OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 20 February 1997 *

1. In this case the Oberlandesgericht (Higher Regional Court), Munich, requests a preliminary ruling on three questions concerning the interpretation of Articles 13, 14 and 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1] ('the Brussels Convention'), 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. [2]

2. The questions, which have been referred to the Court pursuant to the Protocol of 3 June 1971 on the interpretation of the Brussels Convention by the Court of Justice [3] relate to the concepts of consumer contract and sale of goods on instalment credit terms, both used in Article 13 of the Convention, and identification of the competent court to take cognizance of a dispute concerning an agreement conferring jurisdiction of the kind referred to in Article 17 of the Convention.

* Original language: Spanish.

1 — *Journal Officiel* 1972 L 299, p. 32.

2 — OJ 1978 L 304, p. 1; amended text, p. 77.

3 — OJ 1975 L 204, p. 28.

Facts and main proceedings according to the order for reference

3. Dentalkit Srl (hereinafter 'Dentalkit'), a company whose registered office is in Florence (Italy), is the promoter of a chain of franchise shops specializing in the sale of dental hygiene products.

4. On 28 September 1992 Dentalkit and Francesco Benincasa, an Italian national, concluded a franchise agreement in Florence for the opening and operation of a shop in Munich, where Mr Benincasa stated that he resided.

5. Under clause 2 of the agreement Dentalkit undertook, *inter alia*, (a) to allow use of the Dentalkit trade mark for naming the sales outlet; (b) to grant the exclusive right to use the mark within a specified area; (c) to give the necessary assistance in opening the establishment; (d) to supply a list of products; (e) to supply the goods; (f) to give assistance in the presentation of the products; (g) to pass on the technical and commercial expertise and know-how in its possession; (h) to give

assistance in planning advertising and local sales promotion schemes; (i) to supply certain printed matter; (l) to provide theoretical and practical training; (m) to carry out an advertising and sales promotion campaign at national level; and (n) not to open any other sales outlet within the exclusive territory.

6. Under clause 3 of the agreement, Mr Benincasa for his part undertook (a) to arrange for registration in the commercial register and to obtain the requisite authorizations; (b) to keep the business premises available for the term of the agreement; (c) to fit out the premises in the same manner as existing Dentalkit shops; (d) to sell only products supplied by Dentalkit and to keep suitable stocks of them; (e) to suggest new products which could be introduced to fit in with the range; (f) to keep the premises in proper condition and to offer customers an efficient, skilled service; (g) to use the business name and logo in accordance with Dentalkit's instructions, without alteration; (h) to maintain secrecy with regard to information and documentation relating to the 'Dentalkit system'; and (i) to carry out advertising campaigns and local sales promotion at his own expense, by prior agreement with Dentalkit.

7. Finally, Mr Benincasa undertook to pay the defendant LIT 8 000 000 to cover the cost of technical and commercial assistance in opening the shop and, after the first 12 months of trading, 3% of the annual turnover in consideration of the use of the business names and marks granted exclusively for the specified territory.

8. When concluding the agreement, the original term of which was three years and could be extended tacitly, the two parties signed a document in Italian, which is generally used by Dentalkit for that purpose.

9. Mr Benincasa opened the shop, paid the initial sum of LIT 8 000 000 and made various purchases, for which he did not pay. In the meantime he ceased trading. Subsequently he brought an action against the defendant before the Landgericht (Regional Court) Munich I, seeking:

(a) repayment of LIT 8 000 000, together with 12% interest from the date of service of the writ (27 December 1993),

(b) a declaration that the franchise agreement of 28 September 1992 is void and that, consequently, the contracts of sale concluded thereunder are also void.

10. Mr Benincasa contends that the franchise agreement is void on the grounds, first, that it is contrary to Paragraph 138 of the Bürgerliches Gesetzbuch (German Civil Code, 'BGB') and, second, that the agreement lays down an obligation for more than two years without complying with Paragraph 11(12)(a), in conjunction with Paragraph 6, of the Gesetz über die Allgemeinen Geschäftsbedingungen (Law on standard business conditions). He also challenges the agreement on the grounds of mistake pursuant to Paragraph 119 of the BGB and fraudulent misrepresentation pursuant to Paragraph 123 of the BGB.

11. In its defence, Dentalkit asked the court to dismiss Mr Benincasa's claim, but first raised the objection that the German court before which the action had been brought had no international or local jurisdiction. In Dentalkit's opinion, the courts of Florence had exclusive jurisdiction by virtue of the jurisdiction clause included by the parties in the franchise agreement (clause 12).

12. Mr Benincasa's observations in reply to that procedural objection were in essence as follows:

(a) the Landgericht Munich was the court for the place of performance of the obligation in question, within the meaning of Article 5(1) of the Brussels Convention;

(b) the clause conferring jurisdiction on the courts of Florence did not have the effect of excluding jurisdiction to hear his action because he sought the annulment of the entire agreement, including that clause;

(c) application of the jurisdiction clause was also excluded by point 1 of the first paragraph of Article 13 and the first paragraph of Article 14 of the Brussels Convention so that, in accordance with the third paragraph of Article 17 and Article 15 of the Convention, that clause could not take effect.

13. In support of the last-mentioned submission, Mr Benincasa states that when he concluded the franchise agreement he was not carrying on a business and that therefore he should be regarded as a consumer within the meaning of the first paragraph of Article 13 of the Brussels Convention. He bases that view on a teleological interpretation of that provision in the light of an objective of the EC Treaty, namely to ensure a high level of protection for the final consumer.

14. By judgment of 19 July 1993 the Landgericht Munich I upheld Dentalkit's objection and therefore declared the action

inadmissible for lack of international jurisdiction.

15. Consequently the national court took the view that the jurisdiction clause in the franchise agreement was valid and, in accordance with Article 17 of the Brussels Convention, found that the courts of Florence had jurisdiction.

16. The judgment found that the agreement was not a consumer contract, which meant that in this case Article 13 of the Brussels Convention could not be relied on to defeat the jurisdiction clause. It was clear from the actual wording, as well as the purpose, of the first paragraph of Article 13 of the Convention that an agreement intended to establish a trade or profession must be deemed to have been concluded for the purpose of a trade or profession.

17. In the opinion of the Landgericht Munich I, the other conclusions reached by applying the German Verbraucherkreditgesetz (Law on consumer credit) are not relevant to the interpretation of Article 13 of the Brussels Convention, which must be construed independently. Finally, the agreement in question did not fulfil the other requirements for a consumer contract.

18. The plaintiff lodged an appeal against the judgment given at first instance, which Dentalkit considers should be dismissed. In the appeal proceedings both parties in essence repeat their opposing arguments concerning the international jurisdiction of the German courts.

19. In view of the doubts raised regarding interpretation of the Brussels Convention, the appeal court has referred the following questions to the Court of Justice:

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

(2) If Question 1 is to be answered in the affirmative: Does point 1 of the first paragraph of Article 13 of the Convention (contract for the sale of goods on instalment credit terms) cover a franchising agreement which obliges the plaintiff to buy from the other party to the agreement, over a period of several

(three) years, the articles and goods required to equip and operate a business (without instalment credit terms having been agreed) and to pay an initial fee and, as from the second year of the business, a licence fee of 3% of turnover?

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

The provisions of the Brussels Convention to be construed

20. Section 4 of the Brussels Convention is entitled 'Jurisdiction over consumer contracts'.

21. Article 13, which forms part of that Section, provides as follows:

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

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operation of the branch, agency or establishment, be deemed to be domiciled in that State.

[...]'

22. Article 14 of the Brussels Convention provides as follows:

'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 himself is domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.

These provisions shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.'

23. Finally, Article 17 of the Brussels Convention, which forms part of Section 6 entitled 'Prorogation of jurisdiction', is worded as follows:

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

(a) in writing or evidenced in writing, or

(b) in a form which accords with practices which the parties have established between themselves, or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

[...]

Agreements ... conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.

[...]'

Question 1

24. To answer the first question from the national court, the Court of Justice must decide whether a franchise agreement signed by a person who has not previously carried on a business should be classified as a contract 'for a purpose which can be regarded as being outside his trade or profession', within the meaning of Article 13 of the Brussels Convention.

25. I shall begin by examining franchise agreements and go on to consider the Court's case-law relating to the term 'consumer contracts' in Article 13 of the Brussels Convention. This will lead to my conclusion that the term is not applicable to agreements of that kind.

(i) *Franchise agreements*

26. Franchise agreements are a widespread form of business arrangement whereby one undertaking, the franchiser, grants to another, the franchisee, the right to exploit its own system for marketing goods or services.

27. Natural or legal persons who act as franchisers normally establish a network of franchises in a particular field of commerce. They offer to include future franchisees in the network, by concluding a contract

setting out the principal stipulations of the bilateral agreement. In most cases this a standard-form contract.

28. The franchisee is legally independent. He is a genuinely independent trader carrying on his own business and engaging in commercial transactions (he purchases goods from his supplier for resale to his customers).

29. The Court of Justice considered this form of business from the viewpoint of freedom of competition in its judgment of 28 January 1986 in *Pronuptia*, [4] which relates to atypical distribution franchise agreements under which the franchisee merely sells certain products in a shop which bears the franchiser's business name.

30. In paragraph 15 of that judgment the Court outlined the main features of the relationship between franchisers and franchisees, stressing that the latter are independent traders:

'In a system of distribution franchises of that kind, an undertaking which has established itself as a distributor on a given market and thus developed certain business methods grants *independent traders*, for a fee, the right to establish themselves in other markets, using its business name and the business methods which have made it successful. Rather than a method of distribution, it is a way for an undertaking to derive financial benefit from its expertise without investing its own capital. Moreover, the system gives *traders who do not have the necessary experience* access to methods which they could not have learned without considerable effort and allows them to benefit from the reputation of the franchiser's business name.' [5]

31. Article 1 of Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements [6] also presumes that a franchise agreement is entered into by two 'undertakings', that is to say two economic entities operating on a commercial basis. [7]

4 — Case 161/84 [1986] ECR 353.

5 — Emphasis added.

6 — OJ 1988 L 359, p. 46.

7 — Article 1 defines a franchise as 'a package of industrial or intellectual property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the resale of goods or the provision of services to end users'. A franchise agreement is defined as 'an agreement whereby one undertaking, the franchiser, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of marketing specified types of goods and/or services.'

(ii) *The Court's case-law relating to 'consumer contracts'*

32. The *Shearson Lehman Hutton* judgment [8] of 19 January 1993 clearly set out the requirements for contracts of this kind and the position to be taken by national courts when construing Article 13 of the Brussels Convention.

33. That judgment begins by referring to 'the principle, established by case-law [the judgments in Case 150/77 *Bertrand* [1978] ECR 1431, paragraphs 14 to 16 and 19; Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 10], according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This rule must apply in particular to the concept of "consumer" within the meaning of Article 13 et seq. of the Convention, in so far as that concept is the principal factor in the determination of rules governing jurisdiction.' [9]

34. The judgment goes on to describe the interaction between the general and the special rules concerning jurisdiction:

— under the system of the Convention, the general principle, stated in the first paragraph of Article 2, is that the national courts of the Contracting State in which the defendant is domiciled are to have jurisdiction.

— it is only by way of derogation from that general principle that the Convention provides for the cases, exhaustively listed in Sections 2 to 6 of Title II, in which a defendant domiciled or established in a Contracting State may, where the situation comes under a rule of exclusive jurisdiction or of prorogation of jurisdiction, be sued in the courts of another Contracting State.

— consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention.

35. In paragraph 17 of the judgment the Court observes that 'such an interpretation

8 — Case C-89/91 [1993] ECR I-139.
9 — Paragraph 13.

must apply *a fortiori* with respect to a rule of jurisdiction such as that contained in Article 14 of the Convention, which allows a consumer, within the meaning of Article 13 of the Convention, to sue the defendant in the courts of the Contracting State in which the plaintiff is domiciled. Apart from the cases expressly provided for, the Convention appears clearly hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile (see the judgment in Case C-220/88 *Dumez France* [1990] ECR I-49, paragraphs 16 and 19).'

36. After those detailed observations concerning the principles for construing the rules governing jurisdiction, the judgment clarifies the definition of 'consumer' for the purpose of Articles 13 and 14 of the Brussels Convention: 'It follows from the wording and the function of those provisions that they affect only a private final consumer, not engaged in trade or professional activities (see the *Bertrand* judgment cited in paragraph 21 above, and the Expert Report drawn up when the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland acceded to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1979 C 59, p. 71), 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.'

(iii) *Application of those principles to franchise agreements*

37. In view of those considerations, it cannot be said that the parties to a franchise agreement are 'consumers' for the purpose of Article 13 of the Brussels Convention.

38. The status of consumer referred to by Article 13 is not determined by a pre-existing subjective situation: the same natural person may be a consumer for certain purposes and an entrepreneur for others. The decisive factor is, therefore, not the personal circumstances of the individual but rather his position under a particular contract, having regard to its scope and purpose.

39. Where contracts such as franchise agreements are concerned, which are clearly of a commercial nature and necessarily relate to a

trade or profession [10] of the parties, the latter's personal circumstances before the formation of the contract are irrelevant for the purpose of Article 13.

40. Contrary to the appellant's view — which was expounded at greater length during the oral procedure — I certainly do not consider that the Court should disregard or water down the traditional principle of autonomous interpretation of the terms, including 'consumer', used in the Brussels Convention.

41. In my opinion, the autonomous interpretation of 'consumer' to which I referred in connection with the *Shearson Lehman Hutton* judgment is preferable to an interpretation which relies on national law, and there are two reasons for that view:

(a) national legislation need not coincide from one State to another and may differ slightly in certain respects, depending on the particular case. To rely on one body of legislation rather than another (and what would be the criterion for making the choice?) would prejudice the legal certainty which the Brussels Convention aims to ensure;

(b) the same national legislation may contain different definitions of 'consumer', depending on the field of law in which they occur.

42. In the opinion of counsel for the appellant, the Court should give primacy to the German definition of 'consumer' deriving from the German Law on consumer credit (Verbraucherkreditgesetz), [11] which confers the status of consumers upon persons applying for credit in order to pursue an activity which they had not previously taken up.

43. I do not agree with that argument: it is also opposed by the German Government itself which, in its written observations, points out that that wider definition of 'consumer' was expressly and intentionally formulated by the national legislature to go

10 — The term 'actividad profesional' used in the Spanish version must, of course, be construed widely so as to include trade. The English version of Article 13 is more concrete as it refers to 'contracts concluded by a person for a purpose which can be regarded as being outside his *trade or profession*' (emphasis added). The German version also refers to both kinds of activity 'berufliche oder gewerbliche Tätigkeit'.

11 — One of the grounds of the appellant's action in the German court of first instance was that that law applied by analogy to franchise agreements.

beyond the minimum standard laid down by the Directive which the Law on consumer credit was intended to implement [12] so as to offer consumers a higher level of protection than that provided for by the Community measure.

44. According to the German Government, the Community definition of 'consumer' in the Directive on consumer credit [13] excludes not only persons who are parties to contracts relating to a trade or profession 'already taken up' (in the actual words of the Law on consumer credit), but also generally persons who are parties to contracts which are concluded for the purpose of a trade or profession.

45. In the same observations, the German Government adds that in its legal system a narrower definition of 'consumer' is used in other consumer protection measures: for example, the Law on the cancellation of doorstep sales (Haustürwiderrufsgesetz).

46. All this merely confirms the necessity to adhere to the autonomous interpretation of the definition of 'consumer' in Article 13 of the Brussels Convention, which need not be linked to the definitions used in individual cases in the respective national legal systems.

47. Finally, the view I have just put forward is not contradicted by the inclusion in the EC Treaty of a new Title XI [14] on consumer protection, in which Article 129a lays down 'a high level of consumer protection' as an objective of the Community. First, the legal scope of that provision is limited [15] and, secondly, Article 129a(3) expressly permits Member States to maintain or introduce more stringent protective measures. It follows logically that the Community level of protection need not be identified with the level obtaining in one or more of the Member States.

48. To sum up, it is in my view necessary to uphold the autonomous interpretation of the term 'consumer' used in the Brussels Convention, as the Court did in the *Shearson Lehman Hutton* judgment, which means that the term must be limited to private final

12 — Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48).

13 — This is also the criterion used in Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), Article 2 of which defines 'consumer' as 'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession', whereas 'dealer or supplier' means 'any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly or privately owned'.

14 — Added by Article G.38 of the Treaty on European Union.

15 — According to paragraph 19 of the judgment in Case C-192/94 *El Corte Inglés* [1996] ECR I-1281. In paragraph 20 of the same judgment the Court stated that Article 129a 'merely assigns an objective to the Community and confers powers on it to that end without also laying down any obligation on Member States or individuals'.

consumers not acting in the capacity of parties to contracts concerning their trade or professional activities.

Although that provision aims to protect the weaker party in a contractual relationship, its scope is limited to contracts in which one party is acting for purposes unrelated to a business activity, that is to say as a 'private final consumer, not engaged in trade or professional activities'.

49. Sometimes, no doubt, franchisees do not have previous business experience, but this does not justify describing the activity covered by the franchise agreement as being outside a trade or profession. It is precisely the activity in question — and not, I emphasize, the existing personal circumstances of the party to the agreement — which was the factor taken into account when special rules of jurisdiction in relation to certain contracts were laid down in Article 13 of the Convention.

52. In other words, the mere fact that one of the parties to a contract concluded with a view to the pursuit of a trade or professional activity or in the course of such activities is in an inferior position, as in the case of franchise agreements, is not regarded by the Brussels Convention as requiring special protection in relation to the attribution of jurisdiction.

50. Therefore, the wording of Article 13 does not permit it to be extended to cover any contract, irrespective of its subject-matter and purpose, in which an economically weaker party is faced by a party in a position which is objectively superior or superior by reason of the circumstances.

53. Therefore I consider that the Court's reply to the first question should be that Article 13 of the Brussels Convention does not apply to a contract such as that in the present case.

Question 2

51. Contracting parties are not normally in a position of equality in the area of business relationships, but that does not mean that contracts of that kind, including standard-form contracts, entered into by businessmen benefit from the special rule in Article 13.

54. The national court's second question falls to be answered only if the Court's reply to the first is that Article 13 of the Brussels Convention does apply to a contract such as that in the present case. In view of my pro-

posed reply to the first question, it is unnecessary, in my opinion, to answer the second.

55. Should the Court find that Article 13 is applicable, it will have to reply to the second question from the Oberlandesgericht Munich concerning the interpretation of point 1 of the first paragraph of Article 13, relating to the sale of goods on instalment credit terms.

56. Specifically, the national court asks whether or not the legal concept 'contract for the sale of goods on instalment credit terms' covers a franchise agreement under which one party undertakes to buy from the franchiser, over a period of three years, the articles and goods required to equip and operate a business, without instalment credit terms having been agreed. In that connection the franchisee's only obligations are to pay an initial fee and, as from the second year, a licence fee of 3% of his turnover.

57. The significance of the second question lies in the fact that Article 13 of the Brussels Convention not only requires the contract to have been concluded for a purpose which can be regarded as being outside any trade or profession, but also requires it to belong to one of the three categories described in points 1, 2 and 3 of the first paragraph, point 1 being 'contracts for the sale of goods on instalment credit terms'.

58. In my view, the reply to this question must also be in the negative. Contracts for the sale of goods on instalment credit terms cannot be confused with other contracts which, although entailing successive obligations, possess features quite different from those of a sale on instalment credit terms.

59. In the present case, the national court itself observes that the instalment credit rules do not apply to the purchases which the franchisee undertakes to make from the franchiser during the three-year term of the agreement, which makes no provision for the payment of instalments for the goods on successive, predetermined dates.

60. The fact that a contract provides for successive obligations to be performed by one or both parties does not in itself justify treating it as a 'sale of goods on instalment credit terms'.

61. The periodical purchases which the franchisee has to make under a franchise agreement are the consequence or effect of the initial contract which, as such, bears no resemblance at all to a sale on instalment credit terms for the purpose of Article 13 of the Brussels Convention.

62. Furthermore, those periodical purchases are not in this case even subject to provisions relating to the sale of goods on instalment credit terms.

63. Still less can it be concluded from the fact that the franchisee has to pay at regular intervals a sum equal to 3% of his annual turnover for the use of the franchiser's business names that there is a sale of goods on instalment credit terms. It is quite clear that in such circumstances no bilateral contract for the sale of goods exists, whether by instalments or for cash.

64. Consequently, if a reply is required to the second question, in my opinion the Court should answer in the negative.

Question 3

65. The third question is wider in scope. In essence, the national court asks whether, pursuant to the first paragraph of Article 17 of the Brussels Convention, the 'court with exclusive jurisdiction' designated by the parties in a jurisdiction clause [16] is also competent to adjudicate in an action for the annulment of the contract containing the jurisdiction clause.

66. Let me begin with two points which seem to me important:

(a) it is not disputed that the jurisdiction clause in the agreement in question meets the formal requirements of Article 17 of the Brussels Convention; [17]

16 — This footnote relates to the different terms in Spanish for 'jurisdiction clause'. It is not relevant to the English version and has not been translated.

17 — Nor is it disputed that the clause complies with the formal requirements of Italian law as it is a contractual stipulation separately approved in accordance with Articles 1341 and 1342 of the Italian Codice Civile. In any case, there is no question here of applying national law, whether Italian or German: the issue is whether the clause complies with the Brussels Convention.

(b) the jurisdiction clause is in the most general terms possible, as it relates to 'any dispute concerning the interpretation, performance or other aspect of this contract', and it is stipulated that any such dispute must be brought before the courts of Florence.

67. In my view, an agreement conferring jurisdiction such as that in the present case, which is formally valid under the Brussels Convention and has been stipulated by the parties in order to settle future differences of any kind concerning any aspect of the contract, is applicable to any legal disputes which may arise, including those relating to the requirements for the validity of the contract containing the jurisdiction clause.

68. In its judgment in *Effer SpA* [18] the Court examined a similar problem relating to the ambit of Article 5 of the Brussels Convention. The question in that case was whether the courts for the place of performance of the contract had jurisdiction when the dispute between the parties concerned the very existence of the main contract or the conditions for its formation.

69. The Court found that the national court's jurisdiction to determine questions relating to a contract included the power to consider the existence of the constituent parts of the contract itself since that was indispensable in order to enable the national court to examine whether it had jurisdiction under Article 5 of the Convention.

70. That view was strengthened by consideration of the harmful effects on legal certainty [19] if that were not the case. The provisions of the Brussels Convention would be liable to be deprived of their legal effect if it were accepted that, in order to defeat them, it would be sufficient for one of the parties merely to claim that the contract did not exist.

71. The Court added that, on the contrary, respect for the aims and spirit of the Convention demanded that its provisions should be construed as meaning that the court called upon to decide a dispute arising out of a contract may examine, even of its own motion, the essential preconditions for its jurisdiction, having regard to conclusive and relevant evidence adduced by the party concerned, establishing the existence or the non-existence of the contract.

18 — Case 38/81 [1982] ECR 825.

19 — The objective of the Brussels Convention is precisely to ensure legal certainty — and, specifically, certainty or foreseeability in designating a competent court: 'the objectives [of the Convention] include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, enabling the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued' (see the judgment in Case C-125/92 *Mulox IBC* [1993] ECR I-4075).

72. The same arguments are applicable by analogy to the present case, where the issue is the validity, not the existence, of the contract. The difference between this situation and that considered in the *Effer* judgment cited above is that territorial jurisdiction was determined in the latter case by a legal criterion (the place of performance of the obligation), and not by a jurisdiction clause in the contract. In my opinion, however, the legal reasoning used in the earlier case applies equally to both situations.

73. It is possible to reach the same conclusion by analysing the nature of the jurisdiction clauses provided for by Article 17 of the Brussels Convention. In my opinion, it must be recognized that they are to some extent independent of the contract of which they form part.

74. This question is the subject of a well-known academic controversy [20] which has not been settled. However, I consider that, so far as Article 17 of the Brussels Convention is concerned, the Court should take the same approach as in the *Effer* judgment and incline towards the view which promotes legal certainty and which, specifically, means recognizing the court chosen in a jurisdiction clause (provided, of course, that the latter fulfils the requirements of Article 17) as the competent court, even when it is alleged that the contract containing the clause is void.

75. There are a number of reasons for taking this approach. First, jurisdiction clauses do not depend on the economic or legal factors forming the basis of the contract, nor is the *causa* of the contract the same as that of the jurisdiction clause, the purpose of which is merely procedural (to locate within a particular forum proceedings to deal with any future disputes). Consequently, any grounds of nullity which might affect the substantive elements of a contract should not have any impact on jurisdiction clauses.

76. Secondly, if one party alleges that there was no *consensus ad idem* — for example, that there was a mistake as to essential aspects of the subject-matter, rendering the mutual obligations void — the jurisdiction clause is not necessarily affected because the mistake does not extend to the express choice of the competent court. This applies *a fortiori* where the alleged grounds of nullity of the contract relate to its compatibility or otherwise with the substantive law of a particular national system.

77. Thirdly, if a court other than that designated by the parties in a jurisdiction clause were allowed to decide on the validity of the

20 — See the recent works of C. Blanchin, *L'autonomie de la clause compromissoire: un modèle pour la clause attributive de juridiction?*, Paris, 1995, and A. Rodríguez Benot, *Los acuerdos atributivos de competencia judicial internacional en Derecho comunitario europeo*, Madrid, 1994.

contract in general, the practical consequences would be rather disconcerting. If, for example, such proceedings led to a decision that the contract in general was valid, the court in question would immediately have to decline jurisdiction in favour of the court chosen by the parties, which has exclusive jurisdiction to settle their differences. It would be difficult to deny that the latter court in turn would not be competent to rule that the contract or any of its essential stipulations was invalid, even if by so doing it contradicted the judgment of the first court.

78. Finally, the approach that I advocate has the advantage of avoiding concurrent litigation and preventing circumvention of the very system whereby only one forum should have jurisdiction, which forms the basis of the Brussels Convention. Merely by claiming that the contract containing the jurisdiction clause was void, either party would displace the jurisdiction rules and thereby render Article 17 ineffective. That would certainly detract from certainty and foreseeability in designating the competent court.

79. In that connection I should point out that neither party to this action has questioned the validity of the jurisdiction clause itself on substantive [21] or on formal grounds. Mr Benincasa merely claims that the franchise agreement is void in general on grounds based on substantive German law (alleged infringement of the BGB and the German Law on standard business conditions). [22]

80. The response to those allegations, that is to say the decision on the validity of the franchise agreement, will depend on the substantive law found to be applicable to it. However, I consider that the competent court to give a ruling on that point — since the parties have stipulated a jurisdiction clause in such general terms — must be precisely the court designated by them beforehand.

81. The parties' intention expressed in the jurisdiction clause is clear: 'any dispute' concerning any 'aspect' of the contract (which must include disputes on validity) falls within the jurisdiction of the courts of Florence.

21 — The legal system of a particular State may lay down certain substantive conditions for the validity of jurisdiction clauses. It is not clear whether such provisions would be consistent with Article 17 of the Brussels Convention. So far as formal requirements are concerned, it is clear that Article 17 is the only permissible point of reference.

22 — See paragraph 10 of this Opinion.

82. On this point it is inevitable that the Court's reply cannot be limited to a hypothetical interpretation of Article 17 of the Brussels Convention, unconnected with the dispute with which the question from the national court is concerned. Without any intention to take the place of the competent national court in interpreting the agreement between the parties, a helpful reply from the Court of Justice, under the preliminary-ruling procedure, necessitates an analysis of the terms of the jurisdiction clause in order, by reference to its characteristics, to provide the national court with an interpretation of the Brussels Convention, as requested.

Conclusion

83. I therefore propose that the Court reply as follows to the questions from the Oberlandesgericht Munich:

(1) The parties to a franchise agreement for the forthcoming opening of a commercial establishment cannot be regarded as consumers within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Brussels Convention.

(2) The court designated in a jurisdiction clause as having jurisdiction 'to entertain any dispute relating to the interpretation, performance or other aspect of this contract' has exclusive jurisdiction, in accordance with the first sentence of the first paragraph of Article 17 of the Brussels Convention, even where the action seeks, *inter alia*, annulment of the contract containing the jurisdiction clause.