

JUDGMENT OF THE COURT (Sixth Chamber)

1 October 2002 \*

In Case C-167/00,

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 by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

**Verein für Konsumenteninformation**

and

**Karl Heinz Henkel,**

on the interpretation of Article 5(3) of the abovementioned Convention of 27 September 1968 (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,

\* Language of the case: German.

and — amended version — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,  
Registrar: M.-F. Contet, Administrator,

after considering the written observations submitted on behalf of:

- the Verein für Konsumenteninformation, by H. Kosesnik-Wehrle, Rechtsanwalt,
  
- Mr Henkel, by L.J. Kempf and J. Maier, Rechtsanwälte,
  
- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the German Government, by R. Wagner, acting as Agent,
  
- the French Government, by R. Abraham and R. Loosli-Surrans, acting as Agents,
  
- the United Kingdom Government, by G. Amodeo, acting as Agent, and A. Robertson, barrister,
  
- the Commission of the European Communities, by J.L. Iglesias Buhigues and C. Ladenburger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Verein für Konsumenteninformation, represented by S. Langer, Rechtsanwalt; of the French Government, represented by R. Loosli-Surrans; of the United Kingdom Government, represented by A. Robertson, and of the Commission, represented by C. Ladenburger, at the hearing on 11 December 2001,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2002,

gives the following

### Judgment

- 1 By order of 13 April 2000, received at the Court on 8 May 2000, the Oberster Gerichtshof (Supreme Court, Austria) 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, a question on the interpretation of Article 5(3) of that Convention (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, and — amended version — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) ('the Brussels Convention').
  
- 2 That question was raised in proceedings between the Verein für Konsumenteninformation ('the VKI'), an association constituted under Austrian law, established in Austria, and Mr Henkel, a German national domiciled in Germany, concerning Mr Henkel's use in contracts concluded with Austrian consumers of terms which the VKI considered to be unfair.

## Legal background

### *The Brussels Convention*

- 3 The first paragraph of Article 1 of the Brussels Convention, which comprises Title I, entitled ‘Scope’, states:

‘This convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.’

- 4 The rules on jurisdiction laid down by the Brussels Convention are set out in Title II thereof, which consists of Articles 2 to 24.

- 5 The first paragraph of Article 2, which forms part of Section 1, entitled ‘General provisions’, of Title II of the Brussels Convention, sets out the basic rule in the following terms:

‘Subject to the provisions of this convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.’

- 6 The first paragraph of Article 3 of the Brussels Convention, which appears in the same section, provides as follows:

‘Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this title.’

- 7 Articles 5 to 18 of the Brussels Convention, which make up Sections 2 to 6 of Title II thereof, lay down rules governing special, mandatory or exclusive jurisdiction.

- 8 Under Article 5, which appears in Section 2, entitled ‘Special jurisdiction’, of Title II of the Brussels Convention:

‘A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

...’

*Directive 93/13/EEC*

- 9 Article 7(1) and (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) provides:

‘1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.’

*The relevant provisions of national law*

- 10 In Austria, the Konsumentenschutzgesetz (Consumer Protection Law) of 8 March 1979 (BGBl. 1979/140; 'the KSchG') came into force on 1 October 1979.
  
- 11 The KSchG has been amended on several occasions, *inter alia* by a law transposing Directive 93/13 (BGBl. 1997/6).
  
- 12 Paragraph 28 of the KSchG, as amended, provides, with effect from 1 January 1997:

'(1) An injunction may be sought against anyone who in commercial dealings lays down, in general terms and conditions which he uses as a basis for contracts concluded by him or in forms used for contracts in that connection, conditions which are contrary to a statutory prohibition or are unconscionable, and against anyone who recommends such conditions for commercial dealings. This prohibition shall also include the prohibition on relying on such a condition in so far as it has been agreed to in an impermissible manner.

(2) There ceases to be any danger of the use and recommendation of such conditions where a trader gives, within a reasonable period, a declaration of discontinuance secured by an appropriate contractual penalty (Paragraph 1336 of the Allgemeines Bürgerliches Gesetzbuch) following a warning by a body entitled to bring an action under Paragraph 29.'



- 13 The VKI is one of the bodies referred to in Paragraph 29 of the KSchG which are entitled to bring such an action.

### The main proceedings and the question referred for a preliminary ruling

- 14 It is clear from the documents relating to the case in the main proceedings that the VKI is a non-profit-making organisation whose object is the protection of consumers and their interests.
- 15 Mr Henkel is a trader, domiciled in Munich (Germany), who organises sales-promotion trips, *inter alia* in Austria.
- 16 In the context of his contractual dealings with consumers domiciled in Vienna (Austria), Mr Henkel used general terms and conditions that the VKI considers to be contrary to certain provisions of Austrian legislation.
- 17 As an association, the VKI brought an action pursuant to Paragraph 28 of the KSchG before the Handelsgericht Wien (Commercial Court, Vienna), seeking an injunction against Mr Henkel to prevent him from using the contested terms in contracts concluded with Austrian clients.
- 18 Mr Henkel claimed that the Austrian courts had no jurisdiction. In his submission, the action brought by the VKI cannot be regarded as relating to

tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention on the ground that there has been neither harmful behaviour nor damage suffered within the territorial jurisdiction of the court seized.

- 19 The Handelsgericht Wien found that the VKI was not pleading any damage arising out of a tort or delict and hence declared that it had no jurisdiction.
  
- 20 That decision was overturned on appeal by the Oberlandesgericht Wien (Higher Regional Court, Vienna) which considered that Article 5(3) of the Brussels Convention also covers preventive actions brought by an association such as the VKI without requiring it to have personally sustained any damage.
  
- 21 An appeal on a point of law was brought before the Oberster Gerichtshof which is uncertain whether the action at issue in the main proceedings falls within the scope of Article 5(3) of the Brussels Convention or whether it is a matter relating to a contract within the meaning of Article 5(1) of that convention.
  
- 22 According to that court it is not obvious that that action is a matter relating to tort or delict. The VKI does not plead any damage to its property. While it is true that its right to bring an action stems not from a contract, but from statute, and serves to avert future damage to consumers, such damage is none the less contractual in origin. The application of Article 5(1) of the Brussels Convention is therefore conceivable. However, it is also possible to consider that the unlawful act consists of the undermining of legal stability by a trader's use of unfair terms.

- 23 Moreover, the question arises whether a preventive action, which is by its very nature brought before any damage occurs, is capable of coming within the scope of Article 5(3) of the Brussels Convention, given that that provision, which refers to the place where the harmful event occurred, appears to presuppose the existence of damage.
- 24 The Oberster Gerichtshof took the view that, in those circumstances, the outcome of the case before it required an interpretation of the Brussels Convention and it therefore decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does the right to obtain an injunction to prohibit the use of unlawful or unconscionable general terms and conditions provided for in Paragraph 28 of the [KSchG], which is asserted by a consumer protection organisation pursuant to Paragraph 29 of the KSchG and in accordance with Article 7(2) of... Directive 93/13/EEC..., constitute a claim arising out of matters relating to tort, delict or quasi-delict which may be asserted in courts with the special jurisdiction provided for in Article 5(3) of the Brussels Convention...?’

### **The national court’s question**

- 25 The first point to be noted is that the United Kingdom Government submits that an action such as that brought by the VKI does not fall within the scope of the Brussels Convention. Pursuant to the first paragraph of Article 1 thereof, that convention applies only ‘in civil and commercial matters’, whereas a consumer protection organisation such as the VKI must be regarded as a public authority and its right to obtain an injunction to prevent the use of unfair terms in contracts, which is exercised in the main proceedings, constitutes a public law

power. An organisation of that kind takes on the task, in the public interest, of ensuring the protection of the entire class of consumers, and its right to bring proceedings to obtain an injunction preventing unlawful behaviour by traders stems from statute, independent of any private law relationship arising out of a contract between a professional and a private individual.

- 26 However, it is settled case-law that actions between a public authority and a person governed by private law fall outside the scope of the Brussels Convention only in so far as that authority is acting in the exercise of public powers (see, to that effect, Case 29/76 *LTU v Eurocontrol* [1976] ECR 1541, paragraph 4; Case 814/79 *Rüffer* [1980] ECR 3807, paragraph 8, and Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 20).
- 27 That is the case in a dispute which concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by that body, in particular where such use is obligatory and exclusive (see *LTU*, cited above, paragraph 4).
- 28 Similarly, the Court has held that the concept of ‘civil and commercial matters’ within the meaning of the first paragraph of Article 1 of the Brussels Convention does not include actions brought by the State responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck carried out by or at the instigation of that administering agent in the exercise of its public authority (*Rüffer*, cited above, paragraphs 9 and 16).
- 29 Although it thus follows from the case-law of the Court that certain types of dispute must be regarded as excluded from the scope of the Brussels Convention,

by reason either of the legal relationships between the parties to the action or of the subject-matter of the action (see *LTU*, paragraph 4), the case-law arising from *LTU* and *Rüffer* cannot be applied to an action such as that at issue in the main proceedings.

- 30 Not only is a consumer protection organisation such as the VKI a private body, but in addition, as the German Government correctly observed, the subject-matter of the main proceedings is not an exercise of public powers, since those proceedings do not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals. On the contrary, the action pending before the national court concerns the prohibition on traders' using unfair terms in their contracts with consumers and thus seeks to make relationships governed by private law subject to review by the courts. Hence, an action of that kind is a civil matter within the meaning of the first paragraph of Article 1 of the Brussels Convention.
- 31 In those circumstances, the objection raised by the United Kingdom Government cannot be accepted.
- 32 As to the question referred by the national court, it should be noted at the outset that Articles 13 to 15, which comprise Section 4, entitled 'Jurisdiction over consumer contracts', of Title II of the Brussels Convention, are not applicable in the main proceedings.
- 33 As the Court held in Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels

Convention and therefore cannot invoke Articles 13 to 15 of that convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of consumers.

- 34 It follows that, in order to answer the question referred by the national court, it need only be determined whether a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to a contract within the meaning of Article 5(1) of the Brussels Convention, or in fact a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.
- 35 In that regard, the Court has repeatedly held that the concepts of ‘matters relating to a contract’ and ‘matters relating to tort, delict or quasi-delict’ in paragraphs 1 and 3 respectively of Article 5 of the Brussels Convention are to be interpreted independently, having regard primarily to the objectives and general scheme of that convention, in order to ensure that it is both given full effect and applied uniformly in all the Contracting States (see, in particular, Case 34/82 *Peters* [1983] ECR 987, paragraphs 9 and 10; Case 189/87 *Kalfelis* [1988] ECR 5565, paragraphs 15 and 16, and Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 15).
- 36 It is also settled case-law that the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention covers all actions which seek to establish the liability of a defendant and are not matters relating to a contract within the meaning of Article 5(1) of that convention (see, in particular, *Kalfelis*, cited above, paragraph 17; *Reichert and Kockler*, cited above, paragraph 16; Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 22, and Case C-96/00 *Gabriel* [2002] ECR I-6367, paragraph 33).

- 37 It is therefore necessary in the first instance to examine whether an action such as that at issue in the main proceedings is contractual in nature.
- 38 In a situation such as that in the main proceedings, the consumer protection organisation and the trader are in no way linked by any contractual relationship.
- 39 Admittedly, it is likely that the trader has already entered into contracts with a number of consumers. However, whether the court action is subsequent to a contract already concluded between the trader and a consumer or that action is purely preventive in nature and its sole aim is to prevent the occurrence of future damage, the consumer protection organisation which brought that action is never itself a party to the contract. The legal basis for its action is a right conferred by statute for the purpose of preventing the use of terms which the legislature considers to be unlawful in dealings between a professional and a private final consumer.
- 40 In those circumstances, an action such as that brought in the main proceedings cannot be regarded as a matter relating to a contract within the meaning of Article 5(1) of the Brussels Convention.
- 41 By contrast, such an action meets all the criteria established by the Court in the case-law referred to in paragraph 36 of this judgment inasmuch as, first, it does not concern matters relating to a contract within the meaning of Article 5(1) of the Brussels Convention and, second, it seeks to establish the liability of the defendant in tort, delict or quasi-delict, in the present case in respect of the

trader's non-contractual obligation to refrain in his dealings with consumers from certain behaviour deemed unacceptable by the legislature.

- 42 The concept of 'harmful event' within the meaning of Article 5(3) of the Brussels Convention is broad in scope (Case 21/76 *Bier* ('*Mines de Potasse d'Alsace*') [1976] ECR 1735, paragraph 18) so that, with regard to consumer protection, it covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which it is the task of associations such as the VKI to prevent.
- 43 Furthermore, that is the only interpretation consistent with the purpose of Article 7 of Directive 93/13. Accordingly, the efficacy of the actions under that provision to prevent the continued use of unlawful terms would be considerably diminished if those actions could be brought only in the State where the trader is domiciled.
- 44 Mr Henkel and the French Government have, however, submitted that Article 5(3) of the Brussels Convention refers to the place where the harmful event occurred and therefore presupposes, according to its actual terms, the existence of damage. They argue that the same conclusion is dictated by the Court's interpretation of that provision, according to which the expression 'place where the harmful event occurred' must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to that damage, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places (see, in particular, *Mines de Potasse d'Alsace*, cited above, paragraphs 24 and 25; Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraph 10; Case C-68/93 *Shevill and Others* [1995] ECR I-415, paragraph 20, and Case C-364/93 *Marinari* [1995] ECR I-2719, paragraph 11). In their submission, it follows that Article 5(3) of the Brussels Convention



cannot be applied to purely preventive actions which are brought before any actual damage has occurred and are intended to prevent the occurrence of a future harmful event.

45 That objection is not however well founded.

46 The rule of special jurisdiction laid down in Article 5(3) of the Brussels Convention is based on the existence of a particularly close connecting factor between a dispute and the courts for the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see to that effect, *inter alia*, *Mines de Potasse d'Alsace*, paragraphs 11 and 17; *Dumez France and Tracoba*, paragraph 17; *Shevill and Others*, paragraph 19, and *Marinari*, paragraph 10). The courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence. Those considerations are equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage.

47 That interpretation is moreover supported by the Report by Professor Schlosser on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, pp. 71, 111), which states that Article 5(3) of the Brussels Convention also covers actions whose aim is to prevent the imminent commission of a tort (or delict).

48 It is therefore not possible to accept an interpretation of Article 5(3) of the Brussels Convention according to which application of that provision is

conditional on the actual occurrence of damage. Furthermore, it would be inconsistent to require that an action to prevent behaviour considered to be unlawful, such as that brought in the main proceedings, whose principal aim is precisely to prevent damage, may be brought only after that damage has occurred.

- 49 Finally, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), while not applicable *ratione temporis* to the main proceedings, is such as to confirm the interpretation that Article 5(3) of the Brussels Convention does not presuppose the existence of damage. That regulation clarified the wording of Article 5(3) of the Brussels Convention that the new version of that provision resulting from that regulation refers to ‘the place where the harmful event occurred or may occur’. In the absence of any reason for interpreting the two provisions in question differently, consistency requires that Article 5(3) of the Brussels Convention be given a scope identical to that of the equivalent provision of Regulation No 44/2001. This is all the more necessary given that that regulation is intended to replace the Brussels Convention in relations between Member States with the exception of the Kingdom of Denmark, with that convention continuing to apply between the Kingdom of Denmark and the Member States bound by that regulation.

- 50 In the light of all the foregoing considerations, the answer to the question referred by the national court must be that the rules on jurisdiction laid down in the Brussels Convention must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

## Costs

- 51 The costs incurred by the Austrian, German, French and United Kingdom Governments and by the Commission, 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 (Sixth Chamber),

in answer to the question referred to it by the Oberster Gerichtshof by order of 13 April 2000, hereby rules:

The rules on jurisdiction laid down in the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

Macken

Gulmann

Puissochet

Schintgen

Cunha Rodrigues

Delivered in open court in Luxembourg on 1 October 2002.

R. Grass

F. Macken

Registrar

President of the Sixth Chamber