OPINION OF ADVOCATE GENERAL JACOBS
delivered on 16 September 2004 [1]

1. The main issue in the present case concerns the distinction, in the context of the Brussels Convention, [2] between consumer contracts and contracts in general.

2. Specifically, how is it to be decided in which category a contract falls when it is concluded by a farmer for the purchase of roofing tiles for a farmhouse which is occupied by him partly in a private capacity as a family dwelling and partly for farming purposes to house livestock and fodder?

3. Further, more technical, issues concern the steps in the conclusion of a consumer contract which, for the purposes of applying the relevant rule in the Convention, must take place in the State of the consumer's domicile.

The Brussels Convention

4. The Brussels Convention applies in civil and commercial matters. Title II allocates jurisdiction between the Contracting States. The basic rule in Article 2 is that the courts of the Contracting State in which the defendant is domiciled have jurisdiction. However, by way of exception to that rule other courts have jurisdiction to hear certain types of action.

5. Article 5(1) of the Convention confers jurisdiction 'in matters relating to a contract' on 'the courts for the place of performance of the obligation in question'.

1 — Original language: English.

2 — Of 27 September 1968, on jurisdiction and the enforcement of judgments in civil and commercial matters. A consolidated version of the Convention as amended by the four subsequent Accession Conventions — the relevant version in the present case — is published in OJ 1998 C 27, p. 1. Since 1 March 2002 (after the material time in the present case), the Convention has been replaced, except as regards Denmark and certain overseas territories of other Member States, by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12, p. 1.

6. Section 4 of Title II of the Convention, comprising Articles 13 to 15, is entitled 'Jurisdiction over consumer contracts'. Article 13 provides in so far as relevant:

'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 ... if it is:

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.

...'

7. Article 14 provides that 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'.

Facts and proceedings

8. Mr Gruber is a farmer in Austria, near the German border. His steading comprises a farmhouse, in part of which (stated to be 62% of the floor area) he lives with his family, the remainder being used as a pigsty and for storing fodder, and separate outhouses including another pigsty, a room for machinery and a number of fodder silos.

9. BayWa AG has a number of businesses in Germany. At an address in Pocking, not far

from the Austrian border, it operates both a building materials centre and a DIY and garden centre. The DIY and garden centre publishes brochures, which are also distributed across the border in Austria.

10. Mr Gruber became aware of BayWa through such brochures. Wishing to tile his farmhouse roof, he enquired by telephone about the available range of tiles and current prices, although there was no specific mention of tiles in the advertising material. He introduced himself by name and stated where he lived, but did not mention that he was a farmer. The employee he had spoken to later called him back with an oral offer. Mr Gruber however wished to inspect the tiles, so he went to BayWa's premises.

11. There, he was handed a written offer. He stated that he was a farmer and wished to tile the roof of his farmhouse. He also mentioned that he had other buildings used principally for farming purposes, but not whether the building to be tiled was used predominantly for farming or private purposes.

12. The following day, Mr Gruber phoned BayWa from his home in Austria to accept the offer. BayWa faxed a confirmation of the contract to his bank.

13. On completion of the tiling, Mr Gruber found significant colour variations in the tiles supplied, despite a warranty by BayWa that the colour would be uniform. He therefore brought proceedings against BayWa in the Austrian courts, on the basis of the warranty coupled with a claim for damages, seeking reimbursement of the price of the tiles and of the expense of removing them and retiling the roof, together with a declaration of liability for any future expenses.

14. Mr Gruber relied on Article 13 et seq. of the Brussels Convention to found jurisdiction, but BayWa objected. The court of first instance held that it had jurisdiction on the ground that the proceedings concerned a consumer contract for the purposes of those provisions, but that decision was reversed on appeal. The case is now before the Oberster Gerichtshof (Supreme Court), which has stayed the proceedings and seeks a preliminary ruling on the following questions:

'(1) Where the purposes of a contract are partly private, does the status of "consumer" for the purposes of Article 13 of the Convention depend on which of the private and the trade or professional

purposes is predominant, and what criteria are to be applied in determining which of the private and the trade or professional purposes predominates?

(2) Does the determination of the purpose depend on the circumstances which could be objectively ascertained by the other party to the contract with the consumer?

(3) In case of doubt, is a contract which may be attributed both to private and to trade or professional activity to be regarded as a consumer contract?

(4) Is the conclusion of a contract preceded by advertising within the meaning of Article 13(3)(a) of the Convention where the other party to the subsequent contract with the consumer advertised his products by brochure in the ContractingState of the consumer but did not advertise the products the consumer subsequently bought in it?

(5) Is there a consumer contract within the meaning of Article 13 of the Convention where the seller makes an offer by telephone from his own State to the buyer who lives in a different State, and the offer is not accepted but the buyer subsequently buys the product thus offered in response to a written offer?

(6) Does the consumer take the steps necessary for the conclusion of the contract in his own State within the meaning of Article 13(3)(b) of the Convention where an offer is made to him in the State of his contracting partner and he accepts that offer by telephone from his own State?'

15. Written observations have been lodged by the parties to the main proceedings, by the Austrian, German, Italian, Portuguese and Swedish Governments, and by the Commission. At the hearing on 24 June 2004, oral argument was presented by Mr Gruber, the Italian Government and the Commission.

Classification as a consumer contract

16. The interlinked issues raised by the national court's first three questions are all of general scope and may conveniently be examined together, although I prefer to

analyse them in terms slightly different from those in which they are posed.

17. The essential question is whether a 'mixed' contract of the kind which Mr Gruber concluded with BayWa should be regarded as a consumer contract for the purposes of the Brussels Convention.

18. In that regard, the referring court also wishes to know what circumstances are to be taken into account in the assessment, and whether they should be objectively ascertainable by the supplier.

19. As will become clear, the answer to those questions is in my view reasonably straightforward. It is helpful however to look first at the background to the consumer contract provisions in the Brussels Convention and their interpretation by the Court.

Background

20. Article 13 of the original version of the Brussels Convention concerned contracts for the sale of goods on instalment credit terms, or loans expressly made to finance the sale of goods and repayable by instalments. It did not refer to other supplies of goods or services, or to the purchaser as acting 'for a purpose which can be regarded as being outside his trade or profession'.

21. The present wording was introduced by the 1978 Accession Convention.[3] The Schlosser Report[4] on the drafting of that convention explains that the development was prompted by a growing concern for consumer protection in cross-border relationships. Section 4 of Title II was thus 'extended into a section on jurisdiction over consumer contracts, establishing at the same time for future purposes that only final consumers acting in a private capacity should be given special protection and not those contracting in the course of their business ...'.

22. The substance of the definition of a consumer contract was taken from Article 5 of the then preliminary draft convention on the law applicable to contractual and non-

3 — Convention 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.

4 — OJ 1979 C 59, p. 71, at paragraphs 153 to 161, pp. 117 to 120.

contractual obligations, later to become — with reference to contractual obligations only — the Rome Convention, to which the Schlosser Report refers. [5]

23. Article 5 of the Rome Convention proscribes, in substance, any choice of law in a contract which would deprive a consumer of the protection afforded by the law of his country of residence. It defines a consumer contract in essentially the same way as the Brussels Convention, as one 'the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession'.

24. The Giuliano-Lagarde Report [6] on the drafting of that convention casts further light on the concept:

'The definition of consumer contracts corresponds to that contained in Article 13 of the Convention on jurisdiction and enforcement of judgments. It should be interpreted in the light of its purpose which is to protect the weaker party and in accordance with other international instruments with the same purpose such as the Judgments Convention. Thus ... the rule does not apply to contracts made by traders, manufacturers or persons in the exercise of a profession (doctors, for example) who buy equipment or obtain services for that trade or profession. If such a person acts partly within, partly outside his trade or profession the situation only falls within the scope of Article 5 if he acts primarily outside his trade or profession. Where the receiver of goods or services or credit in fact acted primarily outside his trade or profession but the other party did not know this and, taking all the circumstances into account should not reasonably have known it, the situation falls outside the scope of Article 5. Thus if the receiver of goods or services holds himself out as a professional, e.g. by ordering goods which might well be used in his trade or profession on his professional paper the good faith of the other party is protected and the case will not be governed by Article 5.'

25. The notion of a consumer contract in Article 13 et seq. of the Brussels Convention has been considered by the Court of Justice

5 — OJ 1980 L 266, p. 1; see the Schlosser Report at paragraph 155.

6 — OJ 1980 C 282, p. 1, at p. 23.

in particular in *Shearson Lehmann Hutton* [7] and *Benincasa*. [8]

26. In *Shearson Lehmann Hutton* the Court identified the rationale of the provisions as 'the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, [who] must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled'. [9]

27. It also, however, set out reasons for not interpreting the term 'consumer' too broadly in that context: the rule of jurisdiction in question is a derogation from the general rule in Article 2; apart from such express derogations, the Convention is hostile to attribution of jurisdiction to the courts of the claimant's domicile; and the protective aim pursued implies that the derogation should not be extended to persons for whom the protection is not justified. [10] The term thus concerns 'only a private final consumer, not engaged in trade or professional activities'. [11]

28. In *Benincasa*, the Court confirmed that approach, and specified that '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. ... [T]he self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. ... [O]nly 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 ...' [12]

Submissions

29. On the basis of the above considerations, all those submitting observations take the view that the application of Article 13 et seq. is not precluded in the case of 'mixed' contracts. There is also general consensus that the nature of such a contract is to be determined by its predominant ingredient.

7 — Case C-89/91 [1993] ECR I-139.

8 — Case C-269/95 [1997] ECR I-3767.

9 — Paragraph 18 of the judgment.

10 — Paragraphs 16, 17 and 19 of the judgment.

11 — Paragraph 22 of the judgment.

12 — Paragraphs 16 and 17 of the judgment.

However, approaches differ as to the circumstances in which the 'consumer' aspects of a contract should be regarded as predominant for that purpose. Broadly, those approaches may be grouped in two categories.

30. In outline, one point of view is that preference should be given, particularly in cases of doubt, to classification as a consumer contract, because of the concern for consumer protection. The aim of the derogation is to protect the consumer, deemed to be economically weaker and less experienced in legal matters than the other party to the contract, by not requiring him to go to the courts of another Contracting State. Nobody who is in such a position should be denied the protection.

31. The other point of view favours a strict interpretation of Article 13 et seq., classifying a contract as falling within the customer's trade or professional sphere in the event of any doubt, because those provisions involve a derogation from the jurisdiction of the courts of the place of performance in Article 5(1), itself a derogation from the general rule in Article 2 that the courts of the defendant's domicile have jurisdiction (*actor sequitur forum rei*). As a derogation in favour of the courts of the claimant's domicile, to which the Convention is in general hostile, it is particularly exceptional. The Court has repeatedly said that such derogations must be interpreted strictly, and it has stated so specifically in relation to Article 13 et seq.

32. As regards the circumstances to be taken into account, there is considerable diversity of views. Some submissions express the view that the percentage of the goods acquired actually used or intended for each purpose must be a determining factor, while others point out the difficulties inherent in reliance on purely quantitative considerations. Mr Gruber submits that the customer's intention should be decisive, but that a business whose advertising targets private households must in any event expect to deal with consumers. Others argue for consideration of the terms of the contract itself or a range of other objective factors — such as the use of business stationery by the customer, the nature of the goods or services and their relationship with the customer's business, the quantity of goods ordered or the known socio-economic context — which may indicate a probable connection with the customer's trade or professional activity. The Italian, Portuguese and Swedish Governments consider the state of the supplier's knowledge to be irrelevant, while the other parties submitting observations all consider it relevant.

Assessment

33. The essential question, as I have said, is whether a 'mixed' contract of the kind which Mr Gruber concluded with BayWa should be regarded as a consumer contract for the

purposes of the Convention. There are three fundamental points to be borne in mind here.

34. First, it is indeed the contract which has to be classified, not the customer. There is no personal status of consumer or non-consumer; what counts is the capacity in which the customer was acting in entering into the particular contract. This flows from the wording of Article 13 and has been emphasised by the Court, in particular in *Benincasa*.

35. Second, the contract must be classified as a whole and cannot be segmented. There is in fact in this context no such thing as a 'mixed contract', there are only consumer contracts and other contracts. This again flows from the wording of Article 13 and also from one of the essential objectives of the Brussels Convention: that of avoiding any multiplication of courts having jurisdiction over the same matter, in particular over one and the same contract. [13] It would be absurd, and contrary to the very purpose of the Convention, if one court were to have jurisdiction over a dispute concerning part of the value of a contract, while another court had jurisdiction as to the remainder. A contract of the kind in issue must therefore be covered either by Article 5(1) or by Article 13 et seq.

13 — See, for example, Case C-96/00 *Gabriel* [2002] ECR I-6367, at paragraph 57 of the judgment, Case C-437/00 *Pugliese* [2003] ECR I-3573, at paragraph 16, and Case C-18/02 *DFDS Torline*, judgment delivered on 5 February 2004, ECR I-1417, at paragraph 26.

36. Third, and most importantly, the aim of Article 13 et seq. is to make it easier for a private consumer — who, in the context of a particular contract, is usually in a weaker position than his supplier, both in economic terms and in terms of business and legal experience and of resources — to bring proceedings against that supplier. This is clear both from the Giuliano-Lagarde Report and from the Court's case-law on Article 13 et seq. It is this consideration which in my view indicates the approach to be taken with regard to contracts of the type in issue.

37. Consumers are afforded particular, and exceptional, protection on the basis that, when they conclude a contract in that capacity, they are in a weaker position than a supplier acting in the course of his trade or profession.

38. Although clearly there will be some contracts in which the reality is different, the Convention does not require the relative weakness of the consumer's position to be ascertained in every case, but in the interests of legal certainty deems any person who acquires goods or services for a purpose outside his trade or profession to be in a weaker position than his supplier.

39. Conversely, therefore, a person acquiring such supplies for a purpose within his trade or professional sphere must be deemed to be on an equal footing with the supplier, and not entitled to the same exceptional protection.

40. When a contract simultaneously serves both private and trade or professional needs, it may be possible to determine the proportion of the contract within each category. It is not however possible to deem the customer to be, in that proportion or indeed in any other proportion, both in a weaker position than the supplier and on an equal footing with him in relation to one and the same contract.

41. Inasmuch as a contract is entered into for the customer's trade or professional purposes, he must be deemed to be on an equal footing with the supplier. And that position of equality — his deemed business and legal experience, and resources, vis-à-vis those of the supplier — cannot be undermined by the fact that the contract also serves private purposes. That must remain true whatever the relative importance of the two types of purpose, as long as they are both significant.

42. Consequently, a person who concludes a contract for purposes which are in part within and in part outside his trade or profession cannot be in a position to rely on the exceptional protection afforded by Article 13 et seq. of the Brussels Convention unless the trade or professional purpose is insignificant.

43. That conclusion is not only impelled by the policy considerations set out in the Schlosser and Giuliano-Lagarde Reports and imposed by the logic underlying the protection in question. It also flows from the Court's case-law to the effect that, as a derogation from the general rule and in particular as a derogation conferring jurisdiction on the courts of the claimant's domicile, those provisions should be interpreted strictly and not extended to persons for whom the protection is not justified.

44. The national court also asks whether the extent to which the contract serves the customer's private and trade or professional purposes respectively must be objectively ascertainable by the supplier.

45. In the light of the view I have reached above, the court before which proceedings are brought must determine, in the event of a disagreement, whether the contract served to any significant extent a purpose within the customer's trade or professional sphere.

46. That determination must be made on the basis of the evidence, and I agree with the view put forward in a number of the submissions to the Court that the whole context is relevant.

47. If the conclusion from that evidence is that the contract served to a significant extent a purpose within the customer's trade or professional sphere, then Article 13 et seq. cannot apply, and it is immaterial whether the purpose in question was objectively ascertainable by the supplier or not.

48. If the conclusion is that there was no significant trade or professional purpose, the contract should be classified as a consumer contract. In that event, difficulty would arise only if, despite that finding, the supplier had none the less had reasonable cause to believe from the surrounding circumstances that the contract was for a purpose within the customer's trade or professional sphere.

49. In such a situation, it seems to me that the consumer cannot be denied the protection of Article 13 et seq. of the Convention unless he behaved in such a way as to lead to the obvious conclusion that he was acting in his trade or professional capacity and can thus be regarded as having held himself out to be contracting in the course of business.

50. While the consumer contract provisions must not be construed so as to extend the protection they afford to those for whom it is not justified, they must also not be construed so as to deny the protection to those for whom it is intended. That protection is undoubtedly intended for any person who enters into a contract solely or overwhelmingly for purposes which can be regarded as outside his trade or profession. The importance of the aim in question is given further weight by Article 153 EC, which pursues the same overall objective of ensuring a high level of consumer protection.

51. If however a consumer holds himself out as acting in his trade or professional capacity — for example, by corresponding on business stationery, having goods delivered to his business address or mentioning the possibility of recovering VAT — and his supplier is in good faith unaware of any grounds for believing otherwise, the consumer may legitimately be regarded as having forgone his right to that protection, as is suggested in the Giuliano-Lagarde Report.

52. In the light of the above considerations, it seems likely that the contract between Mr Gruber and BayWa cannot be classified as a consumer contract for the purposes of the Convention, so that the remaining questions referred, which are relevant only where a

contract can be so classified, will not arise. However, the assessment is a matter for the national court, and I shall therefore examine those questions none the less.

Previous advertising in the State of the consumer's domicile

53. The national court's fourth question is prompted by the fact that, while Mr Gruber became aware of BayWa's activities through advertising material sent to him in Austria, that material made no mention of the tiles which he wished to purchase and did in fact purchase. Does that situation fall within the notion of a contract 'preceded ... by advertising'?

54. The Schlosser Report refers to the Giuliano-Lagarde Report for details of what is meant by advertising in the State of the consumer's domicile.

55. The latter report states that the condition [14] '... relates to situations where the trader has taken steps to market his goods or services in the country where the consumer resides. It is intended to cover inter alia mail order and door-step selling. Thus the trader must have done certain acts such as advertising in the press, or on radio or television, or in the cinema or by catalogues aimed specifically at that country, or he must have made business proposals individually through a middleman or by canvassing. ...' [15]

56. In two cases, the German Bundesgerichtshof has asked the Court whether the provision requires a connection between the advertising and the conclusion of the contract, [16] but in both the Court decided that Article 13(3)(a) of the Brussels Convention was not applicable on other grounds, and did not examine that aspect.

57. In *Shearson Lehmann Hutton* Advocate General Darmon did however express the view that it was not necessary to establish a causal link between the advertising and the conclusion of the contract. [17] He noted that the Convention does not require the consumer to prove that he was actually affected by the advertising or that there was a causal link between the advertising and the conclusion of the contract, a requirement which would in any event generally be impossible to satisfy. Moreover, such an approach would be contrary to the aim of consumer

14 — In the context of the Rome Convention, the first indent of Article 5(2).

15 — P. 24 of the Report, cited in note 6.

16 — *Shearson Lehmann Hutton*, cited in note 7, question 2; Case C-318/93 *Brenner and Noller* [1994] ECR I-4275, question 3.

17 — See in particular paragraphs 81 to 85 of the Opinion, and paragraph 113, point 2 of the proposed alternative ruling.

protection, any restrictions on which must ensue from the actual wording of the Convention. The only conceivable limitation is one of common sense: the advertising cannot have been too remote in time from the conclusion of the contract, an assessment which falls within the remit of the national court. Thus, he considered, Article 13(3)(a) 'lays down a species of irrebuttable presumption that there is a link between the appearance of the advertising and the conclusion of the contract where the former preceded the latter'.

58. Of the parties submitting observations on this point, only the Portuguese Government considers that a close connection between the goods or services advertised and those acquired is necessary for the consumer protection provisions to apply. The others agree essentially that it is enough for the consumer to have received advertising material and to have subsequently acquired goods or services from the advertiser, regardless of their precise nature. And even the Portuguese Government accepts that strict identity between the supplies advertised and those acquired is not necessary, provided they are similar or within the same field of activity.

59. The Commission in particular points out, in addition to the inherent difficulty of establishing a specific causal link, the risk that suppliers might frame their advertising in such terms as effectively to exclude the application of Article 13 et seq., thus circumventing the aim of the Convention.

60. I can only agree with the approach taken by Advocate General Darmon in *Shearson Lehmann Hutton* and advocated in the majority of the submissions to the Court. As has been pointed out, the Convention speaks only of a contract 'preceded' — not 'brought about' — by advertising.

61. The situation referred to in Article 13(3)(a) is one essentially of deliberate cross-border advertising. A trader in one Contracting State who advertises his goods or services to individuals in another Contracting State should be aware that any resulting contracts will be consumer contracts for the purposes of the Convention if the other relevant conditions are fulfilled. An approach which depended on establishing a specific link between the advertising and the actual goods or services acquired could not meet the criterion of legal certainty.

62. Furthermore, the aim of commercial advertising is rarely if ever limited to the promotion of certain items to the exclusion of all other business. On the contrary, the aim is in general to make the advertiser's existence and range of business activities as widely known as possible, and to generate maximum trade in as many lines as possible. Conversely, it is frequently the case that a recipient of advertising material, attracted by the general nature of the advertiser's business, will investigate further and may acquire

goods or services not specifically mentioned in that material.

63. Consequently, the conclusion of a contract must be regarded as preceded by advertising in the State of the consumer's domicile within the meaning of Article 13(3)(a) of the Brussels Convention where the supplier previously advertised goods or services in that State, even if he did not mention the specific products acquired by the consumer.

Specific invitation addressed to the consumer

64. The national court also seeks guidance, in its fifth question, on the alternative condition in Article 13(3)(a), that of a contract preceded by a specific invitation addressed to the consumer in the State of his domicile. Does that notion cover a situation where the supplier makes an offer by telephone to the customer in the State of his domicile, followed by a written offer handed to the customer in the supplier's State, and it is the latter which the customer accepts?

65. The observations submitted to the Court essentially agree that the condition is fulfilled in the circumstances described, although the Portuguese Government stresses that the two offers must be for the same product. The Commission points out that, here again, the condition is merely that the contract should be preceded by a specific offer addressed to the consumer in the State of his domicile, not that it must be based on that offer.

66. Again, I agree with the approach advocated. In the circumstances of the present case, the written offer handed to Mr Gruber in Germany cannot be considered to have been addressed to him in the State of his domicile, Austria. However, an oral offer had previously been received by him when he was in Austria, clearly meeting the definition in Article 13(3)(a). That offer preceded the conclusion of the contract.

67. It is perhaps none the less useful to distinguish between a 'specific invitation' and 'advertising'. The latter is by nature general, the former is expressly defined as specific. Thus, while it is not necessary for the advertising material to concern the same goods or services as those subsequently acquired, it seems necessary for there to be substantial identity between those proposed in a specific invitation and those acquired. Thus, if the telephone offer to Mr Gruber

had been for tiles, and the written offer and subsequent purchase had concerned roof beams, the 'specific invitation' condition would not have been met.

68. I am thus of the view that where in the State of his domicile a consumer receives a specific offer by telephone from a supplier in another State, and subsequently acquires from that supplier the goods or services thus offered, the conclusion of the contract must be regarded as preceded by a specific invitation within the meaning of Article 13 (3)(a) of the Brussels Convention even if the actual terms of the contract are based on a subsequent offer not received in the State of the consumer's domicile.

Steps necessary for the conclusion of the contract

69. The national court's final question is whether a consumer takes the steps necessary for the conclusion of a contract in his own State within the meaning of Article 13 (3)(b) where an offer is made to him in the supplier's State and he accepts that offer by telephone from his own State.

70. From the terms of the provision, it seems clear that the question should be answered in the affirmative — as is indeed proposed by all the parties submitting observations on this point — and that view is confirmed by the Schlosser and Giuliano-Lagarde reports.

71. The Schlosser Report states that 'the new provisions once again follow the preliminary draft Convention on the law applicable to contractual and non-contractual obligations. Both the conditions referred to in point (3) of the first paragraph of Article 13 — an offer or advertising in the State of the consumer's domicile, and steps necessary for the conclusion of the contract taken by the consumer in that State — must be satisfied.' [18]

72. The Giuliano-Lagarde Report states that the words 'steps necessary on his part' were 'expressly adopted ... in order to avoid the classic problem of determining the place where the contract was concluded. This is a particularly delicate matter in the situations referred to, because it involves international contracts normally concluded by correspondence. The word "steps" includes inter alia writing or any action taken in consequence of an offer or advertisement.' [19]

18 — P. 118 of the Report, cited in note 4.
19 — At p. 24.

73. Thus the place where the offer is made is irrelevant, provided that there is an offer (or advertisement) received by the consumer in the State of his domicile. What matters is whether the consumer takes the steps necessary for the conclusion of the contract in the State of his domicile. It is also irrelevant what means of communication are used to conclude the contract.

74. It is clear that where a consumer telephones from his home to accept an offer, that step is necessary for the conclusion of the contract. On the other hand, even if there have been previous discussions or negotiations in the supplier's State which shape the terms of the contract, those steps are likely to be taken by the supplier rather than by the consumer, and likely in any event to precede the conclusion of the contract.

75. Consequently, for the purposes of Article 13(3)(b), a consumer takes the steps necessary for the conclusion of a contract in the State of his domicile when he communicates his acceptance of an offer from that State, regardless of the place where the offer was made and regardless of the means of communication used.

Conclusion

76. I am therefore of the opinion that the Court should give the following answers to the questions raised by the Oberster Gerichtshof:

(1) A person who concludes a contract for purposes which are in part within and in part outside his trade or profession may not rely on the rule of jurisdiction in Article 13 et seq. of the Brussels Convention unless the trade or professional purpose is insignificant.

(2) When determining whether a person has concluded a contract for a purpose which can be regarded as outside his trade or profession within the meaning of Article 13 et seq. of the Brussels Convention, it is unnecessary to have regard to circumstances which could be objectively ascertained by the other party to the contract unless the consumer held himself out as acting in his trade or professional capacity and the other party was in good faith unaware of any grounds for believing otherwise.

(3) The conclusion of a contract must be regarded as preceded by advertising in the State of the consumer's domicile within the meaning of Article 13(3)(a) of the Brussels Convention where the supplier previously advertised goods or services in that State, even if he did not mention the specific products acquired by the consumer.

(4) Where in the State of his domicile a consumer receives a specific offer by telephone from a supplier in another Contracting State and subsequently acquires from that supplier the goods or services thus offered, the conclusion of the contract must be regarded as preceded by a specific invitation within the meaning of Article 13(3)(a) of the Brussels Convention even if its actual terms are based on a subsequent offer not received in the State of the consumer's domicile.

(5) For the purposes of Article 13(3)(b) of the Brussels Convention, a consumer takes the steps necessary for the conclusion of a contract in the State of his domicile when he communicates his acceptance of an offer from that State, regardless of the place where the offer was made and regardless of the means of communication used.