchase the boat contracted for at the Bootsmesse in Düsseldorf, this second condition would be satisfied. The court applied to would have to satisfy itself of this in any event.

The classification of a measure taken following a procedure of 'kort geding' as a 'provisional, including protective' measure under Article 24 of the Convention.

72. The fourth question, by which the national court asks for the classification, from the point of view of Article 24 of the

46 — Schlosser Report, point 158.

47 — Ibid.

48 — Report concerning the Convention on the law applicable to contractual obligations (OJ 1980 C 282, p.1), called the 'Giuliano-Lagarde Report'.

49 — Paragraph 158, in fine.

50 — Pages 23 and 24.

51 — The Giuliano-Lagarde Report thus refers to '.. situations where the consumer has addressed himself to the stand of a foreign firm at a fair or exhibition taking place in the consumer's country...' (p. 24).

52 — Page 24.

Convention, of a measure taken following a procedure of 'kort geding', would not need to be answered if the Court follows my previous argument. This question is only submitted on the basis that the Court considers the disputed contract to be one of the types referred to in point 1 of paragraph 1 of Article 13 or point 3 of paragraph 1 of Article 13.

73. Furthermore, it is significant that, in asking this question, the referring court seems to be prepared to undertake a review of the jurisdiction of the court of origin, which it is prohibited from doing under the third paragraph of Article 28. In fact, the court applied to is permitted to verify that the court of origin has correctly applied the rules of the Convention only where the rules contained in Sections 3, 4 and 5 of Title II are at issue. Apart from these situations, any review is prohibited. Thus, if it were concluded, following the examination of the first two questions, that the consumer protection provisions were indeed wrongly applied by the court of origin, the court applied to could not in any event grant enforcement of the disputed decision. It could not engage in a lengthy search of the other grounds of jurisdiction on which the court applied to could have based jurisdiction, so as to 'make up for', as it were, its lack of jurisdiction under the consumer protection rules. Even should the fourth question have to be answered in the affirmative, this would not allow the court applied to to base the jurisdiction of the court of origin on Article 24 of the Convention rather than on Article 13, in order to avoid refusing enforcement on the ground of misapplication of the consumer protection provisions.

74. In addition, I should again point out [53] the complexity of the question raised, which the present case invites the Court to examine for the third time. [54]

75. While taking the opportunity to refer back to my Opinion in the afore-mentioned *Van Uden* case on this point, I emphasise, as I did there, that the wide range of measures which may be adopted under the 'kort geding' procedure does not, in my opinion, allow an absolute and abstract answer to be given to the question of their classification under Article 24 of the Convention. [55] Whereas, in the *Van Uden* case, it appeared to me that there were sufficient elements relating to the course of the Dutch proceedings and their subject-matter, to answer, in the alternative, the question posed, in the absence of any such elements in the present case, it seems dangerous for me to express an opinion, even in the alternative.

53 — See my Opinion of 10 June 1997 in the *Van Uden* case (C-391/95, pending, point 101 et seq.).

54 — In the abovementioned *W. v H.* case, the referring court submitted the exact same question to this Court, but the Court did not need to answer the question. The *Van Uden* case, currently pending, raises a question in similar terms.

55 — It is undoubtedly because of this variety of situations that the Commission, in the present case, has adopted a position on the question diametrically opposed to that it put forward in the *Van Uden* case.

Conclusion

76. For the foregoing reasons, I propose to answer the questions submitted by the Bundesgerichtshof as follows:

(1) The concept of 'sale of goods on instalment credit terms', within the meaning of point 1 of the first paragraph of Article 13 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, cannot be understood as including a transaction having as its object the supply of goods to a person acting for a purpose which can be regarded as being outside his trade or profession, when the price, payable in instalments, is fully due before the final delivery of the goods to the consumer who has purchased them.

(2) Within the system of the Convention, the second paragraph of Article 34 and the second paragraph of Article 28 must be interpreted as precluding the court of the State applied to from taking into account, in the exercise of its exceptional power of review of the jurisdiction of the court of origin under Section 4 of Title II, matters of fact other than those that the court of origin has taken into account or could have taken into account if the party putting them forward had not refrained from adducing them before it.

In the alternative,

(3) The concept of 'contract for the supply of goods or a contract for the supply of services', within the meaning of point 3 of the first paragraph of Article 13, must be interpreted as including the case of a contract for the supply of a motor boat, in so far as that contract fulfils the two cumulative conditions under (a) and (b) relating to its connection with the place of domicile of the consumer.

(4) The system put in place by the Convention and, in particular, the second paragraph of Article 34, in so far as it refers to the third paragraph of Article 28, does not permit the court of the State applied to to review the jurisdiction of the court of the State of origin under Article 24 of the Convention.