

JUDGMENT OF THE COURT
19 January 1993 ^{*}

In Case C-89/91,

REFERENCE to the Court under the Protocol of 3 June 1971 on 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 (OJ 1978 L 304, p. 36), by the Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the proceedings pending before that court between

Shearson Lehman Hutton Inc.

and

TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH

on the interpretation of the first and second paragraphs of Article 13 of the above-mentioned Convention of 27 September 1968, 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),

THE COURT,

composed of: C. N. Kakouris, President of Chamber, acting for the President, G. C. Rodríguez Iglesias, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Díez de Velasco and P. J. G. Kapteyn, Judges,

^{*} Language of the case: German.

Advocate General: M. Darmon,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Shearson Lehman Hutton Inc., by G. Limberger, Rechtsanwalt, Frankfurt,
- TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, by J. Kummer, Rechtsanwalt, Karlsruhe,
- the German Government, by C. Böhmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,
- the Commission of the European Communities, by P. van Nuffel, of its Legal Service, acting as Agent, assisted by A. Böhlke, Rechtsanwalt, Frankfurt,

having regard to the Report for the Hearing,

after hearing the oral observations of Shearson Lehman Hutton Inc., TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH and the Commission at the hearing on 7 July 1992,

after hearing the Opinion of the Advocate General at the sitting on 27 October 1992,

gives the following

Judgment

1 By order of 29 January 1991, received at the Court on 11 March 1991, the Bundesgerichtshof referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on 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 (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 (OJ 1978 L 304, p. 1, hereinafter 'the Convention'), four questions on the interpretation of the first and second paragraphs of Article 13 of the Convention.

2 Those questions were raised in proceedings between TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, a company established at Munich (Federal Republic of Germany) (hereinafter 'TVB'), and E. F. Hutton & Co. Inc., a firm established in New York (United States of America), which has in the meantime been taken over by the company Shearson Lehman Hutton Inc., also established in New York (hereinafter 'Hutton Inc.').

3 It is apparent from the documents forwarded to the Court that TVB brought an action before the German courts against Hutton Inc., in reliance on a right assigned to it. The assignor, a German judge, had instructed the brokers Hutton Inc. to carry out currency, security and commodity futures transactions under an agency contract. To that end, the assignor paid over considerable sums in 1986 and 1987, but lost nearly all of his investments in those transactions.

4 Hutton Inc. had offered its services through press advertisements in the Federal Republic of Germany. The business relationships with the assignor were arranged through E. F. Hutton & Co. GmbH (hereinafter '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 had acted, at least in an intermediary capacity, in connection with all the orders to buy and sell given by the assignor. The shares in Hutton GmbH belong to E. F. Hutton International Inc., a wholly-owned subsid-

ary of Hutton Inc. whose registered office is in New York. In addition, many persons having managerial responsibilities within Hutton Inc. also have like responsibilities within Hutton GmbH.

- 5 TVB claims from Hutton Inc. the return of the sums lost by the assignor. It bases its claims on unjust enrichment and on the right to damages for breach of contractual and pre-contractual obligations and for tortious conduct, on the ground that Hutton Inc. had not sufficiently informed the assignor of the risks involved in futures transactions.
- 6 The case was brought before the Landgericht München (Regional Court, Munich), which declined jurisdiction to hear TVB's claim. On appeal, the Oberlandesgericht München (Higher Regional Court, Munich) 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.
- 7 Taking the view that the dispute raised issues relating to interpretation of the Convention, the Bundesgerichtshof decided to stay the proceedings until the Court had given a preliminary ruling on the following questions:

'Question 1

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

Question 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?

Question 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 if, for the conclusion of and performance of the contract, it uses a company having its registered office 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?

Question 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?

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 As a preliminary point, it should be noted that the questions submitted by the national court all relate to the interpretation of the first and second paragraphs of

Article 13 of the Convention, which form part of Section 4, entitled 'Jurisdiction over consumer contracts', of Title II of the Convention, concerning the rules governing jurisdiction.

- 10 Consequently, it must first be ascertained whether the conditions for the application of that provision are satisfied in a situation such as that in point in the main proceedings, since the questions relating to the scope of application of the provisions of the Convention, which determine jurisdiction within the international legal order, must be regarded as being matters of public policy.
- 11 It is apparent from the order for reference that, in the case in the main proceedings, the action for the recovery of debts was brought against Hutton Inc., not by the private individual who was the other party to the contract with Hutton Inc., but by a company, the assignee of the rights of that individual.
- 12 It must therefore be considered whether a plaintiff, such as the plaintiff in the main proceedings, may be regarded as a consumer within the meaning of the Convention and must, therefore, benefit from the special rules governing jurisdiction laid down by the Convention with respect to consumer contracts.
- 13 For the purpose of answering that question, it is necessary to bear in mind the principle, established by case-law (see, in particular, the judgments in Case 150/77 *Bertrand v Ott* [1978] ECR 1431, paragraphs 14 to 16 and 19, and in Case C-26/91 *Handte v Traitements Mécano-chimiques des Surfaces* [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.

- 14 In that connection, it must first be noted that 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.
- 15 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 special jurisdiction, or must, where the situation comes under a rule of exclusive jurisdiction or of prorogation of jurisdiction, be sued in the courts of another Contracting State.
- 16 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 (see the judgments in *Bertrand*, paragraph 17, and *Handte*, paragraph 14, cited above).
- 17 Such an interpretation 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 judgment in Case C-220/88 *Dumez France and Tracoba v Hessische Landesbank (Helaba) and Others* [1990] ECR I-49, paragraphs 16 and 19).
- 18 Secondly, the special system established by Article 13 et seq. of the Convention is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, 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 The protective role fulfilled by those provisions implies that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection is not justified.
- 20 In that regard, it is important to note, in the first place, that the first paragraph of Article 13 of the Convention defines the consumer as a person acting 'for a purpose which can be regarded as being outside his trade or profession' and provides that the various types of contracts listed in that article, and to which the provisions of Section 4 of Title II of the Convention apply, must have been concluded by the consumer.
- 21 Secondly, the first paragraph of Article 14 of the Convention provides for the courts of the Contracting State in which the consumer is domiciled to have jurisdiction to hear and determine the 'proceedings against the other party to a contract'.
- 22 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 also, to that effect, the judgment in *Bertrand*, cited above, paragraph 21, 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, OJ 1979 C 59, p. 71, paragraph 153), 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.
- 23 As the Advocate General pointed out in paragraph 26 of his Opinion, the Convention protects the consumer only in so far as he personally is the plaintiff or defendant in proceedings.

24 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.

25 It follows from the foregoing considerations that it is not necessary to give a ruling on the specific questions put to the Court by the Bundesgerichtshof.

Costs

26 The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesgerichtshof by order of 29 January 1991, hereby rules:

Article 13 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 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.

Kakouris	Rodríguez Iglesias	Zuleeg	Murray
Mancini	Joliet	Schockweiler	
Moitinho de Almeida	Grévisse	Diez de Velasco	Kapteyn

Delivered in open court in Luxembourg on 19 January 1993.

J.-G. Giraud

C. N. Kakouris

Registrar

President of Chamber
For the President