JUDGMENT OF THE COURT (Sixth Chamber)
3 July 1997 *

In Case C-269/95,

REFERENCE to the Court by the Oberlandesgericht München (Germany) under the Protocol of 3 June 1971 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, for a preliminary ruling in the proceedings pending before that court between

Francesco Benincasa

and

Dentalkit Srl

on the interpretation of the first paragraph of Article 13, the first paragraph of Article 14 and the first paragraph of Article 17 of the aforementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1; amended version of the Convention at p. 77),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray, C. N. Kakouris (Rapporteur), P. J. G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr Benincasa, by Reinhard Böhner, Rechtsanwalt, Munich,

— Dentalkit Srl, by Alexander von Kuhlberg, Rechtsanwalt, Munich,

— the German Government, by Jörg Pirrung, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

— the Commission of the European Communities, by Pieter van Nuffel, of its Legal Service, acting as Agent, and Hans-Jürgen Rabe, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Benincasa, represented by Reinhard Böhner, and the Commission, represented by Marco Núñez-Müller, Rechtsanwalt, Hamburg, at the hearing on 22 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 February 1997,

gives the following

Judgment

1 By order of 5 May 1995, received at the Court on 9 August 1995, the Oberlandesgericht (Higher Regional Court), Munich referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 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. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1; amended version of the Convention at p. 77; hereinafter 'the Convention'), three questions on the interpretation of the first paragraph of Article 13, the first paragraph of Article 14 and the first paragraph of Article 17 of the Convention.

2 Those questions were raised in proceedings between Dentalkit Srl ('Dentalkit'), having its seat in Florence, and Mr Benincasa, an Italian national, relating to the validity of a franchising contract concluded between them.

3 According to the case-file relating to the main proceedings, in 1987 Dentalkit developed a chain of franchised shops in Italy specializing in the sale of dental hygiene products. In 1992 Mr Benincasa concluded a franchising contract with Dentalkit with a view to setting up and operating a shop in Munich. In that contract Dentalkit authorized Mr Benincasa to exploit the exclusive right to use the Dentalkit trade mark within a particular geographical area. Dentalkit further undertook to supply goods bearing that trade mark, to support him in various spheres, to carry out the requisite training and promotion and advertising activities and not to open any shop within the geographical area covered by the exclusive right.

4 For his part, Mr Benincasa undertook to equip business premises at his own cost, to stock exclusively Dentalkit's products, not to disclose any information or documents concerning Dentalkit and to pay it a sum of LIT 8 million as payment for the cost of technical and commercial assistance provided when opening the shop and 3% of his annual turnover. By reference to Articles 1341 and 1342 of the Italian Civil Code, the parties specifically approved a clause of the contract reading 'The courts at Florence shall have jurisdiction to entertain any dispute relating to the interpretation, performance or other aspects of the present contract' by separately signing it.

5 Mr Benincasa set up his shop, paid the initial sum of LIT 8 million and made several purchases, for which, however, he never paid. In the meantime, he has ceased trading altogether.

6 Mr Benincasa brought proceedings in the Landgericht (Regional Court), Munich I, where he sought to have the franchising contract declared void on the ground that the contract as a whole was void under German law. He also claimed that the sales contracts concluded subsequently pursuant to the basic franchising contract were void.

7 Mr Benincasa argued that the Landgericht München I had jurisdiction as the court for the place of performance of the obligation in question within the meaning of Article 5(1) of the Convention. He argued that the clause of the franchising contract conferring jurisdiction on the courts at Florence did not have the effect of derogating from Article 5(1) as regards his action to avoid the contract because that action sought to have the whole franchising agreement declared void and, therefore, also the jurisdiction clause. Mr Benincasa further argued that, since he had not yet started trading, he should be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention.

8 The relevant provisions of the Convention read as follows:

Article 13

'In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of point 5 of Articles 4 and 5, if it is:

1. a contract for the sale of goods on instalment credit terms,

...'

Article 14

'A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

...'

9 The Landgericht München I declined jurisdiction on the ground that the jurisdiction clause contained in the franchising contract was valid and that the contract was not a contract concluded by a consumer.

10 Mr Benincasa appealed against that decision to the Oberlandesgericht München, which stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is a plaintiff to be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention even if his action relates to a contract which he concluded not for the purpose of a trade which he was already pursuing but a trade to be taken up only at a future date (here: a franchising agreement concluded for the purpose of setting up a business)?

(2) If Question 1 is to be answered in the affirmative: Does point 1 of the first paragraph of Article 13 of the Convention (contract for the sale of goods on instalment credit terms) cover a franchising agreement which obliges the plaintiff to buy from the other party to the agreement, over a period of several (three) years, the articles and goods required to equip and operate a business (without instalment credit terms having been agreed) and to pay an initial fee and, as from the second year of the business, a licence fee of 3% of turnover?

(3) Does the court of a Member State specified in an agreement conferring jurisdiction have exclusive jurisdiction pursuant to the first paragraph of Article 17 of the Convention even when the action is *inter alia* for a declaration of the invalidity of a franchising agreement containing the jurisdiction clause itself, which is worded "The courts at Florence shall have jurisdiction to entertain any dispute relating to the interpretation, performance or other aspects of the present contract", that clause having been specifically approved within the meaning of Articles 1341 and 1342 of the Italian Civil Code?'

The first question

11 The point sought to be clarified by the national court's first question is whether the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may be regarded as a consumer.

12 In this connection, regard should be had to the principle laid down by the case-law (see, in particular, Case 150/77 *Bertrand* [1978] ECR 1431, paragraphs 14, 15, 16 and 19, and Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, paragraph 13) according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This must apply in particular to the concept of 'consumer' within the meaning of Article 13 et seq. of the Convention, in so far as it determines the rules governing jurisdiction.

13 It must next be observed that, as the Court has consistently held, under the system of the Convention the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and that it is only by way of derogation from that principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention (*Shearson Lehman Hutton*, paragraphs, 14, 15 and 16).

14 Such an interpretation must apply *a fortiori* with respect to a rule of jurisdiction, such as that contained in Article 14 of the Convention, which allows a consumer,

within the meaning of Article 13 of the Convention, to sue the defendant in the courts of the Contracting State in which the plaintiff is domiciled. Apart from the cases expressly provided for, the Convention appears hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile (see Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraphs 16 and 19, and *Shearson Lehman Hutton*, paragraph 17).

15 As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 of the Convention defines a 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities (*Shearson Lehman Hutton*, paragraphs 20 and 22).

16 It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, 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. As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.

17 Consequently, 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. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character.

18 Accordingly, it is consistent with the wording, the spirit and the aim of the provisions concerned to consider that the specific protective rules enshrined in them apply only to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future.

19 The answer to the national court's first question must therefore be that the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.

The second question

20 In view of the answer given to the first question, there is no need to answer the second.

The third question

21 The point sought to be clarified by the national court's third question is whether the courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void.

22 The national court also raises the question whether a jurisdiction clause validly concluded under the rules of the Convention and contained in the main contract must be considered on its own, independently of any allegation as to the validity of the remainder of the contract.

23 The first paragraph of Article 17 of the Convention provides as follows:

'If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either in writing ...'.

24 A distinction must first be drawn between a jurisdiction clause and the substantive provisions of the contract in which it is incorporated.

25 A jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the *lex causae* determined by the private international law of the State of the court having jurisdiction.

26 Next, as the Court has consistently held, the objectives of the Convention include unification of the rules on jurisdiction of the Contracting States's courts, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued (Case 38/81 *Effer* v *Kantner* [1982] ECR 825, paragraph 6, and Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 11).

27 It is also consonant with that aim of legal certainty that the court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case.

28 The aim of securing legal certainty by making it possible reliably to foresee which court will have jurisdiction has been interpreted in connection with Article 17 of the Convention, which accords with the intentions of the parties to the contract and provides for exclusive jurisdiction by dispensing with any objective connection between the relationship in dispute and the court designated, by fixing strict conditions as to form (see, in this regard, Case C-106/95 *MSG* [1997] ECR I-911, paragraph 34).

29 Article 17 of the Convention sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardized if one party to the contract could frustrate that rule of the Convention simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law.

30 That solution is consistent not only with the approach taken by the Court in *Effer* v *Kanter*, cited above, in which it ruled that the plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5(1) of the Convention even when the existence of the contract on which the claim is based is in dispute between the parties, but also with the judgment in Case 73/77 *Sanders* v *Van der Putte* [1977] ECR 2383, paragraph 15, in which the Court held, in connection with Article 16(1) of the Convention, that, in the matter of tenancies of immovable property, the courts of the State in which the immovable property is situated continue to have jurisdiction even where the dispute is concerned with the existence of the lease.

31 It must be added that, as the Court has held, it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope (Case C-214/89 *Powell Duffryn* [1992] ECR I-1745, paragraph 37). Consequently, in the instant case it is for the national court to determine whether the clause invoked before it, which refers to 'any dispute' relating to the interpretation, performance or 'other aspects' of the contract, also covers any dispute relating to the validity of the contract.

32 The answer to the national court's third question must therefore be that the courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void.

Costs

33 The costs incurred by the German Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Oberlandesgericht München by order of 5 May 1995, hereby rules:

1. **The first paragraph of Article 13 and the first paragraph of Article 14 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.**

2. The courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention of 27 September 1968 also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void.

Mancini Murray Kakouris

Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 3 July 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber