OPINION OF ADVOCATE GENERAL DARMON
delivered on 27 October 1992 *

Mr President,
Members of the Court,

1. Faced with the facts set out below, the Bundesgerichtshof has referred four questions to the Court, all relating to the interpretation of Article 13 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels Convention') in the version resulting from the Convention of 9 October 1978 on the accession of Denmark, Ireland and the United Kingdom. [1]

2. Following the appearance of an advertisement in the German press, an individual, a judge by profession, instructed an American firm of brokers, Hutton Inc., to carry out currency and security futures transactions under an agency contract (Kommissionsweise Durchführung von Devisen—, Wertpapier— und Warentermingeschäften). In order to do so, he dealt with the American firm's German subsidiary, Hutton GmbH.

3. After investing considerable sums in 1986 and 1987, which were almost entirely consumed by losses, he assigned his claims to a German trust company, TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH ('TVB').

4. TVB brought an action in the German courts for the recovery of the claims against the American firm of brokers (Brokerfirma), Hutton, which has in the meantime been taken over by another American company, Shearson Lehman Hutton Inc. ('Shearson Hutton').

5. The action is based on unjust enrichment and on claims for damages for breach of contractual and pre-contractual obligations and for tortious conduct inasmuch as, according to TVB, Shearson Lehman did not sufficiently explain to the other party to the contract the risks which he was running.

6. Whereas the Landgericht (Regional Court) held the action to be 'inadmissible', the appeal court held itself to have jurisdiction. Shearson Lehman appealed on a point of law against that decision.

7. The Bundesgerichtshof takes the view that the German courts can have international jurisdiction in this case only if Article 13 of the Brussels Convention is applicable [2] and refers to the Court for a preliminary ruling four questions which are set out in the preliminary report. [3]

* Original language: French.

1 — OJ 1978 L 304, p. 1.

2 — See point III of the grounds of the decision of the Bundesgerichtshof.

3 — Section I, point 11.

8. Essentially those questions seek the Court's interpretation of the expressions set out below:

(a) 'any other contract for the supply of services' within the meaning of subparagraph 3 of the first paragraph of Article 13, in order to determine whether that expression also covers agreements of the type at issue in the main proceedings;

(b) prior 'advertising' within the meaning of subparagraph 3(a) of the first paragraph of Article 13, in order to establish whether it entails a link with the conclusion of the contract;

(c) 'branch, agency or other establishment' within the meaning of the second paragraph of Article 13, in order to determine whether that concept covers a company established in the State of the consumer's domicile which is effectively owned by the company which was the other party to the contract with the consumer, and acted only as intermediary, having no authority to conclude contracts;

(d) 'operations' of the branch, agency or establishment within the meaning of that same provision, in order to determine whether disputes arising in connection with the relations thus created are disputes arising out of such operations;

(e) 'concerning a contract' in the first paragraph of Article 13, in order to establish whether, above and beyond claims for damages for breach of contract, it also covers claims relating to the breach of pre-contractual obligations and unjust enrichment and whether that provision gives ancillary jurisdiction over non-contractual claims on account of connexity.

9. The Court has taken the view that, in order to answer those questions — or to establish whether it was necessary to answer them —, it was appropriate to examine whether TVB, the assignee of the claims, might also claim to have the capacity of a consumer which attached to the assignor and whether the second paragraph of Article 13 of the Brussels Convention was applicable where the consumer was domiciled in the State in which the branch was established and where the parent company had its seat in a third State. The Court has put questions concerning those two points.

10. The jurisdiction rules of the Brussels Convention are set out in Title II (Articles 20 to 24), which is made up of nine sections. Section 1 (Articles 2 to 4) is headed 'General provisions', Section 4 (Articles 13 to 15) 'Jurisdiction over consumer contracts'.

11. The answers to all these questions — those of the national court and those of the Court of Justice — can be found only by comparing and contrasting the provisions set out in sections 1 and 4.

12. It has to be established whether a situation such as the one at issue falls within the scope of the Brussels Convention and, if so, what consequences have to be drawn with regard to the determination of the court having jurisdiction.

13. It should be borne in mind that the action for the recovery of assets has been brought by a company established in a Contracting State against another company having its seat in a third State.

14. The Brussels Convention, which was adopted pursuant to a mandate conferred on the Member States of the European Economic Community by the fourth indent of Article 220 of the Treaty of Rome, aims in particular at standardizing the international jurisdiction rules of courts in the Member States in order to secure, *within the Community*, the 'free movement of judgments' in civil and commercial matters. It is not intended to govern jurisdiction conflicts between signatory States and third countries. [4] Its field of application is confined to the Contracting Parties.

15. That principle is expressly enshrined in the first paragraph of Article 4, which provides that 'if the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State'.

16. Since Article 16 is not in point here, the case falls prima facie under the law of the State of the court hearing the plaintiff's action, since the defendant is domiciled outside the territory of any Contracting State. On the face of it, therefore, the Convention seems to be inapplicable. '[W] here a defendant is not domiciled in a Contracting State the Convention does not contain any rules of its own but refers to the internal law of the State of the court hearing the action (Article 4, first paragraph). As against such a defendant, the Convention permits any person domiciled in a Contracting State, whatever his nationality, to avail himself of the law of that State (...).' [5]

17. The specific provisions of Article 13 also prompted the Bundesgerichtshof to make the reference to the Court.

18. Admittedly the reference made to Article 4 in the first paragraph of Article 13 is a reminder that the scope of Articles 13, 14 and 15 is confined to cases where the defendant is domiciled in a Contracting State; if he is not, the court seised is to apply its own jurisdiction rules.

19. It is clear, however, that the second paragraph of Article 13 implicitly constitutes an exception to Article 4 and must be able to be applied where the other party to the contract with the consumer, the defendant to the proceedings, is domiciled in a State which is not a party to the Convention and has a branch, agency or other establishment in a Contracting State. [6]

20. Consequently, the situation before the Court falls within the scope of the Brussels Convention only if the second paragraph of Article 13 is applicable to it. [7] I would say straight out that this is not the case for three reasons: (1) where the person who initiated the judicial proceedings is not himself a party to one of the contracts listed in the first paragraph of Article 13, that person is

4 — The settlement of such conflicts is a matter solely for bilateral agreements even after the adoption of the Convention (see Articles 57 and 59 thereof).

5 — Report of Professors Evrigenis and Kerameus on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1986 C 298, p. 1).

6 — See O'Malley and Layton, *European Civil Practice*, No 19.05, and Gothot and Holleaux, *La Convention de Bruxelles du 27 septembre 1968*, éd. Jupiter, 1985, No 122.

7 — See the national court's order, p. 6 of the English translation.

not a consumer within the meaning of Articles 13 and 14; (2) a secondary establishment which has no authority to conclude contracts is not a branch, agency or establishment within the meaning of the second paragraph of Article 13; and (3) even if it were, that provision would be inapplicable, in the absence of any extraneous element, where the branch had its seat in the State in which the consumer is domiciled. Let us consider those three points *seriatim*.

21. The alternative jurisdictions and the special jurisdiction for which a consumer qualifies under the first paragraph of Article 14 of the Brussels Convention apply only where 'a consumer (...) bring [s] proceedings against the other party to the contract'.

22. Yet the action for the recovery of claims was indeed not brought before the national court by the initial party to the contract with Shearson Lehman but by a commercial company, the assignor of that party's rights, which was acting within the terms of its corporate objects. May that company therefore claim that it is a consumer within the meaning of Articles 13 and 14 of the Brussels Convention in its action for the recovery of the claims?

23. To my mind, this is the key question. It seems clear to me that if TVB is not entitled validly to claim that it is a consumer, the dispute between it and Shearson Lehman does not fall within the scope of the Convention.

24. There is no doubt that, in order to preserve the coherence of the provisions of Article 4 of the Convention, the term 'consumer' must be given an independent interpretation in order to provide it with a uniform substantive content in the context of the Community order without reference to the law of the Contracting States. The Court has already given a ruling to that effect on the expression 'sale on instalment credit terms' which has been replaced by 'consumer contracts' in Section 4. [8]

25. The question whether the assignee company can be regarded as a consumer does not depend, to my mind, on the nature of the assignment of rights made to it (was merely a claim assigned or also rights attached to the creditor in his personal capacity?). Consideration of the scope of that assignment, which presupposes an interpretation of domestic law, falls, moreover, exclusively within the jurisdiction of the court dealing with the substance.

26. Admittedly, to allow the assignee company to enjoy the benefit of Article 14 would also indirectly benefit the consumer himself (in particular by favouring the conditions for recovery and hence for the assignment of his claims). But the Brussels Convention protects the consumer *expressis verbis* only inasmuch as he *personally is the plaintiff or defendant* in proceedings. [9] That protection does not extend to proceedings to which he is not a party.

27. What is more, the concept of 'consumer' within the meaning of Article 14 necessarily refers to that contained in Article 13. It is inconceivable in the absence of any express

8 — Judgment in Case 150/77 *Bertrand* v *Ott* [1978] ECR 1431, paragraphs 12 to 19; see also Kropholler, *Europaisches Zivilprozessrecht*, 1991, p. 149.

9 — See Article 14 of the Convention: 'A consumer may bring proceedings ... Proceedings may be brought against a consumer'.

provision that the term 'consumer' used in two consecutive articles should refer to two different things. According to Article 13, the status of consumer attaches only to a consumer who has concluded a certain type of contract. This must also be true for the purposes of the application of Article 14.

28. Consequently, only the party to the proceedings who himself satisfies the requirements laid down by Article 13 and therefore took part in concluding the contract with the trader or professional person can benefit from the special jurisdiction rules applying to consumers. [10] The action covered by Article 14 can therefore, in my view, by brought only by a consumer in relation to a contract which he himself concluded.

29. In other words, a consumer entitled to avail himself of the special jurisdiction rules set out in Section 4 must satisfy a two-fold requirement: (1) he must be a party to the proceedings (Article 14); and (2) he must be bound by one of the contracts listed in Article 13. Consequently, if the consumer, who was the other party to the original contract, assigns his claims to a third party who subsequently brings legal proceedings relating to those claims, the third party in question does not, in my view, satisfy the two-fold requirement laid down by those articles.

30. Not only textual analysis, but also the rationale of Articles 13 and 14 considered together, preclude a legal person in the situation of TVB from being regarded as a consumer. The moving spirit behind those provisions is to secure protection for the weaker or less experienced party. That does not apply to a company bringing legal proceedings within the ambit of its corporate objects.

31. In a case in which the Court was asked to interpret the second paragraph of Article 14 in its 1968 wording concerning the sale of goods on instalment credit terms, it was held that:

'A restrictive interpretation of the second paragraph of Article 14, in conformity with the objectives pursued by Section 4, entails the restriction of the jurisdictional advantage described above to buyers who are in need of protection, their economic position being one of weakness in comparison with sellers *by reason of the fact that they are private final consumers and are not engaged*, when buying the product acquired on instalment terms, *in trade or professional activities*'. [11]

32. The Court concluded that:

'(...) the concept of the sale of goods on instalment terms within the meaning of Article 13 of the Brussels Convention of 27 September 1968 is not to be understood to extend to the sale of a machine which one company agrees to make to another company on the basis of a price to be paid by way of bills of exchange spread over a period'. [12]

33. As Professor Schlosser points out, the amendments made in 1978 to Section 4 are based on the same guiding spirit as the previous provisions. The field of application of Section 4 was enlarged to cover consumer contracts. Inspired by the judgment in *Ber-*

10 — See to this effect the German Government's reply to the Court's questions, p. 3 of the French translation.

11 — Judgment in *Bertrand* v *Ott*, paragraph 21, cited above, my emphasis. For the reference see note 8.

12 — Paragraph 22.

trand v *Ott*, [13] the new Section 4 applies therefore only to the *final* consumer. [14]

34. Furthermore, it seems to me to be impossible to vary the jurisdiction rules depending on the origin of the right on which the plaintiff relies: that is to say that, depending on whether he had his right from a consumer or whether he acted by virtue of a right of his own, he would, or would not, be entitled to claim the benefit of Article 14 although the action brought was of the same nature in each case.

35. It follows, in my view, that an initiator of legal proceedings who is not himself a party to one of the contracts listed in the first paragraph of Article 13 is not a consumer within the meaning of Articles 13 and 14.

36. The second paragraph of Article 13, which, I reiterate, is the only provision which might bring the situation described by the national court within the ambit of the Brussels Convention, is inapplicable for a second reason: the other party to the contract with the consumer does not have a branch, agency or other establishment within the meaning of that provision where he has recourse, for the purposes of his activities in a Contracting State, to a company which has its seat there and is effectively owned by it *but has no authority to conclude contracts*.

37. The concept of 'branch, agency or other establishment' which the national court has asked the Court to interpret in its third question is not unfamiliar to the Court. Although the second paragraph of Article 8 and the second paragraph of Article 13 have not yet had to be considered by the Court, Article 5(5), in which that expression also appears, has already been the subject of judgments of the Court.

38. Let us examine what distinguishes those three provisions: Article 5(5) is concerned only with undertakings whose registered office is in the territory of one of the Contracting States. If that undertaking has its seat in the territory of a third State, Article 4 applies. On the contrary, the second paragraph of Article 8 and the second paragraph of Article 13 may cause the strict application of that article to be defeated, since they are concerned with the case where the insurer or the other party to the contract with a consumer are not domiciled in the territory of a signatory State.

39. Since it constitutes an exception to the principle laid down by the first paragraph, in so far as it refers to Article 4, the second paragraph of Article 13, the provisions of which may be relied on against parties domiciled in a third State, must be interpreted strictly. Indeed, if it were given a broad interpretation, the concept of 'branch' would make it easy to defeat the fundamental principle set out in the first paragraph of Article 4.

40. What guidance can be obtained from the Court's case-law on Article 5(5)?

41. The Court came down in favour of an independent interpretation of the concept of a 'dispute arising out of the operations of a branch, agency or establishment' and considered that, as a special jurisdiction constitut-

13 — Cited above, for the reference see note 8.

14 — Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association 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, point 153 (OJ 1979 C 59, p. 71).

ing an exception to the general rule that the courts of the defendant's domicile should have jurisdiction, Article 5(5) had to be interpreted strictly. [15]

42. In the judgment in *De Bloos* v *Bouyer*, [16] the first to consider that provision, the Court observed that:

'One of the essential characteristics of the concepts of branch or agency [17] is the fact of being subject to the direction and control of the parent body'. [18]

The Court concluded that the holder of an exclusive concession who was not subject to the direction and control of a company could not be regarded as being a branch, agency or establishment. [19]

43. In the judgment in *SAR Schotte* v *Parfums Rothschild* [20] the Court held that Article 5(5) could apply to the two separate companies (one being the parent company, the other its wholly-owned subsidiary) bearing the same name and being under common management, one of which (the parent company) entered into transactions on behalf of the other even though it was not a branch or an agency without any independence *vis-à-vis* that other company.

44. Consequently, a company should have acted in the State in which it has its seat as *the extension in business relations* of a company established in another Contracting State if the latter company is to be capable being sued in the courts of the place where the first company has its seat, even though, from the point of view of company law, the two companies are independent of each other.

45. The tie of dependency *vis-à-vis* the company established in another Member State is not the key criterion here. To my mind, the key criterion lies in the fact that the secondary establishment should have the authority to negotiate with third parties.

46. As long ago as the judgment of 18 March 1981 in *Blanckaert & Willems* v *Trost* [21] the Court held that an independent commercial agent did not have the characteristics of a branch, agency or other establishment within the meaning of Article 5(5) *inter alia* because he merely transmitted orders to the parent undertaking *without being involved in either their terms or their execution.* [22]

47. More specifically still, in *Somafer* v *Saar-Ferngas* [23] the Court held as follows:

'the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped *to negotiate business with third parties* so that the latter, although knowing that there will if necessary be a legal link with parent body, the head office of which is abroad, do not

15 — See paragraph 7 and the third sentence of paragraph 8 of the judgment in Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183.

16 — Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497.

17 — The Court treated establishments in the same way: ibid. paragraph 21.

18 — Paragraph 20.

19 — See also paragraph 12 of the judgment in Case 139/80 *Blanckaert & Willems* v *Trost* [1981] ECR 819.

20 — Case 218/86 *SAR Schotte* v *Parfums Rothschild* [1987] ECR 4905.

21 — For the reference see note 19.

22 — Paragraph 13.

23 — For the reference see note 15.

have to deal directly with such parent body but may *transact* business at the place of business constituting the extension.' [24]

48. Lastly, in the aforementioned judgment in *SAR Schotte* v *Parfums Rothschild* the Court categorized as a branch a parent company which had the power to transact business on behalf of its subsidiary.

49. As has been seen, under the second paragraph of Article 13, the other party to a contract with a consumer may be sued in a court in a Contracting State where that party is not domiciled in a Contracting State. As has been pointed out, that constitutes an exception to Article 4. It cannot be given a broader interpretation than Article 5(5), which merely lays down, *within the territorial area to which the Convention applies*, an exception to Article 2.

50. Is it therefore possible to categorize as an establishment, branch or agency an entity which, although effectively owned by a company which has its seat in a non-Contracting State, does not have the authority to conclude contracts? [25]

51. That authority seems to me to be the condition *sine qua non* for the existence of a secondary establishment within the meaning of the second paragraph of Article 13.

52. The rationale of that article is based on the existence of such a strong connecting link with the State in which the consumer is domiciled as to warrant an exception to Article 4 of the Convention, which is made capable of being relied on as against a person domiciled in a third State. [26]

53. This is sufficient to establish that a company domiciled in a Contracting State which serves merely as a forwarding body, a 'letter-box', cannot 'fix' jurisdiction in the territory in which it is established when the contract for which it acted as the intermediary was not concluded by it and was performed in a third State. The contract's centre of gravity could not be located in the Contracting State in which it was perhaps prepared but not concluded. Only the conditions for the conclusion and performance of the contract in the third State may give rise to disputes between the parties. They are not capable of connecting the dispute to the branch's seat.

54. I consider that this point of view is confirmed by the last paragraph of Article 8 of the Convention. Mr Jenard observes that this exception 'applies only to branches and or agencies, i. e. when the foreign company is represented by a person *able to conclude contracts with third parties on behalf of the company*'. [27]

55. I cannot see moreover how there could be a 'dispute arising out of the operations' of the branch if the latter has no authority to conclude contracts.

56. The Court held in paragraph 13 of the judgment in *Somafer* that there cannot be

24 — Paragraph 12, my emphasis.

25 — See the wording of question 3.

26 — See the Schlosser report, point 158.

27 — Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1, especially at p. 31, my emphasis).

said to have been operations of the branch unless it entered into undertakings which are to be performed in the State in which it is established. That presupposes that the branch had the authority to enter into such undertakings. A dispute cannot be located at the branch's seat if the subject-matter of the dispute is not within the branch's 'range of activity'. [28] As Shearson Lehman rightly observes 'if the agency acted merely as a forwarding body, the mere fact that it acted in that capacity precludes the possibility of there having been disputes arising out of its operations'. [29] A mere intermediary could not 'shift' jurisdiction to the courts of its place of establishment. [30]

57. My conclusion is that an operations centre which has no authority to conclude a contract cannot be regarded as being a branch, agency or establishment within the meaning of the second paragraph of Article 13 of the Brussels Convention. The requirements of consumer protection do not extend so far as to allow the consumer in such a case to sue the other party to the contract who is domiciled in a third State in the courts of the signatory State in which he is domiciled and in which the branch has its seat.

58. Lastly, even supposing that there was proof that the other party to the contract with the consumer had a branch within the meaning of the second paragraph of Article 13, we would still be outside the scope of the Convention, since the branch would have its seat in the State in which the consumer was domiciled. The dispute, which may be an international one *inter alia* as regards the applicable law, would not be international from the point of view of the Convention as it would lack the requisite extraneous element, which presupposes in principle the involvement of two States.

59. Where the other party to the contract with the consumer is not domiciled in the territory of a Contracting State but does have a branch, agency or any other establishment in a Contracting State other than that in which the consumer is domiciled, the second paragraph of Article 13 is definitely applicable.

60. As a result of that provision, the other party to the contract with the consumer is deemed to be domiciled by way of fiction in the Contracting State where its branch has its seat. In such case, the Convention exercises a species of 'attraction' on the dispute, which enables the application of the first paragraph of Article 4 to be avoided. The criterion for exclusion from the Convention's scope (the fact that the other party to the contract with the consumer is domiciled in a third State) is replaced by a connecting factor (the fact that the branch has its seat in a signatory State). As a result, an international situation arises within the meaning of the Convention, since the dispute concerns two Contracting States — the State in which the consumer is domiciled and the State in which the branch of the other party to the consumer contract has its seat.

61. But what is the position where the branch has its seat and the consumer is domiciled in the *same* Contracting State?

28 — The expression ('rayon d'activité') is Mr Huet's, JDI, 1979, No 3, p. 681 (note to the judgment in *Somafer*).

29 — Observations, pp. 17 and 22 of the French translation.

30 — See to this effect Huet (same reference): '(...) secondary establishments — such as factories or depots — which have no legal contact with the customers are not subsidiaries (...). Neither are secondary establishments which, although in relations with third parties, constitute simply a staging post of the parent company and act simply as a body forwarding customers' requests to the parent company where the business is in reality dealt with by the parent company'.

62. In his report on the Brussels Convention, Mr Jenard takes the view that 'Proceedings instituted in the courts of a Contracting State which involve only persons domiciled in that State will not normally be affected by the Convention'. [31]

63. Admittedly, it could be argued that, through the operation of the Convention itself and the fiction provided for in the second paragraph of Article 13, the proceedings could be between two parties domiciled in the same Contracting State. But I can see one specific limit to the application of that provision: where the branch and the consumer are domiciled in the same Contracting State the dispute is no longer an 'international' one for the purposes of the Brussels Convention and the second paragraph of Article 13 cannot therefore apply.

64. As Mr Droz observes, 'each time that the Convention lays down a direct special jurisdiction, for example the courts of the place where the policyholder is domiciled, this will apply where the defendant is sued in the courts of a State *other* than the State in which he is domiciled'. [32]

65. The purpose of the Convention is, I reiterate, to determine the international jurisdiction of the Contracting States' courts *within the intra-Community order.* [33]

66. I further consider that a provision of the Convention, such as the second paragraph of Article 13, which *can be relied upon as against persons domiciled in a State which is not a party to the Convention*, has to be interpreted strictly, since that is a situation which the Convention is not intended in principle to govern.

67. Article 14 bears out that interpretation. Under its first paragraph the consumer may bring proceedings 'either in the courts of the Contracting State in which [the other party to the contract] is domiciled or in the courts of the Contracting State in which he is himself domiciled', which implies that there are in fact two States involved.

68. Further confirmation seems to be provided in my view by Article 15. That provision states that the provisions of Section 4 may be departed from only by an agreement:

'(...)

3. which is entered into by the consumer and the other party to the contract, both of whom are *at the time of conclusion of the contract* domiciled or habitually resident *in the same Contracting State*, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.' [34]

That provision — which is in the nature of a derogation and therefore has to be interpreted strictly — indeed seems to mean that the application of the Convention where only one Contracting State is involved at the time when the proceedings are initiated — contrary therefore to the wording of the preamble — is merely in the nature of an exception.

31 — Jenard report, p. 8; see also the Schlosser report, cited above, point 21.

32 — Droz, *Compétence judiciaire et effets des jugements dans le marché commun*, Dalloz, 1972, point 30, my emphasis.

33 — Preamble to the Convention (OJ 1990 C 189, p. 2).

34 — My emphasis.

69. In such an event, jurisdiction must therefore be governed, not by the Convention, but by the *lex fori* of the Contracting State in question, even if that law does not give the consumer the benefit of the *forum actoris*.

70. My conclusion is that the second paragraph of Article 13 of the Convention is not applicable where the branch of a company which has its seat in a third State is located in the territory of the same Contracting State in which the consumer has his domicile.

71. For all those reasons, a situation such as the one at issue does not, in my view, fall within the scope of the Brussels Convention.

72. I shall therefore tackle the Bundesgerichtshof's first, second and fourth questions in the alternative, since its third question, which is concerned with the concept of branch, has already been covered.

73. Let us turn to the first question. The only one of the contracts listed in the first paragraph of Article 13 in point here is the one mentioned in subparagraph 3, 'a contract for the supply of services', which has been taken over from the Convention on Contractual Obligations. [35] Such a contract is not defined in the body of the conventions themselves or in the explanatory reports.

74. The amendment made to Section 4, and Article 13 in particular, of the Brussels Convention by the 1978 accession convention aimed at *extending* consumer protection without confining it to the sphere of sales on instalment terms and loans repayable by instalments. Thus, the article sets out, using very comprehensive wording, a residual category of the contracts — 'any other contract for the supply of goods or a contract for the supply of services' — without making any distinction within that category as to the nature of the contract. [36]

75. Admittedly, Article 5 of the Convention on the Law applicable to Contractual Obligations [37] applies to a contract 'the object of which is the supply of goods and services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object' [38] and, according to the Giulano-Lagarde report, [39] sales of securities are excluded. [40]

76. For all that, it does not follow — as Shearson Lehman wrongly argues — [41] that an agency contract concerning currency, security and commodity futures dealings is excluded from the category of contracts for the supply of services within the meaning of Article 13. The Rome Convention provides for exceptions to its scope which are unknown to the Brussels Convention. [42] Moreover, such a contract is not a 'sale of securities' properly so called.

35 — Schlosser report, point 153.

36 — Subject to the exclusion of transport contracts as provided for in the third paragraph of Article 13.

37 — Opened for signature in Rome on 19 June 1980 (80/934/EEC) (OJ 1980 L 266, p. 1).

38 — Article 5(1) of the Rome Convention.

39 — Report on the Convention on the Law applicable to Contractual Obligations (OJ 1980 C 282, p. 1).

40 — Ibid., p. 23.

41 — Observations of the respondent to the main proceedings, p. 11 of the French translation.

42 — See Article 1(2) of the Rome Convention.

77. Neither can the protection of Article 13 be ruled out on the ground that the contract concerns security and commodity futures dealings 'which are speculative in nature and akin to games of chance, which are alien to the idea of social protection'. [43]

78. As Professor Schlosser points out, even if stock-exchange speculators are not 'paradigms for consumers deserving of protection', the field of Article 13 cannot conceivably be restricted by exclusions not provided for in that provision. [44] Moreover, it seems to me to be dangerous to draw a distinction on the basis of the objective pursuant by the contracting party: how could it be argued that an agency contract concluded into order to manage one's assets prudently would fall within the scope of Article 13 whereas an agency contract concluded for purely speculative purposes would not?

79. It should therefore be considered that that provision also covers agency contracts concerning currency and security futures dealings. [45]

80. Does such a contract satisfy the two concurrent conditions [46] laid down by subparagraphs 3(a) and (b) of the first paragraph of Article 13? If the consumer has indisputably carried out in the State of his domicile the acts necessary to conclude the contract, was that preceded by advertising and does that advertising fulfil the conditions laid down in the Convention? In particular, does there have to be a connection between the advertising and the conclusion of the contract? This is the second question before the Court.

81. As the Schlosser report indicates, [47] contracts for the supply of services can be caught by Article 13 only 'if there is a sufficiently strong connection with the place where the consumer is domiciled'.

82. Thus, the contract must have been *preceded* in the State of the consumer's domicile by *advertising*.

83. The Convention requires no other condition to be met in this regard: the consumer is not required to *prove* that he was actually affected by the advertising or that there was a causal link between the advertising and the conclusion of the contract.

84. Apart from the fact that it would generally be impossible to satisfy such a requirement, it seems to me that such requirement would be contrary to the aim pursued by Article 13: that of consumer protection. Consumer protection is to be fostered: any restrictions on the application of that provision must therefore ensue from the actual wording of the Convention. The only conceivable limitation is one of common sense: it seems to me that the advertising cannot have been too remote in time from the conclusion of the contract to which it is purported to have given rise. This assessment falls within the remit of the national court.

85. It follows that the conditions laid down in subparagraph 3(a) of the first paragraph of Article 13 of the Convention are met where

43 — Observations of the respondent in the main proceedings, p. 11 of the French translation.

44 — P. Schlosser, "Sonderanknüpfungen von zwingendem Verbraucherschutzrecht und europäisches Prozessrecht", *Festschrift fur Ernst Steindorff*, 1990, p. 1383. See also the judgment of the Oberlandesgericht Köln of 16 March 1989, ZIP, 13/89, p. 839.

45 — See to this effect Kropholler, op. cit., p. 151.

46 — See Schlosser report, point 158(b).

47 — Ibid., point 158(b).

the conclusion of the contract in the State of the consumer's domicile was preceded within a reasonable time by advertising, there being no requirement to prove a causal connection between the advertising and the conclusion of the contract. [48] As a result, that article lays down a species of irrebuttable presumption that there is a link between the appearance of the advertising and the conclusion of the contract where the former preceded the latter.

86. Let us turn to question 4(a), which is concerned with the phrase 'concerning a contract'.

87. The phrase 'concerning a contract' in Article 13 of the Convention has never come before the Court. However, the Court has on many occasions interpreted the phrase 'matters relating to a contract' contained in Article 5(1). Here again, there is in my view nothing to justify considering that those two provisions may cover two different things. It seems to me that the interpretations which the Court has given to the expression 'matters relating to a contract' in Article 5 have to be taken into account in interpreting the similar provisions of Article 13.

88. The Court held with regard to Article 5 in the judgment in *Peters* v *ZNAV* [49] that:

'(...) the concept of matters relating to a contract serves as a criterion to define the scope of one of the rules of special jurisdiction available to the plaintiff. Having regard to the objectives and the general scheme of the Convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned.

Therefore (...) the concept of matters relating to a contract should be regarded as an independent concept which, for the purpose of the application of the Convention, must be interpreted by reference chiefly to the system and objectives of the Convention, in order to ensure that it is fully effective.' [50]

89. In the case of *Arcado* v *Haviland*, [51] following the termination of an independent commercial agency agreement by which the Haviland company appointed the Agecobel company as its agent for the sale of porcelain products in Belgium and Luxembourg, the latter company instituted proceedings against Haviland before the Tribunal de Commerce (Commercial Court), Brussels, seeking compensation for wrongful termination of the agreement and the balance of outstanding commission. In appeal proceedings Haviland relied on Article 5(3) of the Convention and contested the jurisdiction of the Belgian courts. The Cour d'Appel (Court of Appeal) took the view that the dispute concerning the payment of commission was contractual in nature but was uncertain as to the nature of the claim for indemnity for the sudden and premature repudiation of the contract, and referred to the Court for a preliminary ruling a question on that point.

90. The Court held that:

48 — See to this effect Hartung, "Termineinwand bei Warentermingeschäften an Auslandsbörsen", *ZIP*, 27 September 1992, Heft 18, p. 1192.

49 — Case 34/82 *Peters* v *ZNAV* [1983] ECR 987.

50 — Paragraphs 9 and 10.

51 — Judgment in Case 9/87 *SPRL Arcado* v *SA Haviland* [1988] ECR 1539.

'There is no doubt that a claim for the payment of commission due under an independent commercial agency agreement finds its very basis in that agreement and consequently constitutes a matter relating to a contract within the meaning of Article 5(1) of the Convention.'

The same view must be taken of a claim for compensation for the wrongful repudiation of such an agreement as the basis for such compensation is the failure to comply with a contractual obligation. [52]

91. The Court based itself in particular on Article 10 of the Rome Convention:

'[That article] confirms the contractual nature of judicial proceedings such as those in point inasmuch as it provides that the law applicable to a contract governs the consequences of a total or partial failure to comply with obligations arising under it and consequently the contractual liability of the party responsible for such breach'. [53]

92. In the earlier judgment in *De Bloos* v *Bouyer* [54] the Court held that:

'In disputes concerning the consequences of the infringement by the grantor of a contract conferring an exclusive concession, such as the payment of damages or the dissolution of the contract, the obligation to which reference must be made for the purposes of applying Article 5(1) of the Convention is that which the contract imposes on the grantor and the non-performance of which is relied upon by the grantee in support of the application for damages or for the dissolution of the contract.' [55]

93. In my view, an action for damages for breach of contractual obligations by the grantee of a concession is not different in kind from an action for wrongful termination — and hence for failure to comply with contractual obligations — which is brought by a grantor or by the other party to a contract with a commercial agent: in both cases, the basis of the right to compensation is the contract.

94. Does the expression 'concerning a contract' in the first paragraph of Article 13 also cover claims based on infringement of the advisory duty in pre-contractual negotiations? Do such claims deserve the same treatment as claims based on the main contractual obligation?

95. During pre-contractual negotiations, the parties thereto are not bound by obligations based on the contract precisely because the contract does not yet exist and perhaps never will. It is generally considered that they are simply under a reciprocal obligation to act with care and diligence. [56]

96. Of course, a claim for liability arising out of failure to fulfil that obligation cannot in itself be regarded as contractual. This is

52 — Paragraphs 12 and 13.

53 — Paragraph 15.

54 — For the reference see note 16.

55 — Paragraph 16.

56 — See Shearson Lehman's observations, p. 19 of the French translation.

shown by the fact that it could asserted even if, in the end, the contract has not been concluded.

97. However, once it is combined with a claim based on contractual liability under a contract to which the pre-contractual negotiations themselves succeeded in giving rise, it appears that the claim for pre-contractual liability becomes inseparable from the contract.

98. Lastly, the nature of the claim based on unjust enrichment with regard to the Brussels Convention raises a delicate issue.

99. In the judgment in *Kalfelis* [57] the Court had to categorize such a claim.

100. In that case, the appellant in the main proceedings concluded with a bank established in Luxembourg, through the intermediary of the German affiliate of that bank, spot and futures stock-exchange transactions in silver bullion. The futures transactions resulted in a total loss and the appellant brought an action for payment of sums owed against Bankhaus Schröder in Luxembourg and its affiliate.

101. The action was based both on contractual liability (infringement of obligations to provide information) and on tortious liability (conduct *contra bonos mores*). The action was also based on unjust enrichment on the ground that futures stock-exchange transactions, such as futures transactions in silver bullion, were not binding on the parties.

102. Asked to interpret the expression 'matters relating to tort, delict or quasi delict' in Article 5(3) of the Convention, the Court held that:

'[that expression] must be regarded as an independent concept covering *all* actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1)', [58] and therefore includes under matters relating to tort a claim based on unjust enrichment.

103. In my opinion on that case, I suggested, on the basis of the aforementioned judgment in *Martin Peters* v *ZNAV*, [59] a solution which would enable the dispute to be brought before just one court where there was a multiplication of the bases of jurisdiction in one and the same case.

104. I should like to quote a brief passage. After setting out the wording of that judgment, to the effect that:

'(...) the designation by Article 5(1) of the Convention of the courts for the place of performance of the obligation in question expresses the concern that, because of the close links created by a contract between the parties thereto, it should be possible for all the difficulties which may arise on the occasion of the performance of a contractual obligation to be brought before the same court: that for the place of performance of the obligation', [60]

57 — Judgment in Case 189/87 *Kalfelis* v *Bankhaus Schröder, Münchmeyer, Hengst & Co.* [1988] ECR 5565.

58 — Paragraph 18, my emphasis.

59 — For the reference see note 49.

60 — Judgment in *Peters* v *ZNAV*, cited above, paragraph 12.

I stated that:

'The Court thus formulated the reasons which militate in favour of an "attraction" towards Article 5(1), an attraction which must extend to the *grounds* of the claims, whether they derive from a tort or unjust enrichment under the *lex causae*, provided that, as in the present case, they are based "for the most part on the non-performance of contractual obligations".

(...)

In other words, it is thus appropriate to conclude that where there are overlapping grounds of that kind, only Article 5(1) will determine the jurisdiction of the court, since the matters relating to contract will "channel" all the aspects of the dispute.' [61]

105. This case prompts me to submit the same proposal for the determination of a single court having jurisdiction.

106. It is in fact impossible not to see that what 'federates' and 'unites' the various claims made before the national court is *the contract concluded by the parties.* [62]

107. It follows that where a claim reflects difficulties which are liable to arise when contractual obligations are performed, it must fall within the scope of Article 5(1) of the Convention.

108. That 'centralization' of jurisdiction which seemed to me to be necessary in connection with matters relating to a contract under Article 5 is even more necessary in my view where what is involved is contracts concluded by a consumer, on whom the multiplication of bases of jurisdiction could have a very particular adverse effect.

109. The desire to foster legal certainty and the effectiveness of legal protection throughout the territory of the Community can result only in the application of the first paragraph of Article 13, which was the solution which I advocated with regard to Article 5(1).

110. It follows in my view that the concept of matters relating to a contract within the meaning the first paragraph of Article 13 covers a claim based on breach of contractual obligations, breach of pre-contractual obligations and unjust enrichment arising out of one and the same agency contract.

111. Since matters relating to a contract within the meaning of that article channel *all* the aspects of the dispute and the claims are interconnected in such a way that they can only be assessed together in accordance with the Court's judgment in *Martin Peters* v *ZNAV*, jurisdiction must be determined by Article 14 alone.

112. As a result, the last question relating to connexity is otiose.

61 — Paragraphs 27 and 29, [1988] ECR 5573, at 5577.

62 — See to this effect Kropholler, *op. cit.*, p. 100: 'Denn für eine umfassende Zuständigkeit im Vertragsgerichtsstand spricht (im Unterschied zu der abgelehnten Erweiterung der deliktischen Zuständigkeit), dass in derartigen Fällen im allgemeinen das Vertragsverhältnis and nicht das Deliktsverhältnis prägend ist, so dass im Interesse der Prozessökonomie liegende gemeinsame Behandlung aller Ansprüche in diesem Gerichtsstand nicht nur praktisch, sondern auch sachgerecht erschiene'.

113. I propose therefore that the Court should rule as follows:

(1) An initiator of legal proceedings who is not himself a party to one of the contracts listed in the first paragraph of Article 13 is not a consumer within the meaning of Articles 13 and 14 of the Brussels Convention.

(2) A company which is established in a signatory State of the Brussels Convention, is effectively owned by the other party to the contract with the consumer and has no authority to conclude contracts is not a branch, agency or other establishment within the meaning of the second paragraph of Article 13 of the Brussels Convention.

(3) The second paragraph of Article 13 of the Brussels Convention is not applicable, in the absence of any extraneous element, where the branch of the company based in a third State is situated in the territory of the same Contracting State in which the consumer has his domicile.

In the alternative

(1) An agency contract concerning currency, security and commodity futures dealings is a contract for the supply of services within the meaning of subparagraph 3 of the first paragraph of Article 13 of the Brussels Convention.

(2) The latter provision does not require there to be proof of a causal link between the advertising and the conclusion of the contract.

(3) The concept of matters relating to a contract within the meaning the first paragraph of Article 13 covers a claim based on breach of contractual obligations, breach of pre-contractual obligations and unjust enrichment arising out of the conclusion of one and the same contract.