cally weaker and less experienced in legal matters than the other party to the contract, so that the consumer must not 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. Those provisions affect only a private final consumer, not engaged in trade or professional activities, who is bound by one of the contracts listed in Article 13 and who is a party to the action, in accordance with Article 14. It follows that Article 13 of the Convention is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity, and who is not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts.

REPORT FOR THE HEARING
in Case C-89/91 *

I — Facts and written procedure

1. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH (hereinafter 'TVB'), a company incorporated under German law whose registered office is in Munich (Germany), brought an action in the German courts for the repayment of a sum of money and for damages against an American firm of brokers, E. F. Hutton & Company Inc. ('Hutton Inc.'), whose registered office is in New York (United States of America). In the meantime that firm has been taken over by the American company Shearson Lehman Hutton Inc., whose registered office is in New York, which is also referred to hereinafter as 'Hutton Inc.'.

2. TVB's action against Hutton Inc. is based on rights assigned to it. The assignor, a German judge, had instructed Hutton Inc. to carry out currency, security and commodity futures transactions under an agency contract. He invested considerable sums in 1986 and 1987, which, apart from a small remainder, were consumed by losses resulting from speculation.

3. Hutton Inc. had offered its services through press advertisements in the Federal Republic of Germany. The contractual relationship with the assignor was arranged following the appearance of those advertisements through E. F. Hutton & Company GmbH ('Hutton GmbH'), whose registered office is in Germany, which is dependent on Hutton Inc. and undertakes consultancy functions *vis-à-vis* its customers for the purposes of Hutton Inc.'s operations. Hutton GmbH acted at least in an intermediary capacity in all the orders to buy and sell

* Language of the case: German.

which the assignor gave. Its shares belong to E. F. Hutton International Inc., a wholly-owned subsidiary of Hutton Inc. whose registered office is in New York. In addition, several persons have management responsibilities both with Hutton Inc. and Hutton GmbH.

4. TVB claims from Hutton Inc. the return of the assignor's lost payments. It makes claims of unjust enrichment and claims for damages for breach of contractual and pre-contractual obligations and for tortious conduct inasmuch as the defendant did not sufficiently explain to the assignor the risks of the futures transactions.

5. The case was brought before the Landgericht (Regional Court) München, which declined jurisdiction and dismissed the action as inadmissible.

On appeal, the Oberlandesgericht (Higher Regional Court) München overturned that decision and held that the Landgericht did have jurisdiction.

Hutton Inc. appealed on a point of law against that decision to the Bundesgerichtshof.

6. The Bundesgerichtshof takes the view that its decision depends upon the interpretation of Article 13 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 to that Convention (OJ 1978 L 304, p. 1, hereinafter 'the Convention' or 'the Brussels Convention'). Only if that provision applies can the German courts be held to have jurisdiction.

7. In this regard, whilst the Bundesgerichtshof assumes that a party to currency, security and commodity futures transactions is to be regarded as a consumer within the meaning of the first paragraph of Article 13 of the Convention where, like the assignor in this case, he carries out such operations outside his trade or profession, it considered first whether the agency contract concluded between the assignor and Hutton Inc. constituted a 'contract for the supply of services' within the meaning of subparagraph 3 of the first paragraph of Article 13 of the Convention.

8. In the light of the fact that subparagraph 3(a) of the first paragraph of Article 13 of the Convention requires that the conclusion of the contract must have been preceded by advertising in the State of the consumer's domicile, the Bundesgerichtshof goes on to ask whether that requirement is satisfied simply by the fact that in this case Hutton Inc. frequently placed advertisements for its services in the German press in the period before the contract was concluded or must the assignor have been actually aware of the advertising or, more strictly, must there have been a causal link between the advertisements and the conclusion of the contract.

9. The Bundesgerichtshof further asks whether the party with whom the consumer entered into the contract has a branch, agency or other establishment in one of the Contracting States within the meaning of the second paragraph of Article 13 of the Convention where that party is not domiciled in a Contracting State and it employs a company, acting simply as an intermediary, through which business relations were entered into between the consumer and that other party, and it is not certain that that company itself concluded transactions having legal effects *vis-à-vis* the party with whom the consumer concluded the contract. In addition, the Bundesgerichtshof wonders whether disputes arising in connection with the relations thus created between the consumer and the other party are disputes arising out of the operations of a branch, agency or establishment within the meaning of the second paragraph of Article 13 of the Convention.

10. Lastly, the Bundesgerichtshof has doubts as to whether the phrase 'concerning a contract' in the first paragraph of Article 13 covers claims relating to the breach of pre-contractual obligations and unjust enrichment. It also asks whether, in the event that jurisdiction is based on Articles 13 and 14 of the Convention, the court has international jurisdiction to entertain all the claims to be taken into consideration, whatever their basis, on account of connexity. In the Bundesgerichtshof's view, the close links created by a contract could favour bringing all issues between parties to a contract before the court which has jurisdiction in matters relating to the contract. Moreover, the objective of Article 13 — consumer protection — favours the view that an ancillary jurisdiction exists under Article 13 in non-contractual matters on the basis of connexity.

11. Consequently, taking the view that the dispute raised issues relating to the interpretation of the Convention, the Bundesgerichtshof, by order of 29 January 1991, decided, pursuant to Article 3 of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention, to stay the proceedings until the Court gave a preliminary ruling on the following questions:

'1. Does subparagraph 3 of the first paragraph of Article 13 of the Convention cover agency contracts concerning currency, security and commodity futures dealings?

2. Is it sufficient, for subparagraph 3(a) of the first paragraph of Article 13 of the Convention to apply, that before conclusion of the contract the other party to the contract with the consumer advertised in newspapers in the State of the consumer's domicile, or does the provision require a connection between the advertising and the conclusion of the contract?

3. Does the other party to the contract with the consumer have a branch, agency or other establishment within the meaning of the second paragraph of Article 13 of the Convention if for the conclusion and performance of the contract it uses a company established in the State of the consumer's domicile

which is effectively owned by it and has staff links with it but has no authority to contract on its behalf, acting only as intermediary and advising the consumer, and are disputes which arise in connection with the relations so arranged between the consumer and the other party to the contract disputes arising out of the operation of the branch, agency or other establishment?

4. (a) In addition to claims for damages for breach of contractual obligations, does the phrase "proceedings concerning a contract" in the first paragraph of Article 13 of the Convention also cover claims arising out of the breach of pre-contractual obligations (*culpa in contrahendo*) and unjust enrichment in connection with the unwinding of contractual transactions?

(b) In an action in which claims for damages for breach of contractual and pre-contractual obligations, claims relating to unjust enrichment and claims for damages for tort or delict are put forward, does the first paragraph of Article 13 of the Convention give ancillary jurisdiction to hear the non-contractual claims because of their relationship to the contractual claims?'

12. The Bundesgerichtshof's order was received at the Court Registry on 11 March 1991.

13. Written observations were submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community on 20 June 1991 by the Government of the Federal Republic of Germany, represented by Chr. Böhmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent; on 21 June 1991 by the Commission of the European Communities, represented by P. Van Nuffel, of its Legal Service, acting as Agent, assisted by A. Böhlke, Rechtsanwalt, Frankfurt-am-Main; and on 27 June 1991 by TVB, represented by J. Kummer, Rechtsanwalt, Karlsruhe, and by Hutton Inc., represented by G. Limberger, Rechtsanwalt, Frankfurt-am-Main.

14. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

However, the Court asked the parties to the main proceedings, the Contracting States party to the Convention and the Commission to answer a number of questions in writing. Hutton Inc., TVB, the German Government, the United Kingdom and the Commission complied with that request within the stipulated time.

II — Written observations submitted to the Court

1. *Hutton Inc.*, the appellant on a point of law, starts out by observing that in the order for reference the Bundesgerichtshof implicitly assumes that the Convention is applica-

ble to disputes, such as the dispute at issue in the main proceedings between TVB and Hutton Inc., in which the defendant is a legal person whose registered office is not located in the territory of a Contracting State.

However, the first paragraph of Article 4 of the Convention — whose objective according to the preamble is to 'strengthen in the Community the legal protection of persons therein established' — provides that if the defendant is not domiciled or does not have its registered office in a Contracting State, jurisdiction is to be determined by the law of the State in which the court is located, subject to the provisions of Article 16, which is not in point in the main proceedings.

Consequently, the first paragraph of Article 4 takes the dispute which is the subject of the order for reference outside the scope of the Convention, on the ground that the registered office of Hutton Inc. is located in New York and Hutton Inc. has no establishment within the meaning of the first paragraph of Article 13 of the Convention in the Federal Republic of Germany. Moreover, the words 'without prejudice to the provisions of ... [Article] 4' in the first paragraph of Article 13 confirm that, as far as consumer contracts are concerned, the defendant must be domiciled or have its registered office in a Contracting State in order for the Convention to be applicable.

Lastly, Hutton Inc. points out that the second paragraph of Article 13 of the Convention does provide, in the case of consumer contracts, for a special jurisdiction in the case of establishments empowered to conclude contracts on behalf of defendants whose registered office is located outside the Contracting States, but argues that in the main proceedings it does not satisfy the requirements of that provision.

(a) With regard to the national court's *first question*, Hutton Inc. observes in the first place that, whereas the original version of the Convention laid down rules on jurisdiction for the benefit of consumers only in the limited sphere of instalment sales and loans, the amendments made following the adoption of the 1978 Accession Convention sought, *inter alia*, to broaden consumer protection by laying down in Section 4 of Title II of the Convention special rules on 'jurisdiction over consumer contracts'.

Hutton Inc. goes on to argue that the term 'consumer' refers only to the final consumer, an individual, and not to traders. The expression 'consumer contract' used in the Convention denotes, like Article 5(1) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (OJ 1980 L 266, p. 1), 'a contract [with a person] ... for a purpose which can be regarded as being outside his trade or profession'.

Hutton Inc. further claims that the term 'consumer' must be interpreted independently and uniformly in the context of the

two conventions, having regard to the function of the provisions concerned, which is namely to protect the weaker party to the contract. The experts' report drawn up in connection with the drawing up of the Rome Convention (OJ 1980 C 282, p. 1, hereinafter 'the Giuliano/Lagarde report') states that the rules on consumer contracts extend to credit sales as well as cash sales, but that sales of securities are excluded.

In Hutton Inc.'s view, the same conclusion must be reached, in view of the fact that there is no need for protection, with regard to agency contracts for carrying out commodity and security futures transactions. Such transactions are of a speculative nature and are akin to games of chance, which have nothing to do with the function of social protection inherent in the provisions relating to consumers.

In those circumstances, an individual having a well-established social position, like the assignor in the main proceedings, a judge by profession, who carried out, quasi-professionally, risky speculative transactions involving high potential gains and losses over many years cannot be regarded as a consumer for the purposes of the Convention.

(b) As for the *second question*, Hutton Inc. argues that the wording of subparagraph 3(a) of the first paragraph of Article 13, together with the experts' report drawn up in connection with the drafting of the Convention (OJ 1979 C 59, p. 71, 'the Schlosser report'), clearly indicate that, at the very least, there must be a genuine, concrete connection between the advertising carried out and the conclusion of the contract. The Giuliano/Lagarde report even seems to require there to be a causal connection between the advertising and the conclusion of the contract.

Hutton Inc. infers that in any event it must be proved that the consumer was affected by the advertising measures carried out and that he might genuinely have taken them into account when he took the decision to conclude the contract.

In the absence of a sufficient connection between the advertising and the conclusion of the contract, the requirements for the application of Article 13 of the Convention would not be fulfilled, as is the case with the dispute before the national court.

(c) As regards the *third question*, Hutton Inc. points out that in the case at issue in the main proceedings Hutton GmbH was responsible solely for forwarding financial transactions and correspondence between Hutton Inc. and its customers in the Germany, but concluded no contract binding on Hutton Inc. with such customers.

Consequently, neither of the two requirements laid down in the second paragraph of Article 13 of the Convention, which refers to 'a branch, agency or other establishment' of the party with whom the consumer entered into the contract and to 'disputes arising out of the operations' of such branch, agency or establishment, is fulfilled.

As far as the first requirement is required, it appears from the Court's case-law (judgment in Case 33/78 *Somafer* [1978] ECR 2183; judgment in Case 218/86 *Schotte* [1987] ECR 4905) concerning the same question in the context of Article 5(5) of the Convention that the concept of a 'branch, agency or other establishment' implies a place of business which has the appearance of permanency, such as the extension of a parent body, and is provided with the necessary powers to conclude business on behalf of the parent body.

The determining criterion is therefore the way in which the parent body and the company representing it abroad conduct themselves in society and present themselves vis-à-vis third parties in their trading relations. In the case at issue in the main proceedings neither Hutton Inc. nor Hutton GmbH gave such an appearance of extension. Indeed, among other things particulars given on the stationery of Hutton GmbH drew third parties' attention to the fact that it acted simply as a forwarding body for Hutton Inc.

Hutton Inc. adds that, in interpreting the concept of branch, agency or other establishment within the meaning of the second paragraph of Article 13 of the Convention, account should also be taken of the fact that that provision constitutes an exception to the principle laid down by the first paragraph of Article 13 in conjunction with the first paragraph of Article 4 to the effect that the Convention applies *ratione personae* only to defendants who have their domicile or registered office in a Contracting State. The exception to that principle must be interpreted restrictively. Consequently, in the case of a defendant whose registered office is located outside the territory of the Contracting States, an establishment within the meaning of the second paragraph of Article 13 cannot constitute the basis for jurisdiction provided for by the Convention as regards consumer contracts unless it is empowered to conclude business in the name and on behalf of the foreign parent body and, as a result, acts as an extension of that body.

As far as the second requirement is concerned, Hutton Inc. argues that the dispute at issue before the national court does not arise out of the operations of the establishment in a Contracting State within the meaning of the second paragraph of Article 13. That concept should be interpreted in the light of the judgments in *Somafer* and *Schotte* (both cited above), and hence the second paragraph of Article 13 does not cover a case where the company representing the parent body acted merely as a forwarding body and did not carry out transactions with customers as an extension of the parent body.

(d) With regard to the *fourth question*, Hutton Inc. first points out that, according to the Court's case-law on Article 5(1) of the Convention (judgments in Case 34/82 *Peters* [1983] ECR 987 and in Case 9/87 *Arcado* [1988] ECR 1539), the expression 'matters relating to a contract' is an independent concept which must be interpreted by

reference principally to the system and objectives of the Convention and covers in principle all claims for damages for the breach of contractual obligations.

Hutton Inc. goes on to observe that in the main proceedings TVB's claim is based, not on the breach of contractual obligations, but on unjust enrichment, tortious liability and breach of pre-contractual obligations (*culpa in contrahendo*) for failure to provide sufficient information about the risks connected with speculative transactions.

Such a claim based on unjust enrichment is intended precisely to recover payments made without a solid contractual basis.

Likewise, neither is an action based on *culpa in contrahendo* contractual in nature. During negotiations intended to lead to the conclusion of a contract there are not yet any contractual obligations in existence but simply a reciprocal duty to act with care and diligence, which is intended to guarantee certainty in transactions and is related to the law of delict. Consequently, the Bundesgerichtshof has to date consistently based *culpa in contrahendo* on rules taken from customary law. Moreover, the fact that there can be liability without its being necessary for the contract to actually come into being also weighs in favour of classifying *culpa in contrahendo* within the system of non-contractual liability.

Lastly, the claims in delict which TVB asserted in the German courts cannot enable jurisdiction under Articles 13 and 14 to be based on connexity. In that regard the Court in the judgment in Case 189/87 *Kalfelis* [1988] ECR 5565 did not follow the Advocate General's view that the close links created by a contract might be an incentive for bringing all disputes between parties to the contract before the court with jurisdiction over matters relating to the contract. On the contrary, it held that where there are a number of related claims, the court which has jurisdiction to entertain the aspect of a claim which is based on tort or delict does not have jurisdiction to entertain other aspects of the same claim which are not based on tort or delict. The Court's reason for this decision was that the special jurisdictions listed in Article 5 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively. The same reasoning holds good for Article 13 of the Convention.

Hutton Inc. infers from these considerations that the Convention does not apply to cases in which the defendant does not have its domicile or registered office in one of the Contracting States or an agency or establishment empowered to conclude contracts with third parties.

For the rest, Hutton Inc. proposes that the Bundesgerichtshof's questions should be answered as follows:

'1. Agency contracts concerning currency, security and commodity futures dealings do not fall within the scope of subparagraph 3 of the first paragraph of Article 13 of the Convention, since, having regard to the

objective of protection pursued by that provision, such contracts cannot be regarded as being services provided to a consumer.

2. Subparagraph 3(a) of the first paragraph of Article 13 of the Convention requires there to be an actual link between the advertising and the conclusion of the contract. If there is no link or an insufficient link between the advertising measures and the actual conclusion of the contract, the requirement laid down in subparagraph 3 of the first paragraph of Article 13 of the Convention to the effect that there must be a relationship between the supply of the service to be carried out abroad and the contract concluded in the national territory is not satisfied.

3. There is a branch, agency or establishment within the meaning of the second paragraph of Article 13 of the Convention only if the establishment in question concludes contracts in the defendant's name and on its behalf, that is to say, if it has the power to conclude contracts and appears to be an extension of the foreign parent body and has the power to conclude contracts. In contrast, a mere representative office, which appears *vis-à-vis* the customer as a forwarding body and acts solely as a relay for business between the customer and the parent body, in particular by forwarding correspondence, but has no power to conclude contracts in the name and on behalf of the parent body cannot be regarded as being an establishment for the purposes of the second paragraph of Article 13 of the Convention. If such a representative office acts merely as a forwarding body, disputes between the consumer and the party abroad with whom he entered into a contract do not arise out of the operations of the representative office.

4. The concept of "proceedings concerning a contract" does not cover claims arising out of the breach of pre-contractual obligations (*culpa in contrahendo*) and unjust enrichment in connection with the unwinding of contractual transactions. *Culpa in contrahendo* is based, not on the contractual duty to act with care and diligence, but on the pre-contractual duty to guarantee certainty of transactions, which is related to the law of delict. Claims based on unjust enrichment therefore do not arise out of a contract but are legal claims based on a situation of unjust enrichment that only a service provided without legal (contractual) cause brings into being.

The first paragraph of Article 13 of the Convention does not give ancillary jurisdiction to hear non-contractual claims on the ground of connexity in an action in which claims for damages for breach of contractual and pre-contractual obligations and claims for compensation for unjust enrichment and for damages in contract are put forward.

Consequently, a plaintiff cannot rely on all the other non-contractual aspects of the action under Article 13 of the Convention, as well as on the contractual aspects of the action, before the court which has jurisdiction under the special European rules concerning consumer contracts.'

2. *TVB*, the respondent on a point of law, observes generally that the system of the Convention requires Article 13 to be given as broad a scope as possible in the interests of consumers.

(a) As far as the *first question* is concerned, TVB argues that the concept of a 'contract for the supply of services' within the meaning of subparagraph 3 of the first paragraph of Article 13 of the Convention should be interpreted in the context of the Convention and should not be limited to the concept of the contract for the supply of services (Dienstvertrag) which exists in German law. Consequently, the provision covers contracts for services (Werkverträge) and agency contracts (Geschäftsbesorgungsverträge), so long as the Convention itself does not provide for exceptions, as it does for transport contracts. Moreover, the legal systems of many of the Contracting States do not make the distinction made by German law between contracts for the supply of services (Dienstverträge) and contracts for services (Werkverträge).

In TVB's view, that broad interpretation is also supported by academic writings, in which the view is taken that subparagraph 3 of the first paragraph of Article 13 also covers forward transactions on foreign stock exchanges.

(b) With regard to the *second question*, TVB argues that a broad interpretation must also be given to the requirement laid down in subparagraph 3(a) of the first paragraph of Article 13 to the effect that the conclusion of the contract must have been preceded by advertising in the State of the consumer's domicile. Accordingly there is no need for a causal link between the advertising and the conclusion of the contract.

Consequently, in the main proceedings it is decisive that Hutton Inc. operated on the German market. It should therefore agree to appear as defendant in proceedings brought in the German courts.

(c) As regards the *third question* on the concept of 'establishment' for the purposes of the second paragraph of Article 13 of the Convention, TVB maintains that account should be taken of the same considerations which led the Court to give a broad interpretation to Article 5(5) of the Convention.

Accordingly, the decisive criterion is Hutton Inc.'s participation in the business in Germany; Hutton GmbH could not be required — in accordance with the procedural rules in force in Germany — to take all the commercial decisions of its own responsibility and therefore not only to act as intermediary for Hutton Inc.

(d) Lastly, the words 'concerning a contract' in the first paragraph of Article 13 of the

Convention, which are the subject of the national court's *fourth question*, should be interpreted broadly, in the interests of effective consumer protection, as covering claims based on liability for fault during the formation of the contract, unjust enrichment and tortious liability. The same reasoning should be adopted as for Article 5(1) of the Convention as interpreted by the Court in the judgment in *Arcado* (cited above).

As a result, there is no doubt that heads of claim based on pre-contractual liability are covered by contractual liability, since on practical grounds alone claims based on breach of the duty to provide information during pre-contractual negotiations and claims based on the main contractual obligation cannot be treated differently from the point of view of the rules governing international jurisdiction.

By the same token, connexity supports the submission of claims based on unjust enrichment and tortious liability to the rule on jurisdiction laid down in the first paragraph of Article 13 of the Convention.

In sum, TVB suggests that all the questions submitted by the Bundesgerichtshof should be answered in the affirmative.

3. (a) The *German Government* starts by observing with regard to the *first question* that, whilst the first version of Articles 13, 14 and 15 of the Convention embodied special jurisdiction rules only for instalment sales, the 1978 Accession Convention extended those provisions to other consumer contracts, thereby bringing the Brussels Convention into line with the Rome Convention.

Even though neither the two conventions themselves nor the reports drawn up in connection with them clearly define the concept of a 'contract for the supply of services', the aim of protection of the final consumer supports a broad interpretation of the concept of 'services'. Furthermore, it would be desirable to have a uniform definition of that concept used in the Brussels and Rome Conventions.

Accordingly, having regard to the dominant view taken in the literature and in the case-law, agency contracts concerning currency, security and commodity futures dealings must be regarded as being contracts for the supply of services within the meaning of subparagraph 3 of the first paragraph of Article 13 of the Convention. The fact that contracts concluded with lawyers are classed as consumer contracts also supports that interpretation.

(b) As for the *second question*, the German Government takes the view that, according to the provisions of indents (a) and (b) of subparagraph 3 of the first paragraph of Article 13, only contracts for the supply of

services which are sufficiently connected to the consumer's domicile fall within the jurisdiction rules set out in Section 4 of Title II of the Convention.

Accordingly, where in the State of the consumer's domicile the conclusion of the contract was preceded by advertising, there must be a temporal connection with the conclusion of the contract: the advertising must not go back to a date too remote from the date on which the contract was concluded.

However, additional conditions, such as a requirement for a causal link between the advertising and the conclusion of the contract or for proof that the consumer was aware of the advertising, are unwarranted since the Convention aims to secure a broad measure of protection for the consumer and any such restrictions should ensue from the actual wording of the relevant provision of the Convention. Moreover, the Giuliano/Lagarde report, to which the Schlosser report refers, merely requires there to be advertising intended for the 'country where the consumer resides'.

Accordingly, subparagraph 3(a) of the first paragraph of Article 13 of the Convention applies where the party with whom the consumer concluded the contract placed advertising in the press in the country of the consumer's domicile within a reasonable time prior to the conclusion of the contract.

(c) As far as the *third question* is concerned, the German Government states that the Court held in Case 14/76 *De Bloos* [1976] ECR 1497 with regard to Article 5(5) of the Convention that the spirit of the Convention requires that the concept of 'establishment' be based on the same essential characteristics as a branch or agency. It adds that it appears from the judgment in *Somafer* (cited above), in which the Court held that the jurisdiction requirements of Article 5(5) of the Convention must be given an independent interpretation, that an establishment will not be covered by that provision unless it is empowered to act on behalf of the parent body and to bind it directly.

In the German Government's view, to adopt a different interpretation of the concept of 'establishment' in the context of the second paragraph of Article 13 of the Convention, merely because that provision is intended to provide consumer protection, would be contrary to the principle of legal certainty.

The German Government goes on to argue that the concept of 'disputes arising out of the operations of the branch, agency or establishment' does not merely imply that a commitment must have been entered into by the establishment on behalf of the foreign parent body. It follows from the judgment in *Somafer* (cited above) that in addition the commitment in question must have to be carried out in the Contracting State where the company representing the parent company is established.

Consequently, it is important in the case at issue in the main proceedings to determine where the obligation characteristic of the contract was actually performed. In that case the forward operations which the American firm of brokers were charged with carrying out were to be performed in the United States and not at the place where the company representing that firm in Germany had its registered office. Consequently, the dispute has to be connected to the principal

establishment of the party with whom the consumer concluded the contract, namely Hutton Inc. The German Government takes the view that the fact that TVB does not rely on a claim of a contractual nature is irrelevant in that regard. Consequently, the action for payment which is pending before the Bundesgerichtshof does not arise out of the operations of Hutton GmbH.

(d) As for the *fourth question*, the German Government argues that to consider that, because the words 'concerning a contract' are used in the first paragraph of Article 13 of the Convention, Articles 14 and 15 lay down rules merely on international jurisdiction in matters relating to contracts is consistent neither with the aim of consumer protection inherent in those rules nor with the system of the Convention. Articles 13, 14 and 15 in fact lay down independent, exhaustive rules on jurisdiction over consumer contracts which should prevail over the general rules on jurisdiction and therefore also apply to non-contractual matters.

As the German version of the heading of Section 4 of Title II of the Convention ('Zuständigkeit für Verbrauchersachen' (jurisdiction over matters concerning consumers)) indicates, Articles 14 and 15 have a broad field of application and extend to all disputes, including non-contractual disputes, arising in connection with consumer contracts. As a result, the first paragraph of Article 13 of the Convention also applies to claims for damages based on the breach of pre-contractual obligations and unjust enrichment in connection with the unwinding of contractual transactions.

The German Government states that it is unnecessary for it to consider question 4(b) because on the interpretation set out above Article 13 also covers all non-contractual claims.

In the German Government's view, it follows from the whole of the above considerations that the Bundesgerichtshof's questions should be answered as follows:

'1. Subparagraph 3 of the first paragraph of Article 13 of the Convention also covers agency contracts concerning currency, security and commodity futures dealings.

2. Subparagraph 3(a) of the first paragraph of Article 13 of the Convention applies where within a reasonable time before the conclusion of the contract the other party to the contract with the consumer advertised in the press in the State of the consumer's domicile.

3. Where the other party to the contract with the consumer uses a company established in the State of the consumer's domicile which is effectively owned by it and has staff links with it but has no authority to contract on its behalf, acting only as intermediary and advising

the consumer, it does not have a branch, agency or other establishment within the meaning of the second paragraph of Article 13 of the Convention.

Disputes arising in connection with the relations thus arranged between the consumer and the other party to the contract are not disputes arising out of the operations of the branch, agency or establishment within the meaning of the second paragraph of Article 13 of the Convention.

4. In addition to claims for damages for the breach of contractual obligations, the phrase "proceedings concerning a contract" in the first paragraph of Article 13 of the Convention also covers claims arising out of the breach of pre-contractual obligations (*culpa in contrahendo*) and unjust enrichment in connection with the unwinding of contractual transactions.'

4. By way of *general observation* the *Commission* states that Section 4 of Title II of the Convention, which initially covered only instalment contracts, was extended following the entry into force of the 1978 Accession Convention so as, first, to take in consumer matters generally and, secondly, to provide in Article 13 for a special jurisdiction where the party with whom the consumer concluded the contract is not domiciled in a Contracting State but does have a branch, agency or other establishment in such a State.

(a) The Commission observes that the national court's *first question* seeks to establish, without calling in question the assignor's classification as a consumer in the main proceedings, whether the agency contract at issue constitutes a contract 'for the supply of services' within the meaning of subparagraph 3 of the first paragraph of Article 13 of the Convention.

The Commission considers that, in view of the wording of that provision ('any other contract'), supplies of services of every kind are meant, with the exception of contracts of transport, for which the third paragraph of Article 13 provides an exception.

However, unlike contracts for the sale of goods on instalment terms and contracts for a loan repayable by instalments or for any other credit, made to finance the sale of goods, supplies of services are regarded as matters affecting consumers only if the additional requirements listed in indents (a) and (b) of subparagraph 3 of the first paragraph of Article 13 are satisfied. According to the Schlosser report, all of those requirements must be met and they are designed to establish a sufficiently strong connection between the supply of services and the place where the consumer is domiciled. However, that report does not give any indications as to other restrictions on the concept of a 'contract for the supply of services'.

The Commission further observes that whilst the definition of consumer contracts provided in Article 5 of the Rome Convention corresponds to that set out in Article 13 of the Brussels Convention, there is an

important difference between the two conventions in that Article 5(4) of the Rome Convention provides that 'a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence' does not constitute a consumer contract within the meaning of that convention.

According to the Commission, the upshot is that neither the wording nor the background to subparagraph 3 of the first paragraph of Article 13 of the Brussels Convention afford justification for excluding from the scope of that provision the agency contract at issue in the main proceedings.

That analysis is confirmed by the objective of that provision, namely that of guaranteeing that the final consumer can bring proceedings in appropriate courts even with regard to transnational transactions. A person dealing on the stock market is deserving of protection and, according to the German literature, the investor protection provided by the German stock-exchange legislation is part of consumer protection.

Admittedly, according to the Giuliano/Lagarde report, sales of securities do not constitute consumer contracts within the meaning of Article 5 of the Rome Convention, but that exclusion is due to the fact that it is provided in subparagraph (c) of the second paragraph of Article 1 of that convention that it is not to apply to contractual obligations relating to 'obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character'. Moreover, in the main proceedings the dispute did not arise between parties to a sale of securities but between a speculator and a broker, and it was not a question of a supply of securities as far as they were concerned.

The Commission concludes that subparagraph 3 of the first paragraph of Article 13 of the Convention also covers agency contracts concerning currency, security and commodity futures dealings.

(b) As far as the *second question* is concerned, the Commission maintains that the concept of advertising preceding the conclusion of the contract in the State of the consumer's domicile must be understood as a targeted activity in that State by the provider of services. However, the relationship between the advertising and the conclusion of the contract is purely chronological inasmuch as the advertising must precede the conclusion of the contract. In contrast, there is no requirement for a causal link between the two, for if there were the provision would be at risk of being rendered ineffective, since the difficulties of proving the existence of such a link would be liable in many cases to prevent consumers from taking advantage of the rule on jurisdiction, even though that rule was designed to protect them.

In those circumstances, subparagraph 3(a) of the first paragraph of Article 13 is applicable where the party with whom the consumer concluded the contract placed advertisements in the press in the Contracting State where the consumer is domiciled.

(c) Turning to the *third question*, the Commission points out that the concept of 'disputes arising out of the operations of the branch, agency or establishment' is common to Article 5(5), the second paragraph of Article 8 and the second paragraph of Article 13 of the Convention.

The aim of the second paragraph of Article 13 is to protect consumers by precluding the application of Article 4 of the Convention where the party which concluded the contract with the consumer is resident in a third country. That objective distinguishes the second paragraph of Article 13 from Article 5(5), which creates a special jurisdiction, departing from the general principle governing jurisdiction set out in Article 2 of the Convention, in order to facilitate proceedings. Moreover, according to the experts' report drawn up in connection with the initial version of the Convention (OJ 1979 C 59, p. 1, 'the Jenard report'), the rules of Section 4 of Title II of the Convention are independent and exhaustive and not subject to the provisions of Article 2 et seq. of the Convention.

The Commission goes on to state that the Court has already given an interpretation of Article 5(5) of the Convention in its judgments in *De Bloos*, *Somafer* (both cited above), Case 139/80 *Blanckaert* [1981] ECR 819 and *Schotte* (cited above); it is now a question of establishing to what extent that case-law is also relevant for the interpretation of the second paragraph of Article 13 of the Convention. Whilst the concepts contained in those two provisions are parallel, albeit the contexts are different, it would also be conceivable to confer a wider scope on the second paragraph of Article 13 inasmuch as that provision is not subject to Article 2 et seq. of the Convention.

In a situation like the one at issue in the main proceedings where Hutton GmbH, which is effectively owned by Hutton Inc., acted as an intermediary when the contracts were concluded by the assignor and advised the assignor, albeit it is not established that it itself undertook commitments which had legal effects as regards Hutton Inc., the judgments in *Somafer*, *Blanckaert* and *Schotte* (cited above) seem to lay down the requirement that the company representing the parent body should have had the power to conclude contracts and to bind the parent body *vis-à-vis* third parties. The same conclusion emerges from the Jenard report as regards the second paragraph of Article 8 of the Convention.

By contrast, in his Opinion in the *Schotte* case (cited above) the Advocate General proposed a less restrictive interpretation in so far as he considered that Article 5(5) might apply where the branch conducted all the negotiations but the final contract was signed by the parent company.

The Commission takes the view that, at least as regards the second paragraph of Article 13 of the Convention, that interpretation should apply, since more restrictive requirements would not be compatible with the objective of consumer protection. Consequently, regard should be had first of all to the fact that the local representative of the

party with whom the consumer concluded the contract advised the consumer and stress should not be placed on the question whether or not that representative legally had the power to conclude contracts on behalf of the parent company.

(d) Considering the *fourth question*, the Commission observes that in the judgment in *Kalfelis* the Court held that the term 'matters relating to tort, delict or quasi-delict' used in Article 5(3) of the Convention had to be regarded as an independent concept covering all actions which sought to establish the liability of a defendant and which were not related to a 'contract' within the meaning of Article 5(1). As a result, the Court ruled out the existence of an ancillary jurisdiction under Article 5(3) of the Convention.

In the judgment in *Peters* (cited above) the Court also gave an independent interpretation of the concept of 'matters relating to a contract' within the meaning of Article 5(1) of the Convention, but the ancillary jurisdiction on account of connexity is implicit in that provision as regards claims connected with a contract. Moreover, in his Opinion in the *Kalfelis* case (cited above) the Advocate General stressed the advantages of holding that there was an ancillary jurisdiction based on connexity: the court dealing with the contract is best placed to understand the relationship between the contract and all its implications as regards legal proceedings.

In the Commission's view, the latter solution is all the more justified in the context of the first paragraph of Article 13 of the Convention, since a more restrictive interpretation would reduce the consumer's possibilities of bringing an action. Academic writers are of the same view.

By way of conclusion, the Commission proposes that the national court's questions be answered as follows:

'1. Subparagraph 3 of the first paragraph of Article 13 of the Convention covers agency contracts concerning currency, security and commodity futures dealings.

2. Subparagraph 3(a) of the first paragraph of Article 13 of the Convention applies where the other party to the contract with the consumer advertised in the press in the State of the consumer's domicile.

3. The other party to the contract with the consumer has a branch, agency or other establishment within the meaning of the second paragraph of Article 13 of the Convention if for the conclusion and performance of the contract it uses a company established in the State of the consumer's domicile which is effectively owned by it and has staff links with it but has no authority to contract on its behalf, acting only as intermediary and advising the consumer; disputes which arise in connection with the relations so

arranged between the consumer and the other party to the contract do arise out of the operation of the branch, agency or other establishment.

4. Claims relating to the breach of pre-contractual obligations, unjust enrichment and tort or delict which are connected with a "contract" are proceedings concerning a contract within the meaning of the first paragraph of Article 13 of the Convention.'

III — Replies to the questions put by the Court

(a) *First question*: 'May the TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, a company incorporated under German law, like the individual who transfers his rights to it, properly claim to be a consumer, this being a condition for the application of the Brussels Convention?'

1. *Hutton Inc.* considers that this question should be answered in the negative.

It first observes that for the purposes of the Convention a consumer is a person who has concluded a contract for a purpose which can be regarded as being outside his trade or profession.

It goes on to state that Article 13 of the Convention assumes that the plaintiff claiming to be a consumer is also the party with whom the defendant initially concluded the contract.

The case before the national court is untypical inasmuch as TVB is asserting rights assigned to it by a consumer who was the party with whom Hutton Inc. initially concluded the contract. In those circumstances, it must be considered first whether for the purposes of the application of Article 13 of the Convention the assignee himself must be a consumer within the meaning of that provision or whether the assignor's capacity as a consumer is passed on by virtue of the assignment.

In this connection, Hutton Inc. argues that the subject-matter of the assignment of a debt consists of the actual transfer of the right arising out of the debt and any personal qualities attaching to the assignor are not involved in the assignment. By the same token, in the case of Article 13 the stipulation that the contract must have been concluded by a consumer is intended to benefit — from the point of view of the rules on jurisdiction — a plaintiff who is deserving of protection, but has no effect on the content of the right relied upon. It follows that, in order to be able to rely on that provision, a plaintiff acting on the basis of a right which has been assigned to him must himself be a consumer.

As regards the further question as to whether in the case at issue in the main proceedings the assignee TVB, as a legal person incorporated under German law, may be a consumer, Hutton Inc. argues that whereas, on a literal reading of Article 13, the term 'consumer' is not restricted to natural per-

sons, this is precluded by a teleological interpretation. It is implicit in the underlying aim of Article 13, which is to protect the weaker party to the contract, that that provision may be relied on only by a private individual who is the final consumer and not by traders, industrialists or professional persons concluding contracts for the exercise of their trade or profession, since such contracts are presumed to be business contracts.

As a limited liability company governed by German law, TVB is, by virtue of its legal form, a trader (Kaufmann) and cannot act for non-business purposes. Hence contracts concluded by such a legal person are always to be regarded as falling within the sphere of the company's business activities.

In Hutton Inc.'s view, the fact that TVB therefore cannot be considered a consumer within the meaning of Article 13 is borne out by that company's name and objects, namely currency, security and commodity futures dealings, such as those which are the subject of the main proceedings.

2. *TVB* proposes that the first question should be answered in the affirmative.

Articles 13 and 14 of the Convention are intended to make it easier for the consumer to assert his rights by providing that the courts of the Contracting State in which he is domiciled are to have jurisdiction. The social protection inherent in those provisions is indispensable even where the consumer has assigned his rights to a third party, since it is often the actual consequences of the contract concluded by the consumer which place him in financial difficulties that force him to assign his rights. Accordingly, it is right also to extend the benefit of the advantages of Article 13 and 14 from the point of view of the conduct of the proceedings to the assignee, since the consumer who assigned his rights benefits indirectly from this.

3. The *German Government* states that Article 13 et seq. of the Convention, which are motivated by social considerations, assume that as a general rule the consumer is economically weaker and less experienced legally than the other party to the contract. Since as a result he needs special protection in the context of legal proceedings, he has the right to choose between courts in several Contracting States.

If, however, it did not matter what third party assigned a claim by the consumer were to be regarded as being a consumer, the other party to the contract would be placed before a multiplicity of consumers in the case of a single contract and might be obliged, on account of the conclusion of a single contract, to defend itself in several sets of legal proceedings brought in different Contracting States.

The German Government considers that such an interpretation of the Convention should be rejected on the ground that the jurisdiction rules laid down therein should

be able to be applied straightforwardly. Moreover, such an interpretation would be liable to result in an extension of the protection afforded by Article 13 et seq. to persons for whom those provisions were not intended.

On the other hand, for reasons of legal certainty and clarity it would not be possible to hold that those of the consumer's assignees who, in a given situation, are as deserving of protection as the original consumer himself should not be recognized as being consumers.

Accordingly, in general individual assignees of the consumer should not be treated as consumers for the purposes of Article 13 of the Convention. This conclusion is borne out, moreover, by the Schlosser report, which states that an assignee of a policyholder cannot be regarded as being a policyholder within the meaning of Article 7 et seq. of the Convention. The social-policy grounds underlying Sections 3 and 4 of Title II of the Convention imply that the special rules laid down therein regarding insurance contracts and consumer contracts respectively should be interpreted similarly.

4. The *Commission* observes in the first place that, under Article 13 of the Convention, a consumer is defined as a person who has concluded a contract for a purpose which can be regarded as being outside his trade or profession.

It goes on to observe that under the first paragraph of Article 14 of the Convention the plaintiff is required to be a consumer.

Where, as in the case at issue in the main proceedings, the plaintiff is not himself a consumer as is required, it must be considered whether he can invoke the status of consumer of the person from whom he obtained his rights.

According to the Commission, the answer to that question depends on the legal basis of the assignment.

Accordingly, in the case of the sale of a claim or a gift, the assignee cannot be treated as if he were a consumer as the assignor was.

In contrast where a claim is assigned for the purposes of collection, the plaintiff may treated as if he were a consumer like the assignor and the action which he brings may be dealt with as if it had been brought by a consumer within the meaning of the Convention. That type of assignment, under which the assignee is authorized to collect a claim on behalf of the assignor and hand over to the latter that which he receives from the debtor, implies that, as between the parties and from the economic point of view, the assignor remains the real holder of the debt. In view of the protective function of Section 4 of Title II of the Convention, it would be appropriate to treat an action relating to such an assignment of a debt by a consumer as if it were an action brought by a consumer within the meaning of the Convention.

(b) *Second question*: 'Does the second paragraph of Article 13 of the Brussels Convention apply where the branch, agency or establishment, within the meaning of that paragraph, is situated in the territory of the same Contracting State as that in which the consumer is domiciled and where the parent company has its seat in a third State?'

1. *Hutton Inc.* points out that the Convention was drawn up pursuant to Article 220 of the EEC Treaty and aims at harmonizing the law in the Member States on civil procedure with a view to eliminating the legal barriers to the common market and to obviating the difficulties which may arise in the economic life of the Community as a result of conflicts of jurisdiction.

Consequently, the Convention's field of application is restricted to the Contracting States. It therefore is not intended to settle conflicts of jurisdiction between Contracting States and third States.

In this way, the first paragraph of Article 4 of the Convention provides that, subject to the provisions of Article 16 (which is not applicable to the case at issue in the main proceedings), the jurisdiction of the courts of each Contracting State is to be determined by the law of that State if the defendant is not domiciled or does not have its registered office in a Contracting State.

The first paragraph of Article 13 of the Convention, which refers to Article 4, also assumes that the defendant does not have its domicile or registered office in a Contracting State. Consequently, Articles 13 and 14 do not create additional jurisdictions on top of the independent national jurisdictions. If that were not the case Article 4 would have had to incorporate a reservation for the provisions of Article 13, which is not the case.

In these circumstances, where the defendant is domiciled or has its registered office in a third State, jurisdiction is governed by the law of that State, even in respect of matters relating to consumers.

Hutton Inc. considers that the same interpretation must apply to the second paragraph of Article 13 of the Convention, since, from the point of view of the system of the Convention, that provision must be on a parallel footing to the first paragraph of Article 13.

Since in the main proceedings Hutton Inc. has its registered office in a third State, the second paragraph of Article 13 is not applicable to it.

Hutton Inc. goes on to argue that, even if the second paragraph of Article 13 had to be interpreted as diverging from the principle set out in the first paragraph of Article 4 of the Convention, it could apply only if the dispute related to an international situation. That requirement ensues both from the third recital in the preamble to the Convention, which refers to 'international jurisdiction', and from the spirit and aims of the Convention (facilitating legal relations between the

various Member States of the Community without affecting disputes in their own national legal systems). Moreover, in so far as the first paragraph of Article 14 of the Convention provides that the consumer has the choice between the courts of the State of the defendant's domicile and those of the State of his own domicile, this means that there is invariably an international action brought by the consumer.

It follows that only disputes where the defendant's domicile is not located in the same Contracting State as the plaintiff's domicile fall within the scope of the Convention.

That view is confirmed, moreover, by the Jenard report, where it is stated that:

'Proceedings instituted in the courts of a Contracting State which involve only persons domiciled in that State will not normally be affected by the Convention; Article 2 simply refers matters back to the rules of jurisdiction in force in that State'.

Since the main proceedings are only between persons who are domiciled in the same Contracting State, the dispute is purely national and the Convention does not apply.

2. *TVB* considers that this question should be answered in the affirmative.

In its view, the determining aspect is that the party with whom the consumer concluded the contract is subject to the Convention because it has an establishment in a State party to that Convention. On the other hand, the question whether the consumer is domiciled in the same State or in another Contracting State is irrelevant.

It can be expected in most cases in which subparagraph 3 of the first paragraph of Article 13 of the Convention applies that the consumer's domicile and the establishment of the party with which it concluded the contract will be in the same Contracting State, since, as a general rule, the trader will initially conclude contracts with consumers who are resident in the State in which it has its establishment. Moreover, it is necessary for that provision to apply to a consumer who lives in the same Contracting State as the party with whom he concludes the contract so long as national provisions governing procedure do not recognize, for all disputes involving consumer contracts, the principle that the courts of the domicile of the consumer bringing the action have jurisdiction.

3. The *German Government* argues by reference to Article 4 of the Convention that the first paragraph of Article 13 shows that Section 4 of Title II in principle does not apply where the party with whom the consumer concluded the contract is not domiciled or does not have its registered office in a Contracting State.

However, the second paragraph of Article 13 provides for an exception to that rule to

cover cases where the party with whom the consumer concluded a contract has in a Contracting State a branch, agency or other establishment and the dispute arises out of the operations of that establishment. Consequently, the first paragraph of Article 14 and Article 15 apply to such disputes irrespective as to the place of the consumer's domicile. As a result, the Court's second question should be answered in the affirmative.

It goes on to state that the purpose of Section 4 of Title II of the Convention is to protect consumers who are domiciled in the Community. Where the consumer is the plaintiff and the defendant is not domiciled in a Contracting State, the national law of the consumer's domicile will apply under Article 4 of the Convention.

However, in a case which concerns the operation of a branch, agency or other establishment within the Community, notwithstanding the fact that the actual party is not domiciled within a Contracting State, there is a sufficiently strong connection within the Community for it to be appropriate for the Convention to apply. This is achieved under the second paragraph of Article 13 by deeming the defendant to be domiciled in the State in which the branch is situated.

4. The *United Kingdom* begins by quoting the following passage from the Schlosser report:

'The exclusion from the scope of Section 4 of contracts between consumers and firms domiciled outside the EEC would not be reasonable where such firms have a branch, agency or other establishment within the EEC. Under the national laws upon which jurisdiction is to be founded in such cases pursuant to Article 4, it would often be impossible for the consumer to sue in the courts which would often be guaranteed to have jurisdiction for his purposes in the case of parties domiciled within the EEC. Insurers with branches, agencies or other establishments in the EEC are treated as regards jurisdiction in like manner to those domiciled within the Community and for the same reasons the other parties to contracts with consumers must also be deemed to be domiciled within the EEC if they have a branch, agency or other establishment in the Community.'

In the opinion of the United Kingdom, there is no reason in principle why the protection afforded by the Convention in respect of consumer contracts should be lost on the grounds that the defendant's branch is in the same State as that of the consumer's domicile. Section 4 of Title II is of uniform application, that is to say that it applies whether or not the national law of a Contracting State gives sufficient protection to a consumer in his relations with a party from a non-Contracting State. The deeming provision in the second paragraph of Article 13 should therefore be given an equally uniform application.

The United Kingdom adds that there are exceptions to the statement in the Jenard report to the effect that the proceedings instituted in the courts of a Contracting State which involve only persons domiciled in that State will not normally be affected by the Convention. The case at issue in the main proceedings is such an exception since it is the Convention itself which, by virtue of the deeming provision in the second paragraph of Article 13, leads to the result that proceedings take place between two parties domiciled in the same Contracting State.

5. The *Commission* points out first that there is nothing in the wording of the second paragraph of Article 13 to suggest that the branch, agency or establishment referred to in that provision may not be in the same Contracting State as the consumer's domicile.

It goes on to observe that whilst under the first paragraph of Article 13, which refers to Article 4, the Convention applies only if the defendant is domiciled or has its registered office in a Contracting State, the second paragraph of Article 13 shows that the situation must be different, in the consumer's interest, where instead of the domicile or registered office of the party with whom the consumer concluded the contract being located in a Contracting State, that party has a secondary establishment in a Contracting State and a dispute arises out of its operations.

The aim of those rules is to protect the consumer *qua* traditionally the weaker party to the contract. From the social point of view, it would not be fitting to vary that protection according to the connection between the Contracting State where the establishment of the party with whom the consumer concluded the contract is located and the State where the consumer is domiciled. Furthermore, it would be difficult to argue that where the establishment of the party with whom the consumer concluded the contract is located in the same State where the consumer is domiciled, the deemed domicile provided for in the second paragraph of Article 13 of the Convention should confer a purely national character on the dispute.

In the Commission's view, the interpretation whereby the second paragraph of Article 13 is applicable where the establishment within the meaning of that provision is situated within the same Contracting State as the consumer's domicile and the parent company has its registered office in a third State is consistent with the aim of the Convention, which, according to its preamble, is to 'strengthen in the Community the legal protection of persons therein established'.

F. A. Schockweiler
Judge-Rapporteur