AG Opinion in Case “Ilsinger”

On 11 September 2008, Advocate General Trstenjak’s opinion in case C-180/06 (*Renate Ilsinger v. Martin Dreschers (administrator in the insolvency of Schlank & Schick GmbH*) has been published.

The case basically concerns the question whether international jurisdiction for consumer claims against undertakings for prizes ostensibly won can be established under Art. 15 No. 1 (c) Brussels I Regulation (Regulation (EC) No. 44/2001). The problem in this case is whether it concerns a consumer contract in terms of Art. 15 Brussels I Regulation since the claiming of the prize was not made conditional upon actually ordering goods.

When faced with a comparable case under the Brussels *Convention*, the ECJ had decided that Art. 13 Brussels Convention was not applicable in a situation where a professional vendor made contact with a consumer by sending a personalised letter containing a prize notification where the vendor’s initiative was not followed by the conclusion of a contract between the consumer and the vendor since the action brought by the consumer for the payment of the prize could not be regarded as being contractual in nature for the purposes of Art. 13 Brussels Convention (C-27/02 – Engler). However, the ECJ had not to decide on this issue under the Brussels *Regulation* so far.

Thus, the *Oberlandesgericht Wien* referred the **following questions** to the ECJ for a preliminary ruling:

> *Does the provision in Paragraph 5j of the Konsumentenschutzgesetz (Law on consumer protection; KSchG), BGBl 1979/140, in the version of Art I, para. 2 of the Fernabsatz-Gesetz (Law on distance selling), BGBl I 1999/185, which entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute, in circumstances where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, for the purposes of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the*

recognition and enforcement of judgments in civil and commercial matters ('the regulation'): a contractual, or equivalent, claim under Article 15(1)(c) of the regulation?

If the answer to question 1 is in the negative:

Does a claim falling under Article 15(1)(c) of the regulation arise if the claim for payment of the prize was not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods?

The Advocate General points out in her **opinion** that the reference raises the question of continuity of interpretation between the Brussels Convention and the Regulation, i.e. whether Art. 15 No. 1 (c) Brussels I Regulation has to be interpreted in the same way as Art. 13 Brussels Convention. In general it should be adhered to a continuous interpretation which is also shown by recital No. 19 Brussels Regulation (para. 37). Thus, the question in the present case is as to whether there are – in particular in view of the differing wording of Art. 13 Brussels Convention and Art. 15 Brussels Regulation as well as the necessity to ensure a high standard of consumer protection – good reasons to interpret Art. 15 Brussels I Regulation in a different way the ECJ has done with regard to Art. 13 Brussels Convention in "Engler". To answer this question, the Advocate General refers to arguments based on a literal, historical, systematical and teleological interpretation:

While agreeing with Advocate General Tizzano's assessment in "Kapferer" that the modifications with regard to Art. 15 Brussels I Regulation in comparison to Art. 13 Brussels Convention do not question the requirement of the conclusion of a contract (para. 42), she argues that the Community legislature did not intend to limit Art. 15 No. 1 (c) Brussels I Regulation to synallagmatic contracts by modifying the wording of Art. 15 Brussels I Regulation (para. 40 et seq.).

On the basis that the application of Art. 15 Brussels I Regulation requires a contract, she examines the general requirements for the conclusion of contracts within the framework of Community law by referring to the Court's case law, several directives and – and this might be particularly emphasised – to the Draft Common Frame of Reference (DCFR) and the Principles of European Contract Law (PECL). She concludes that one of the basic prerequisites for the conclusion of a contract was that the parties agree on the conclusion of a contract by means of

“offer” and “acceptance” (para. 44 et seq.).

She argues that – also in view of the necessity to ensure a high standard of consumer protection (para. 64) – that prize notifications can, in principle, lead to the conclusion of a contract. However, whether this was the case in the main proceedings, had to be answered by the national court by examining whether the prize notification can be regarded as an offer in the specific case and whether the consumer has accepted this offer (para. 59 et seq.).

Concluding, the **Advocate General suggests to answer the referred questions** as follows (para. 81):

Art. 15 No. 1 (c) Brussels I Regulation has to be interpreted as meaning that a right which entitles consumers under the law of the Member State where they are domiciled to claim from undertakings domiciled in another Member State prizes ostensibly won by them where the undertakings send them prize notifications and give – by means of the design of the communications – the impression that they have won a particular prize without making claiming of that prize conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, can constitute a claim arising from a contract in terms of Art. 15 Brussels I Regulation if a consumer contract in terms of this provision has actually been concluded. The question whether a consumer contract in terms of Art. 15 Brussels I Regulation has actually been concluded in the main proceedings has to be examined by the national court.

The right entitling the consumer to claim the prize ostensibly won from the undertaking, constitutes a claim arising from a contract in terms of Art. 15 No. 1 (c) Brussels I Regulation if the claiming of the prize was not made conditional upon actually ordering goods, but when the consumer has ordered goods nevertheless.

(Approximate translation from the German version of the opinion.)

The full opinion can be found (in French, German, Italian, Slovene and Finnish) at the ECJ’s website.