OPINION OF ADVOCATE GENERAL JACOBS

delivered on 13 December 2001 [1]

1. In this case, the Oberster Gerichtshof (Supreme Court, Austria) has asked the Court for guidance on the correct classification for the purposes of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [2] of an action brought under national consumer protection legislation under which consumers who have been sent prize notifications or other similar communications worded so as to give the impression that they have won a particular prize may bring legal proceedings to claim that prize from the notifying undertaking and in particular on whether such an action constitutes proceedings concerning a consumer contract under Article 13(3) of the Convention.

The Brussels Convention

2. The Brussels Convention applies in civil and commercial matters. Title II allocates international jurisdiction between the Contracting States and in some cases to local courts within the relevant Contracting State. It is common ground that the subject-matter of the main proceedings falls within the scope of 'civil and commercial' matters.

3. The basic rule of the Convention is that the courts of the Contracting State in which the defendant is domiciled have jurisdiction (Article 2).

4. However, by way of exception to that rule other courts may or must 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'. Article 5(3) confers jurisdiction 'in matters relating to tort, delict or quasi-delict [on] the courts for the place where the harmful

1 — Original language: English.

2 — Convention of 27 September 1968. 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.

event occurred'. In both those cases, the jurisdiction supplements rather than replaces that conferred by Article 2.

6. Section 4 of Title II of the Convention, which comprises Articles 13 to 15, is entitled 'Jurisdiction over consumer contracts'.

7. 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.

...'

8. It is apparent from the documents before the Court that Mr Gabriel, the claimant in the main proceedings, was acting as a consumer within the meaning of Article 13.

9. 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'.

10. Article 15 provides that the provisions of Section 4 may be departed from only by an agreement which satisfies certain prescribed requirements. There is no suggestion that there is any such agreement in the present case.

The relevant national legislation

11. Paragraph 5j of the Austrian Consumer Protection Law [3] was inserted into that Law by the Austrian Law on Distance Contracts, which transposes Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts. [4]

12. Paragraph 5j provides as follows:

'Undertakings which send prize notifications or other similar communications to specific consumers, and by the wording of those communications give the impression that the consumer has won a particular prize, must give that prize to the consumer; it may also be claimed in legal proceedings.'

13. It appears from the order for reference that the purpose of that provision was to remove the civil law barriers against enforcing such promises. It was considered that the grounds on which the legislature had made certain claims unactionable should not enable undertakings to behave unconscionably in commercial dealings with consumers and not keep promises made. In particular, while it was recognised that gaming debts should be unenforceable on the ground that the legal system has no interest in protecting contracts where 'carelessness and impulse' are often factors, it was considered that that approach should not apply where undertakings promise prizes to consumers whom they have contacted personally.

The facts and the main proceedings

14. According to the order for reference, Mr Gabriel, domiciled in Austria, claims

3 — Konsumentenschutzgesetz, BGBl. 1979/140, in the version enacted by Art I, para. 2 of the Austrian Distance Selling Law (Fernabsatz-Gesetz), BGBl. I 1999/185.

4 — Directive of 20 May 1997, OJ 1997 L 144, p. 19.

that in 1999 he received a communication addressed to him personally from Schlank & Schick, a mail order company domiciled in Germany, which gave the impression that, as a result of a draw, a cash prize of ATS 49 700 was awaiting him, and that he only needed to claim it and order goods to a minimum value. Only in the 'rules', which were written in relatively small print on the back of the 'Registered certificate of guaranteed payment of the prize', was there a reference to the non-binding nature of the prize notification. Those rules stated that the amount of the prize to be awarded lay in the discretion of the company making the promotion and that legal proceedings were excluded. Mr Gabriel maintains that there can be no doubt as to the misleading nature of that prize notification. A 'sensible consumer' would conclude that he had already won the prize.

15. Further details about the transaction giving rise to Mr Gabriel's claim appear from the documents before the Court. In October and November 1999, Schlank & Schick sent him two personalised communications containing a mail order catalogue and an order form. The communications indicated that he had won by draw a prize of ATS 49 700 payable if he claimed it and ordered goods to the minimum value of ATS 200; a cheque would then be sent by return. Personalised letters asked Mr Gabriel why he had not claimed his prize, referred to his 'right' to 100% of it, and enclosed a photocopy of a 'payment voucher' in his favour for ATS 49 700. Further personalised letters from 'European Credit' headed 'Official confirmation of payment' confirmed that ATS 49 700 was awaiting Mr Gabriel and included copies of the same voucher. The communications also included what appeared to be numbered savings books issued by European Credit, showing Mr Gabriel as the holder and the balance standing to his credit as ATS 49 700.

16. At the hearing, Mr Gabriel's lawyer denied that — as stated in the order for reference — the documentation included a statement to the effect that the amount of the prize to be awarded lay in the discretion of the company making the promotion. Rather there was on the reverse of the payment vouchers a notice to the effect that cash prizes may be divided into several unequal fractions depending on the number of responses. That does indeed appear to be borne out by the documents annexed to Mr Gabriel's written observations, although the matter is not beyond doubt. It is in any event clear from the order for reference that the national court is asking the Court to assume that Schlank & Schick gave the impression that Mr Gabriel had won a particular prize for the purposes of paragraph 5j of the Consumer Protection Law.

17. Mr Gabriel filled in and returned the two order forms by registered post, the first for goods to the value of ATS 79 and the

second for goods to the value of ATS 249. Schlank & Schick sent the goods ordered together with an invoice for the price and ancillary costs of post, packing and insurance; no cheque for the prize money was ever sent.

18. Mr Gabriel intends to claim the prize from Schlank & Schick. The national court states that he has already prepared a claim seeking an order that Schlank & Schick pay him ATS 49 700 plus interest and costs on the basis of Paragraph 5j of the Consumer Protection Law.

The question referred

19. Under paragraph 28.1.1 of the Austrian Law on the exercise of jurisdiction and the competence of the ordinary courts in civil matters, [5] the Oberster Gerichtshof must assign a local court with jurisdiction for a civil matter if neither that Law nor any other legal provision provides a basis for the local jurisdiction of a domestic court but Austria is nevertheless required to exercise jurisdiction under an international treaty.

5 — Law of 1 August 1895, RGBl. 111.

20. It appears that the Austrian rules on jurisdiction do not determine which court is competent to hear an action brought under paragraph 5j of the Consumer Protection Law. Whether the Oberster Gerichtshof is required to assign a local court with jurisdiction to hear such an action will depend therefore on whether 'any other legal provision', including particularly the Brussels Convention, confers jurisdiction on a local court.

21. If an action under paragraph 5j is correctly regarded as falling within the scope of 'matters relating to a contract' within the meaning of Article 5(1) of the Convention or 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3), the Convention will confer jurisdiction on 'the courts for the place of performance of the obligation in question' or 'the courts for the place where the harmful event occurred'. Whereas Article 2 of the Convention, in laying down the general rule that the courts of the Contracting State in which the defendant is domiciled have jurisdiction, leaves it to the rules of each Contracting State to determine which of its national courts has jurisdiction to hear a given dispute, it is accepted that the effect of Article 5(1) and 5(3) is to confer jurisdiction on a specific local court within a Contracting State. If therefore Article 5(1) or 5(3) applies in the present case, the Oberster Gerichtshof will not be called upon to assign a local court with jurisdiction.

22. If, however, an action under paragraph 5j is correctly regarded as 'proceedings concerning a contract concluded by a [consumer]' within the meaning of Article 13 of the Convention, that Convention simply allocates jurisdiction to the courts of Austria without being more specific and the Oberster Gerichtshof will therefore need to assign a local court with jurisdiction.

23. Mr Gabriel has applied to the Oberster Gerichtshof to assign a local court with jurisdiction to hear his claim. Unsure as to the correct classification of the proceedings for the purpose of the Brussels Convention, and hence as to the need to assign a local court, the Oberster Gerichtshof has referred the following question to the Court:

'For the purposes of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 ("the Convention"), does the provision in Paragraph 5j of the Austrian Consumer Protection Law ("the Consumer Protection Law") (Konsumentenschutzgesetz (KSchG), BGBl. 1979/140, in the version of Art I, para. 2 of the Austrian Distance Selling Law (Fernabsatz-Gesetz), BGBl. I 1999/185), which entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute:

(1) a contractual claim under Article 13(3); or

(2) a contractual claim under Article 5(1);

or

(3) a claim in respect of a tort, delict or quasi-delict under Article 5(3)?'

24. Written observations have been submitted by Mr Gabriel, the Austrian and German Governments and the Commission. Mr Gabriel and the Commission were represented at the hearing.

Admissibility

25. Mr Gabriel and the Austrian Government mention — but do not support — possible objections to the admissibility of the reference.

26. Mr Gabriel refers to the requirement [6] that, before a national court may request a ruling from the Court of Justice on the interpretation of the Brussels Convention, a case must be 'pending' before it. The question may arise whether the main action in the present case is correctly regarded as 'pending' before the Oberster Gerichtshof. Mr Gabriel submits, however, that the national procedure by which the court with territorial competence is designated is possible only in the context of a specific case. The action is consequently pending and the request for a ruling admissible.

27. The Austrian Government notes that, in accordance with the Court's case-law, a request for a ruling will be admissible only if the ruling will resolve the question of law arising in the specific case before the referring court. [7] In Austrian law, the procedure for the designation of territorial competence is possible only if proceedings have commenced or are to be commenced. There is accordingly no doubt that the questions referred in the present case are admissible.

28. In my view the present reference is clearly admissible. Article 3 of the Protocol [8] provides that a court of a Contracting State may or must request a ruling from the Court of Justice where a question of interpretation of the Convention is raised in a case pending before it and it considers that a decision on the question is necessary to enable it to give judgment. I do not consider that it is always necessary in order for a reference to be admissible for the main action to be pending before the court which makes the reference. In particular, where there are proceedings before a national court to determine which court has jurisdiction to hear a specific case, a question may properly be referred. In the present case the Oberster Gerichtshof is seised of an application by Mr Gabriel to assign a local court with jurisdiction to hear his claim. For the reasons set out above that court considers that a decision on the question referred is necessary to enable it to dispose of that application. The requirements of Article 3 of the Protocol are accordingly in my view plainly satisfied.

6 — In Article 3 of the Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Luxembourg on 3 June 1971, OJ 1975 L 204, p. 28. A consolidated version of the Protocol as amended by the four subsequent Accession Conventions is published in OJ 1998 C 27, p. 24.

7 — Case 104/79 *Foglia* [1980] ECR 745 and Case C-83/91 *Meilicke* [1992] ECR I-4871.

8 — Cited in note 6.

Analysis

29. The referring court asks first whether an action under paragraph 5j of the Austrian Consumer Protection Law constitutes 'proceedings concerning a contract... for the supply of goods' within the meaning of Article 13(3) of the Convention.

30. The right of action conferred by paragraph 5j may arise in many different circumstances and I do not consider that it is appropriate in the context of the present case to lay down a general principle applicable to all such actions. I shall accordingly approach the referring court's question on the basis that it concerns an action under paragraph 5j where (i) an undertaking which sells goods by mail order gave the impression in a personalised communication that the consumer had won a prize which was payable on receipt of an order for goods over a specified value, (ii) the consumer made such an order and (iii) the goods ordered were delivered.

31. Article 13(3), it will be recalled, requires, first, that the proceedings should concern a contract for the supply of goods or services, second, that '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 third, that 'the consumer took in that State the steps necessary for the conclusion of the contract'. The purpose of the second and third cumulative conditions is to ensure a sufficiently strong connection between the contract and the country of domicile of the consumer. [9]

32. That provision appears at first sight to be tailor-made for Mr Gabriel's situation. Schlank & Schick sent him, in the State of his domicile, an invitation indicating that, if he ordered goods to a certain value, he would receive ATS 49 700, and Mr Gabriel took in that State the steps necessary for the conclusion of that contract, ordering goods to the prescribed value. That is essentially the position taken by Mr Gabriel and the Austrian Government: both submit essentially that the consideration provided by Mr Gabriel (ordering goods) and by Schlank & Schick (promising to pay ATS 49 700) must be considered to form an indissociable whole and that, since the other conditions laid down by that provision are clearly satisfied, Article 13(3) applies.

33. The German Government, however, submits that Article 13 presupposes that

9 — Case C-99/96 *Mietz* [1999] ECR I-2277, paragraph 69 of the Opinion of Advocate General Léger, referring to paragraph 158 of Professor Schlosser's report on the 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, 1979 OJ C 59, p. 71.

the action is based on a contract already formed ('proceedings concerning a contract concluded by a person...'). Paragraph 5j on the other hand provides for legal liability based on appearances, regardless of whether a contract has been concluded; claims brought under that provision are accordingly not within the scope of Article 13. The alternative view would involve giving Article 13 a wider interpretation than envisaged by the Convention: since however Article 13 is an exception to the normal rule under which the courts of the State of the defendant's domicile have jurisdiction, it is to be restrictively interpreted and cannot apply by analogy. [10]

34. The Commission similarly submits that whether Article 13 applies depends on whether the personalised communication from Schlank & Schick satisfied the conditions of an offer or whether it was simply an invitation to treat. Only if it was an offer accepted by Mr Gabriel will Article 13(3) apply.

35. I agree with Mr Gabriel and the Austrian Government that an action brought by a consumer under paragraph 5j of the Consumer Protection Law in circumstances such as those of the present case [11] constitutes 'proceedings concerning a contract' [12] within the meaning of Article 13(3) of the Convention for the simple reason that the right of action is closely connected to the underlying contract. Mr Gabriel's action seeks payment of a promised prize, and since, first, it was an express condition of attribution of the prize that he placed an order and, second, that order was both placed and executed, the action unquestionably concerns a contract.

36. That view is supported by the case-law of the Court both on Article 13 and on Article 5(1).

37. The Court has given some guidance as to what constitutes a contract for the purpose of Article 5(1) of the Convention, which applies to 'matters relating to a contract'. Such guidance may be of assistance in determining what is meant by a contract concluded by a consumer within the meaning of Article 13 [13] (although where Article 13 applies it is clear from the scheme of the Convention and the terms of Articles 13 to 15 that Article 14 [14] alone will determine jurisdiction, to the exclusion of Article 5(1)).

38. The concept of 'matters relating to a contract' — like many other concepts used

10 — Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139.

11 — See paragraph 30 above.

12 — Or, in most of the language versions of the Convention, that it should be a contractual matter or a matter concerning a contract.

13 — See also *Shearson Lehman Hutton*, cited in note 10, paragraph 87 of the Opinion of Advocate General Darmon.

14 — Or Article 15 in the case of an agreement conferring jurisdiction which satisfies the requirements of that provision.

in the Convention — is an independent concept to be interpreted by reference principally to the system and objectives of the Convention in order to ensure that the Convention is fully effective. [15]

39. In interpreting the concept of 'matters relating to a contract' the Court has been guided in particular by the following objectives of the Convention.

40. First, the Court has stressed that the essential aim of the Convention is to strengthen in the Community the legal protection of persons established there and that for that purpose it provides a collection of rules which are designed to avoid the occurrence of concurrent litigation in two or more Member States and which, in the interests of legal certainty and for the benefit of the parties, confer jurisdiction upon the national court territorially best qualified to determine a dispute. [16]

41. More particularly, the objectives of the Convention imply the need to avoid, as far as possible, creating a situation in which a number of courts have jurisdiction in respect of one and the same contract. [17]

42. Furthermore, the objective of strengthening legal protection of persons established in the Community also requires that the jurisdictional rules which derogate from the general principle of the Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to predict before which courts, other than those of the State in which he is domiciled, he may be sued. [18]

43. The principle that account must be taken of the system and objectives of the Convention and the need to ensure that the Convention is fully effective also require that, where the concept of a contract is being interpreted in the context of Article 13, the particular objectives of that provision must also be considered.

44. The principal objective of Section 4 of Title II of the Convention, which includes Article 13, is the protection of the weaker contracting party, namely the consumer. The Court has stated unambiguously that 'the special system established by Article 13 et seq. of the Convention is inspired by the concern to protect the

15 — Case 34/82 *Peters* [1983] ECR 987, paragraph 10 of the judgment; Case 9/87 *Arcado* [1988] ECR 1539, paragraph 11.

16 — Case 38/81 *Effer* [1982] ECR 825, paragraph 6 of the judgment; see also *Peters*, cited in note 15, paragraphs 11 to 14.

17 — Case 14/76 *De Bloos* [1976] ECR 1497, paragraph 9 of the judgment.

18 — Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 18 of the judgment.

consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, and the consumer 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'. [19]

45. A technical or literal interpretation of the concept of a consumer contract is not therefore appropriate if it runs counter to the objective of protecting the weaker party.

46. That is so notwithstanding the fact that Article 13 is an exception to the general rule under which the courts of the State of the defendant's domicile have jurisdiction. I do not accept the German Government's argument that, because Article 13 is an exception to that rule, it must therefore be restrictively interpreted. Restrictive interpretation of a derogation is sometimes justified: for example a derogation from a fundamental right must as such be restrictively interpreted. But that approach should not in my view be generalised to all exceptions. A legislative exception, like any other legislative provision, should be given its proper meaning, determined in the light of its purpose and wording and the scheme and object of the instrument of which it forms part.

47. Even if, however, one takes the view that exceptions to general rules should of necessity be restrictively interpreted, I do not consider that that approach leads to the interpretation favoured by the German Government. I entirely concur with the explanation given by Advocate General Reischl in *Effer* in the context of Article 5(1) of the Convention: 'Although it must be conceded that Article 5(1) constitutes an exception to the general rule contained in Article 2 — jurisdiction of the courts of the defendant's domicile — and consequently it cannot be presumed that the former provision is to be interpreted broadly, yet such considerations may certainly not lead to an interpretation which would make it possible to render an exceptional provision practically ineffective'. [20]

48. In the present case, if Article 13 were held to be inapplicable because, on analysis on the basis of common contractual principles, there was a possibility that Schlank & Schick's communication to Mr Gabriel was technically an invitation to treat rather than an offer, and hence incapable of acceptance culminating in a contract, undertakings such as Schlank & Schick could, simply by tinkering with the format of their communications, ensure that the consumer could not bring proceedings

19 — *Shearson Lehman Hutton*, cited in note 10, paragraph 18 of the judgment.

20 — Cited in note 16, paragraph 3 of the Opinion; see also paragraph 7 of the judgment.

under national consumer protection legislation in his State of domicile in reliance on the consumer protection provisions of the Convention. Such a result would be flagrantly contrary to the objective of those provisions.

49. It may be noted that, according to the Austrian Government, offers of prizes to be given when goods are ordered — such as that at issue in the main proceedings — are increasingly common in Austria, and are organised in numerous different ways. The Austrian Government concludes that it is accordingly difficult to apply general principles to all such schemes.

50. Excluding the application of Article 13 would moreover also be contrary to another objective of the Convention mentioned above, namely the avoidance of multiplication of bases of jurisdiction. The Court stated in *Peters* that 'the Convention should therefore be interpreted in such a way that the court seised is not required to declare that it has jurisdiction to adjudicate upon certain applications but has no jurisdiction to hear certain other applications, even though they are closely related. Moreover, respect for the purposes and spirit of the Convention requires an interpretation of Article 5 which enables the national court to rule on its own jurisdiction without being compelled to consider the substance of the case'. [21] That last sentence applies equally, it need hardly be said, to an interpretation of Article 13.

51. Furthermore, I concur with Advocate General Darmon who stated in *Shearson Lehman Hutton* [22] that the multiplication of bases of jurisdiction could have a very particular adverse effect in the case of consumers.

52. The context of the action in *Peters* was similar to that in the present case in that it did not fit squarely into the 'classical' view of a contract: the action concerned the obligation on a member of an association by virtue of the document of association to pay a sum of money to the association and it was not entirely clear whether that obligation arose simply from the act of becoming a member or resulted from that act in conjunction with a decision of an organ of the association.

53. Referring to the objectives of the Convention mentioned above, the Court ruled

21 — *Peters*, cited in note 15, paragraph 17 of the judgment.
22 — Cited in note 10, paragraph 108 of the Opinion.

that, first, since membership of an association creates between the members close links of the same kind as those created by the parties to a contract, such obligations on a member must be regarded as 'matters relating to a contract' within the meaning of Article 5(1) of the Convention, and, second, that it was irrelevant for the purpose of that provision whether the obligation arose simply from the act of becoming a member or resulted from that act in conjunction with a decision of an organ of the association. [23]

54. Admittedly in *Handte* [24] the Court ruled that the phrase 'matters relating to a contract' did not cover a situation in which there was no obligation freely assumed by one party towards another. [25] That statement, however, was made in the context of a claim by a sub-buyer of goods against their manufacturer: as the Court noted, there was no contractual relationship between those parties because the manufacturer had not undertaken any contractual obligation towards the sub-buyer. [26] That situation is clearly wholly different from that at issue in the present case. In particular, the Court in *Handte* noted that the application of Article 5(1) to an action brought by a sub-buyer of goods against the manufacturer was not foreseeable by the latter and was therefore incompatible with the principle of legal certainty. [27] That objection does not apply to actions brought by consumers who were targets of personalised communications by mail order companies.

55. If actions brought under paragraph 5j of the Austrian Consumer Protection Law in circumstances such as those at issue are — as I believe — 'proceedings concerning a contract' within the meaning of Article 13 of the Convention, such a company may without difficulty predict before which courts, other than those of the State in which it is domiciled, it may be sued. That would not be the case if minor differences in the formal structure of the contract led to different courts having jurisdiction over such actions. It would be even more at odds with the objectives of the Convention if the courts of one Contracting State had jurisdiction to hear actions concerning one aspect of the transaction — the promise to pay the prize — while the courts of another Contracting State had jurisdiction to hear actions concerning another — the order for goods given in reliance on the assurance that it was a

23 — Paragraphs 13, 15 and 18 of the judgment.

24 — Cited in note 18.

25 — Paragraph 15 of the judgment.

26 — Paragraph 16 of the judgment.

27 — *Handte*, paragraph 19 of the judgment.

necessary and sufficient condition for receipt of the prize.

56. It is important to bear in mind that the interpretation which I propose does not lay an unreasonable burden on defendants who may find themselves obliged to defend themselves before the courts of a State in which they are not domiciled. Thus the second paragraph of Article 20 of the Convention, which provides that the court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, ensures that the defendant has an opportunity to submit his point of view.

57. It must also be borne in mind — as I noted in my Opinion in *Handte*[28] — that the jurisdiction rules of the Convention deal solely with the issue of jurisdiction: they do not affect the classification of the action for such purposes as determining the applicable principles of liability. The defendant will thus in no way be precluded from pleading that no valid contract was in fact formed.[29]

58. Finally, I do not accept — at least with regard to claims such as that at issue in the main proceedings — the German Government's argument[30] that, because paragraph 5j of the Austrian Consumer Protection Law provides for liability where the notifying undertaking gives the impression that a prize has been won, rather than liability based on the conclusion of a contract, claims brought under that provision are not within the scope of Article 13. The purpose of the provision was, as mentioned above, to remove the civil law barriers against the enforcement of promises in such circumstances; as appears from the order for reference, the legislature considered that the earlier legislation, which expressly precluded the legal enforcement of what were regarded as gaming contracts, was being abused and consumers deliberately misled by undertakings which relied on the impossibility of suit. Since the national legislation has the clear aim of protecting the consumer, it is manifestly consistent with the scheme and objectives of the Convention as a whole that actions brought under that legislation in circumstances such as those of the present case should be regarded as proceedings concerning consumer contracts within the meaning of Article 13 of the Convention.

28 — Cited in note 18, paragraph 24 of the Opinion.

29 — See *Effer*, in particular paragraph 7 of the judgment.

30 — See paragraph 33 above.

Conclusion

59. I accordingly conclude that the question referred by the Oberster Gerichtshof should be answered as follows:

Where (i) under national consumer protection legislation consumers who have been sent prize notifications or other similar communications worded so as to give the impression that they have won a particular prize may bring legal proceedings to claim that prize from the notifying undertaking, (ii) an undertaking which sells goods by mail order gives the impression in a personalised communication that a consumer has won a prize which is payable on receipt of an order for goods over a specified value, (iii) the consumer makes such an order and (iv) the goods ordered are delivered, an action brought by a consumer under that legislation constitutes proceedings concerning a consumer contract within the meaning of Article 13(3) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.