OPINION OF ADVOCATE GENERAL DARMON
delivered on 8 June 1994 *

Mr President,
Members of the Court,

1. By order of 25 May 1993 the Bundesgerichtshof refers to the Court for a preliminary ruling four questions on the interpretation of Articles 13 and 14 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter 'the Convention') as amended on 9 October 1978. [1] Three of the questions are identical in content with those referred by the Bundesgerichtshof in the *Shearson Lehman Hutton* case. [2]

2. The facts of the case may be summarised briefly. Two private individuals, Mr Brenner and Mr Noller, not acting in connection with their profession or occupation, commissioned the broking firm of Dean Witter Reynolds Inc., established in the United States of America, with the implementation of commodity futures transactions. That firm has an agency in Frankfurt am Main, Dean Witter Reynolds GmbH, which advertises for it, but the contract between the parties was mediated exclusively by Metzler Wirtschafts- und Börsenberatungsgesellschaft mbH, a company which is independent of Dean Witter Reynolds Inc.

3. The result of the investments made by that firm on behalf of the plaintiffs in the main proceedings was that, following speculative transactions, they lost almost all the capital provided. Mr Brenner and Mr Noller therefore brought proceedings for compensation against the broking firm, seeking repayment of the sums lost; they claimed on the basis of breach of contractual and pre-contractual obligations, tortious conduct in connection with inflating charges by carrying out a large number of sometimes unreasonable transactions ('churning'), and unjust enrichment.

4. The Landgericht, at first instance, held that it lacked jurisdiction, and its decision was upheld on appeal. The plaintiffs in the main proceedings thereupon appealed on a point of law to the Bundesgerichtshof, which now seeks a preliminary ruling from the Court on its jurisdiction with respect to the first paragraph *in fine* of Article 14 of the Convention where, as in the present case, the other party to the contract is domiciled in a non-Contracting State and no branch, agency or other establishment has acted as an

* Original language: French.
1 — OJ 1978 L 304, p. 1.
2 — Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139.

intermediary in the conclusion or performance of the contract. [3]

5. The other, subsidiary, questions essentially ask the Court for an interpretation of the following terms:

— 'contract for the supply of goods or a contract for the supply of services' in subparagraph 3 of the first paragraph of Article 13, in order to determine whether a contract on a commission basis for the purpose of carrying out commodity futures transactions comes within that category;

— 'advertising' within the meaning of that provision, in order to determine whether it means that there must be a link with the conclusion of a contract;

— 'proceedings concerning a contract' in the first paragraph of Article 13, so as to know whether it covers not only claims for damages for breach of contract but also claims on the basis of breach of pre-contractual obligations and unjust enrichment, and if so, whether it creates, by virtue of the factual connection, an ancillary jurisdiction for non-contractual claims.

6. I have already considered those questions in my Opinion in the *Shearson Lehman Hutton* case. The Court did not, however, answer them since it considered, as I had suggested, that

'... Article 13 of the Convention is to be interpreted as meaning that where a plaintiff, party to one of the contracts mentioned in the first paragraph of that provision, is engaged in his trade or professional activity, and is not himself the consumer, he cannot enjoy the benefit of the special rules of jurisdiction laid down by the Convention concerning consumer contracts'. [4]

7. The Court thus considered that the assignee of a claim acting in the course of his professional activity could not rely on the protective rules of Article 13 which the assigning consumer could have relied on.

3 — Page 6 of the order for reference.

4 — Paragraph 24 and operative part.

8. The present case, on the other hand, according to the findings of the national court, in fact concerns two consumers who each concluded with a company established in a non-Contracting State a contract on a commission basis for the purpose of carrying out commodity futures transactions. The preliminary question to be answered in this case is that of the determination of the scope of the provisions on jurisdiction over consumer contracts in Section 4 of Title II of the Convention. [5]

9. I may state straight away that in my opinion, where, as in the present case, the defendant is not domiciled within the Community and no branch, agency or other establishment has acted in the conclusion and/or performance of the contract, the national court can apply only its own rules on jurisdiction, with the effect that it is not only one of the two alternatives in the first paragraph of Article 14 which is inapplicable, but the whole of Section 4.

10. The Brussels Convention is not intended to regulate jurisdictional disputes which may arise between courts in a Contracting State on the one hand and those in a non-Contracting State on the other hand. As the Jenard Report [6] states,

'... the territory of the Contracting States may be regarded as forming a single entity: it follows, for the purpose of laying down rules on jurisdiction, that a very clear distinction can be drawn between litigants who are domiciled within the Community and those who are not', [7]

with the result that

'if a person is not domiciled in a Contracting State, that is, if he is domiciled outside the Community, the rules of jurisdiction in force in each Contracting State, including those regarded as exorbitant, are applicable'. [8]

11. The Evrigenis and Kerameus Report [9] on the accession of the Hellenic Republic to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters similarly states that:

'where a defendant is not domiciled in a Contracting State the Convention does not contain any rules of its own but refers to the

5 — That section originally related only to the sale of goods on instalment credit terms and to loans expressly made to finance the sale of goods and repayable by instalments. Its scope was extended by the amendment in 1978.

6 — OJ 1979 C 59, p. 1.

7 — Page 13.

8 — Ibid.

9 — OJ 1986 C 298, p. 1.

internal law of the State of the court hearing the action (Article 4, first paragraph). As against such a defendant, the Convention permits any person domiciled in a Contracting State, whatever his nationality, to avail himself of the law of that State ...'. [10]

12. The first paragraph of Article 4 of the Convention indeed provides that:

'If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.'

13. Although Article 4 does not say so, other provisions in addition to Article 16 apply even where the defendant is domiciled in a non-Contracting State.

14. That is the case where jurisdiction is based on an agreement conferring jurisdiction within the meaning of the first paragraph of Article 17, since in such a case the parties have by joint agreement chosen to 'embed' the case in the Community legal order. It suffices here if one of them is domiciled in a Contracting State.

15. Similarly, Article 18 deals with the case of a defendant who enters an appearance before a court of a Contracting State, where he does not contest its jurisdiction and there is no conflict with the provisions of Article 16. [11]

16. Article 21 also applies independently of any condition as to domicile. The Court held in the *Overseas Union Insurance and Others* judgment [12] that

'... Article 21 of the Convention must be interpreted as applying irrespective of the domicile of the parties to the two sets of proceedings'. [13]

17. However, the plaintiff cannot be allowed to rely on the rules on jurisdiction in Section 4 if the defendant is not domiciled in a

10 — Paragraph 44.

11 — See Gaudemet-Tallon, H: 'Les conventions de Bruxelles et de Lugano', *LGDJ*, 1993, point 79. See also Droz: *Compétence judiciaire et effet des jugements dans le marché commun*, Dalloz, 1972, point 228 et seq; Gothot and Holleaux: *La Convention de Bruxelles du 27 septembre 1968*, Jupiter, 1985, point 35 et seq.

12 — Case C-351/89 [1991] ECR I-3317.

13 — Paragraph 18.

Contracting State and the conditions in the second paragraph of Article 13 are not fulfilled. [14]

18. As Article 13 states,

'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 Articles 4* and 5 (5)'. [15]

19. The express reference to Article 4 in the first paragraph of Article 13 is thus a reminder that the scope of Articles 13 to 15 is limited to cases where the defendant is domiciled in a Contracting State. [16]

20. In the circumstances the rules on jurisdiction set out in the Convention do not apply to proceedings such as those pending before the national court, with the consequence that the rules of the *lex fori* on international jurisdiction remain applicable. In such a case the consumer must rely on those rules, including those which derogate from the ordinary law.

21. As Gothot and Holleaux write, [17]

'... if the defendant is not domiciled in the territory of a Contracting State, the first paragraph of Article 4 expressly refers to the law of each Contracting State for determination in such a case of the *international* jurisdiction of the courts of that State .... It is thus necessary — but also sufficient — that the defendant is domiciled outside the Community for all the rules of international jurisdiction of the court in which proceedings are brought to be applicable, including if appropriate so-called exorbitant rules of jurisdiction. Article 3 gives a list of them: ... the forum where the property is situated under Paragraph 23 of the German ZPO ... .

The mere fact that he is not domiciled in a Contracting State thus means that the defendant, even if he is a national of a Contracting State, loses the benefit of the European jurisdiction system in Articles 2 to 15 ...'. [18]

14 — With reference to the last point, note that the national court considers that 'no branch, agency or other establishment within the meaning of the second paragraph of Article 13 ... has acted as an intermediary in the conclusion or performance of the contract' (p. 6 of the order for reference).

15 — My emphasis.

16 — See, *inter alia*, Lasok and Stone: *Conflict of Laws in the European Community*, Professional Books Limited, 1987, p. 228.

17 — Cited in note 11 above.

18 — Point 35, p. 20.

22. In proceedings concerning consumer contracts, the only exception to the rule in Article 4 is introduced by the second paragraph of Article 13, which applies where the party with whom the consumer contracts is domiciled in a non-Contracting State but has a branch, agency or other establishment in a Contracting State which represents him and can bind him vis-à-vis third parties; that is not the case here.

23. As Professor Kaye writes, [19]

'... a non-Contracting State domiciled non-consumer, which possesses a branch, agency or other establishment within the Community *from which it transacts* with the consumer, is deemed to be domiciled in the Contracting State in which the branch, agency or other establishment is situated, so that instead of being subject to national jurisdiction rules by virtue of Article 4, it can be proceeded against by the consumer in the latter State, as its domicile, under Article 14, para. 1'. [20]

24. I note, however, that even if that condition were fulfilled Articles 13 to 15 would still not apply, since the proceedings would not be international for the purposes of the Convention, as Dean Witter Reynolds GmbH and Mr Brenner and Mr Noller would be domiciled in the same Contracting State.

25. It was stated by Droz, in his work cited above, that

'... wherever the Convention determines a special direct jurisdiction, for example, the court of the place where the holder of an insurance policy is domiciled, this is a case where the defendant is sued in the courts of a State which is not that where he is domiciled'. [21]

26. Similarly, in her commentary on the Court's judgment in the *Shearson Lehman Hutton* case, Gaudemet-Tallon also considers that

'... the basic principle ... is that the Brussels Convention lays down rules for intra-Community proceedings, not for national proceedings ...'. [22]

19 — *Civil Jurisdiction and Enforcement of Foreign Judgments*, Professional Books Limited, 1987.

20 — Pages 842 and 843, my emphasis.

21 — Point 30.

22 — *Revue critique de droit international privé*, 1993, p. 325, at p. 330.

27. The main proceedings are therefore not covered by the rules on direct jurisdiction in the Convention, more particularly those in the first paragraph of Article 14.

28. There is therefore no need to answer the subsidiary questions.

29. That is, moreover, the approach adopted by the Court in the judgment in *Shearson Lehman Hutton*. I dealt with them in my Opinion, on an alternative basis. I will therefore restrict myself to referring to my observations in that Opinion [23] in case the Court, contrary to my conclusion, considers that Article 14 of the Convention does apply here.

30. Accordingly, I propose that the Court hold that Article 14 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is not applicable where the proceedings are brought by a consumer in a Contracting State against the other party to the contract who is domiciled in a non-Contracting State, where the conditions in the second paragraph of Article 13 are not fulfilled. In any event, the latter provision is not applicable, for want of a foreign element, where the branch, agency or other establishment of a company based in a non-Contracting State is situated on the territory of the same Contracting State as that in which the consumer is domiciled.

23 — Paragraph 73 et seq.