

BGH (D) 28 November 2002 – III ZR 102/02

Brussels Convention¹ Articles 5, point 3; 13, first paragraph, point 3; 14, first paragraph, second alternative – Prize notifications in distance contracts – International jurisdiction over claims for payment of prizes allegedly won – Jurisdiction in matters relating to consumer interests – Jurisdiction in matters relating to tort – Competence to refer to the ECJ – Impermissibility of its restriction via limits on appeal in civil procedure

For a cause of action relating to a prize notification (*Gewinnzusage*) within the meaning of § 661a BGB that is brought against a (natural or legal) person domiciled in another Contracting State, courts of the consumer-plaintiff's place of residence have international jurisdiction over either consumer contracts (Article 13 et seq. Brussels Convention) or tort (Article 5, point 3 Brussels Convention). (*Headnote of the court*)

The provision of § 545(2) of the German Code of Civil Procedure, pursuant to which review of the correctness of a lower court decision affirming or denying its jurisdiction is barred, does not apply to international jurisdiction.

Discussion of the Decision

1. Facts

1.1. The German plaintiff received a letter from the defendant, a Netherlands mail-order business. Featured prominently on the letter was the statement “important notice of cash allotment in competition”. The defendant stated that, because of an “extra payout”, DEM 12 300 would be awarded before 20 July 2000. The letter read: “And just imagine, Ms M, your name was not only listed, but has also been drawn as the winner. That means the cash amount is already yours!”

The plaintiff followed the instructions contained in the letter and returned the notice of the drawing to the defendant with a special sticker affixed. When the defendant did not make the anticipated payment, the plaintiff brought an action before the Landgericht Mönchengladbach (D), the regional court in Germany with jurisdiction over her place of residence. The defendant objected, primarily on the grounds that the German court lacked international jurisdiction to entertain the case.

¹ Convention of 27 September 1968 (OJ 1978 L 304, at 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, at 1, and - amended version – at 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, at 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, at 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, at 1).

According to the defendant, the Netherlands courts with competence over its corporate seat possessed exclusive jurisdiction.

The Landgericht ordered a separate hearing relating to the admissibility of the complaint. It decided in an interlocutory judgment that it had jurisdiction under the provisions of the Brussels Convention. An appeals court affirmed this decision on review. The Bundesgerichtshof (Federal High Court of Justice, “BGH”) refused to take up the matter, upholding the lower courts.

1.2. The BGH decision first had to dispatch a problem arising from the overhaul of Germany's code of civil procedure (*Zivilprozessordnung*, “ZPO”) in 2002. Under the reform, the German legislature limited, *inter alia*, the permissibility of review of civil court decisions concerning the proper application of jurisdictional rules. The statutory text prior to the reform had limited reconsideration of territorial and subject matter jurisdiction; in the wake of §§ 513(2) and 545(2) ZPO, which were rewritten as part of the reform, this limitation now generally applies without a more precise differentiation to lower court decisions on jurisdiction. Consequently, German appellate courts and commentaries to the ZPO on various occasions took the view that appellate courts are thus largely deprived of the power to review decisions relating to international jurisdiction.

This encountered strong resistance, above all from exponents of international civil procedure in the German literature. An answer to this question was thus anxiously anticipated. In this case, the BGH has adopted the perspective of the international proceduralists, stating that the German legislature could not restrict the reconsideration on appeal of the proper application of international jurisdiction rules and moreover that the possibility of such review remains open.

2. The Court's Decision

2.1. Appellate review of international jurisdiction

On the question of the extent to which appeals aimed at reviewing the propriety of the application of international jurisdiction rules are admissible under German civil procedure law, the BGH first notes that the new version of the ZPO does not manifest with sufficient clarity the intention of the German legislature to eliminate the possibility of review of this issue by appellate courts. The BGH alludes to the fact that the decision accepting or rejecting international jurisdiction has much greater weight than, for example, the decision on territorial jurisdiction.

In this connection, the BGH recalls that international jurisdiction concerns the delimitation between sovereign rights of the state with jurisdiction and the sovereign rights of other states. It determines whether and to what extent domestic courts may claim the power to render decisions in cases with a foreign connection. Furthermore, under the generally recognised principle that the law governing the proceedings derives

from the *lex fori*, the applicable procedural law is simultaneously established by affirming or denying international jurisdiction. The same applies to the conflict of laws, which is also governed by the *lex fori*; it is not uncommon that in this way international jurisdiction indirectly controls even the substantive law and thereby may be outcome determinative for the legal case.

Furthermore, the BGH states that circumscribing the extent of appellate review of decisions concerning international jurisdiction would essentially lead to a breakdown in the system of rules for referring decisions to the ECJ. In the instant case, the referral power arose under the Luxembourg Protocol of 3 June 1971.² The obligation contained therein for national supreme courts to submit questions for reference and the discretion of appellate courts to do the same threaten to be deprived of all meaning if framers of civil procedure law can strip in particular the highest courts of the power to review decisions concerning international jurisdiction. Such an expansive virtual restriction on the provisions for reference would contradict Germany's obligations under international law and must therefore be adjudged inadmissible.

In conclusion, the BGH decided that the consideration of international jurisdiction in German civil procedure law on direct appeal and subsequent review must be permitted without constraint.

2.2. Forum for complaints on payment of prize notifications

2.2.1. As part of the transposition of the directive on distance contracts,³ the German legislature granted consumers a cause of action in § 661a BGB for payment of awards announced in prize notifications. The BGH's decision concerning jurisdiction over complaints asserting this right within the system of the Brussels Convention – and in the future of the pertinent regulation⁴ – ties in with the ECJ's recent decision in *Gabriel*⁵, decided on 11 July 2002, only a few months earlier. In the case decided by the Court of Justice, the consumer received a prize notification which was subject to the ordering of a certain minimum quantity of goods; the required order was actually made. As a result, the ECJ deduced that the case concerned a consumer contract and founded jurisdiction on Article 13, first paragraph, point 3.⁶

In the case before the BGH, the mail-order business making

the prize offer imposed no similar condition. Accordingly there was no order and thus no conclusion of a contract. In view of this fact pattern – not yet taken up by the Court of Justice – the BGH avoids taking a definitive stance. It determines that the jurisdiction of the courts of the state in which the plaintiff is domiciled could be based on Article 13, first paragraph, point 3 in connection with Article 14, first paragraph of the Brussels Convention with respect to consumer contracts. In the alternative, should the actual conclusion of a consumer contract be a prerequisite, the German courts can turn to Article 5, point 3 as a source of international jurisdiction.

2.2.2. The decision reveals the tendency of the German BGH to presume jurisdiction over consumer complaints relating to the payment of transborder prize notifications. It is true that the prize notification sent to the plaintiff did not result in the conclusion of a contract. However, the defendant aimed at having the plaintiff conclude a contract with the notification of an award, which on the basis of its subject matter falls under the Brussels Convention provisions relating to consumer contracts. When the plaintiff sent the defendant the notice of the drawing with the special sticker affixed, as per the defendant's instructions, the plaintiff commenced the steps necessary for the conclusion of the contract within the meaning of Article 13, first paragraph, point 3(b) in Germany, her state of residence. If the provisions relating to jurisdiction over consumer contracts are brought into play through this procedure, the plaintiff may lodge a complaint before the court with jurisdiction over her domicile in accordance with Article 14, first paragraph, second alternative of the Brussels Convention.

2.2.3. The BGH clearly avoids a definitive determination as to whether the rules concerning jurisdiction over consumer contracts could also be applied in the present case, in which no contract was concluded. According to the decision, if the conclusion of a contract is denied, international jurisdiction follows at any rate from Article 5, point 3 of the Brussels Convention.

Here, the BGH refers to the ECJ's established case law in which the notion of "tort" contained in the Brussels Convention is autonomously construed in a broad sense to encompass all complaints alleging liability for damages which are not connected to the conclusion of a contract within the meaning of Article 5, point 1.⁷ If tying international jurisdiction to the defendant's attempt to initiate a contractual relationship with the plaintiff were not to suffice for the purposes of jurisdiction over consumer matters, the defendant's liability to fulfil the terms of the its prize notification in accordance with § 661a of the German civil code can be classified as delictual or quasi-delictual within the meaning of the expansively interpreted Article 5, point 3 of the Brussels Convention.

² Luxembourg Protocol of 3 June 1971 concerning 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 1975 L 204, at 28), as amended by the fourth accession convention (OJ 1997 C 15, at 1).

³ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, at 19).

⁴ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12, at 1).

⁵ ECJ 11 July 2002 – C-96/00 – *Rudolf Gabriel* [2002] ECR I-6367 = [2002] EuLF (E) 307 et seq.

⁶ *Rudolf Gabriel* (*supra* note 5), para. 53 et seq.

⁷ The BGH cites *Rudolf Gabriel* (*supra* note 5); ECJ 27 September 1989 – 189/87 – *Kalfelis* – [1988] ECR 5565, 5585. Most recently, see also ECJ 1 October 2002 – C-167/00 – *Henkel*, nyr, para. 36 = [2002] EuLF (E) 302, 304; ECJ 17 September 2002 – C-334/00 – *Tacconi*, nyr, para. 19 et seq. = [2002] EuLF (E) 305, 307.

The BGH notes that prize notifications not meant in earnest which intend to induce the consumer into concluding a contract have up to this point been dealt with under the German law governing unfair trade practices. The trend introduced by the distance contracts directive by which violations of competition law are handled by means of private causes of action suggests a tortuous qualification in the broad sense of the ECJ's jurisprudence on Article 5, point 3 of the Brussels Convention.

The same conclusion could also eventually be reached if the business's obligation to pay the notified prize when it has violated fair trade practices were understood as the statutorily defined case of *culpa in contrahendo* in connection with the ECJ decision of 17 September 2002 in the case of *Tacconi*.⁸

2.2.4. The BGH did not consider a reference to the ECJ to be required. According to the case law of the ECJ, a reference is not necessary if the correct application of Community law is so patent that no room exists for reasonable doubt. Such was the case in the dispute decided here. Following the ECJ's most recent jurisprudence, international jurisdiction for causes of action relating to the payment of an award promised in a prize notification could reside in the jurisdiction over consumer matters of Article 13 et seq. of the Brussels Convention or in the tort jurisdiction contained in Article 5, point 3. No serious thought was given to the potential jurisdiction of the Netherlands courts with jurisdiction over the defendant pursuant to the general provisions in Article 2, first paragraph in the event that neither route for asserting international jurisdiction remained open to German courts.

3. Comment

The BGH's decision to affirm the jurisdiction of the court with jurisdiction over the domicile of the affected consumer is correct in its end result. However, it is regrettable that the BGH side-stepped a reference to the Court of Justice.

3.1. First, the BGH's holding that the legislature may not frivolously deprive appellate courts of the power to consider the constellation of questions concerning international jurisdiction is of significance transcending German law.

It demonstrates the diplomatic reserve of the BGH that it first arrives at this conclusion via the interpretation of the provisions governing the review of international jurisdiction by appellate courts, which were reformulated in the context of the reform of German civil procedure law. The text of these provisions reveal that the German legislature was not aware of the explosiveness of this restriction in terms of EU law.

The BGH dispositively ties in with the rules governing references to the ECJ, the essential function of which is to ensure a uniform application of the Convention in all Contracting States. Worth noting is the unmistakable clarity of the BGH in holding that the national legislature's provisions preventing

de facto references to the ECJ violate Germany's obligations under international law and are therefore inadmissible. This holds true not only for the Luxembourg Protocol, which will lose meaning with the dissolution of the Brussels Convention system by the EU regulation, but also for the *lex specialis* of Article 68 EC regulating the referral power contained in Article 234 EC, which will feature prominently in the future.

The interplay of the jurisprudence of the ECJ and qualified questions for reference of the Member State courts was of great importance in the development of European civil procedure law in the decades in which the Brussels Convention was in effect and bears a good deal of credit for the current high standards. Referrals emitted even in cases before German courts have gone on to provide the grounds for landmark decisions by the ECJ. It would be negligent to tinker with this system. It is a good thing that the BGH provided for clarification on this point only a few months after the entry into force of the German civil procedure reform on 1 July 2002.

3.2. In contrast, it is questionable whether the BGH was well advised to forego an ECJ reference and ultimately decide for itself the question of the qualification of the cause of action for prize payment – but leave the question open in end effect.

In light of its decision in *Gabriel*, in which it opted for a contract law classification, linking it to the fact that in the case referred the addressee of the prize notification also made a small order, it would have been all the more interesting to see how the Court of Justice would now have answered in the BGH case which did not reach that point.

The difficulty of qualifying a claim for payment of a promised award in the framework of unfair trading practices, as currently provided in German as well as Austrian law, owes to the fact that this cause of action is based on tort law but also avails itself of quasi-contractual forms. The BGH ruled correctly in its decision that the goal of emphasising the obligation of businesses to comport themselves with fair trading practices is achieved by conferring a private law cause of action for payment of the promised award used as bait to initiate a contract.

If the prize claim thereby approaches a criminal penalty, it leads to a fundamental problem for the system: Damages as a sanction for unlawful behaviour is best known in the instrument of "punitive damages" allowed under US law.⁹ Decisions of American courts awarding punitive damages have not been recognised up to now – in Germany, at any rate.¹⁰ This non-recognition is based on the fact that punitive damages repre-

⁸ *Tacconi* (*supra* note 7).

⁹ See also *Rauscher/Schülke*, Transborder Prize Notification: Linkage and International Jurisdiction, [2000/01] EuLF (E) 334, 337. On punitive damages in US law, see *Cota*, Punitive Damages, Case and Statute Law Reactions to Punitive Damages in the USA, [1997] Int'l Legal Forum (E) 171.

¹⁰ In a landmark decision, the BGH determined that the order of enforcement of a US judgment requiring the payment of punitive damages should generally fail in Germany based on substantive requirements of *ordre public*. See BGH (D) 4 June 1992, 118 BGHZ 312, 338 et seq.

sent a concept foreign to the local law and would mean a breach of the system.¹¹ It is true that the cause of action granted by the German legislature for the payment of dishonestly promised prizes is not directly comparable with outrageously high punitive damages in American law in terms of its extent and significance. Systematically, however, it should not be forgotten that the cause of action represents a legal tool which does not disavow its affinity to tort law, but which nevertheless breaks off from the tort law principle of compensation for losses suffered as a consequence of an unlawful act. The claim for payment of the prize promised in violation of normal trading practices must consequently be interpreted as the remuneration of the addressee of the prize notification for his part in monitoring fair competition and thereby in a sense which the BGH has seen as foreign to the German legal system in its jurisprudence on punitive damages.

The absence of a need to refer the case to the ECJ is contradicted by the fact that BGH itself avoided a final determination with respect to the classification of the prize claim as either relating to consumer contacts or tort and argued both in the alternative. This derivation of international jurisdiction from one of two rules that are systematically total opposites evidences a need for further – and indeed fundamental – clarification, which the ECJ should have been asked to provide.

The ECJ only recently illustrated its readiness to extend the coverage of the classification of tort in the area of unfair trading practices in its decision of 1 October 2002 in *Henkel*.¹² In paragraph 42 of that decision, which concerned the permissibility of actions brought by consumer protection groups concerning unfair trade practices, the Court held that the concept of “harmful event” in Article 5, point 3 of the Brussels Convention is broad in scope and with regard to consumer protection covers not only situations where an individual has personally sustained damage. The undermining of legal stability by the use of unfair terms which it is the task of such organisations to prevent also falls under this category. It is – possibly – only a small step from this determination to an extension of the tort law qualification to claims for payment of prizes that are dishonestly promised.

Such a step would clearly advance a review of the consumer contract qualification of prize claims recently taken up by the ECJ in *Gabriel*. The Court of Justice made this connection to qualification in that case based on the accessory (and rather incidental) fact that the consumer in question actually made an order and thus concluded a contract. Given that this condition is absent in the case decided by the BGH, the ECJ would have had to devise an independent qualification for the action relat-

ing to an awarded prize. It is unfortunate that the BGH avoided a referral to the ECJ.

Thomas Simons

Extract from the decision: “(...)

Das Berufungsurteil hält der rechtlichen Prüfung im Ergebnis stand.

2. Die mithin zulässige revisionsrechtliche Prüfung ergibt, daß im Streitfall die deutschen Gerichte entweder gemäß Art. 13 Abs. 1 Nr. 3 i.V.m. Art. 14 Abs. 1 zweite Alternative EuGVÜ oder gemäß Art. 5 Nr. 3 EuGVÜ international zuständig sind.

a) Grundsätzlich sind natürliche Personen, die ihren Wohnsitz in dem Hoheitsgebiet eines Vertragsstaates des EuGVÜ haben, vor den Gerichten dieses Staates zu verklagen (Art. 2 Abs. 1 EuGVÜ); entsprechendes gilt für Gesellschaften und juristische Personen, die ihren Sitz in dem Hoheitsgebiet eines Vertragsstaates haben (Art. 2 Abs. 1 i.V.m. Art. 53 Abs. 1 Satz 1 EuGVÜ). Abweichend von dieser Regel können in einem Vertragsstaat ansässige (natürliche oder juristische) Personen vor den Gerichten eines anderen Vertragsstaates verklagt werden, wenn dort einer der in Art. 5 ff. EuGVÜ genannten Wahlgerichtsstände besteht.¹³ So liegt der Streitfall. Die in den Niederlanden ansässige Beklagte kann vor einem deutschen Gericht verklagt werden, weil in der Bundesrepublik Deutschland entweder die internationale Zuständigkeit für Verbrauchersachen (Art. 13, 14 EuGVÜ) oder der unerlaubten Handlung (Art. 5 Nr. 3 EuGVÜ) begründet ist.

b) Für Klagen aus einem Vertrag, den eine Person zu einem Zweck abgeschlossen hat, der nicht der beruflichen oder gewerblichen Tätigkeit dieser Person (Verbraucher) zugerechnet werden kann, bestimmt sich die Zuständigkeit nach den Art. 13 ff. EuGVÜ für „andere Verträge“ (als Teilzahlungskauf oder Darlehen), wenn sie die Lieferung beweglicher Sachen zum Gegenstand haben, sofern dem Vertragsschluß in dem Staat des Wohnsitzes des Verbrauchers ein ausdrückliches Angebot oder eine Werbung vorausgegangen ist und der Verbraucher in diesem Staat die zum Abschluß des Vertrages erforderlichen Rechtshandlungen vorgenommen hat (Art. 13 Abs. 1 Nr. 3 zweite Alternative EuGVÜ). Es handelt sich bei dieser Zuständigkeit um einen Sonderfall des Gerichtsstandes des Erfüllungsortes (Art. 5 Nr. 1 erster Halbsatz EuGVÜ). Während Art. 5 Nr. 1 erster Halbsatz EuGVÜ sich allgemein auf Klagen aus Vertrag bezieht, erfaßt Art. 13 EuGVÜ bestimmte Arten von Verträgen, die ein Verbraucher geschlossen hat.¹⁴ Die in Art. 13 EuGVÜ verwendeten Begriffe sind autonom auszulegen, wobei in erster Linie die Systematik und die Zielsetzung des Übereinkommens zu berücksichtigen sind, um dessen volle Wirksamkeit zu sichern.¹⁵

Die vorliegende auf eine Gewinnzusage im Sinne des § 661a BGB gestützte Klage kann als Klage aus einem Verbrauchervertrag (Art. 13 Abs. 1 EuGVÜ) angesehen werden.

¹¹ 118 BGHZ 312, 338: The modern German private law system sees as a legal consequence of a tortious act only compensation for damages, not the enrichment of the injured party. Punishment and deterrence tailored to the wrong are possible goals of criminal law, not private law. (*Die moderne deutsche Zivilrechtsordnung sieht als Rechtsfolge einer unerlaubten Handlung nur den Schadensausgleich, nicht aber eine Bereicherung des Geschädigten vor. (...) Die Bestrafung und – im Rahmen einer Schuldangemessenen – Abschreckung sind mögliche Ziele der Kriminalstrafe (...) nicht des Zivilrechts.*)

¹² *Henkel* (supra note 7).

¹³ Art. 3 Abs. 1 EuGVÜ; vgl. auch *Musielak/Weth*, ZPO, 2. Aufl., 2000, Art. 3 EuGVÜ Rn. 1.

¹⁴ EuGH 11. 7. 2002 – C-96/00 – *Rudolf Gabriel*, Slg. 2002, I-6367 = EuLF 2002 (D), S. 308 ff. = NJW 2002, S. 2697, 2698.

¹⁵ EuGH 11. 7. 2002 – C-96/00 – *Rudolf Gabriel*, aaO.

aa) Zwar handelt es sich bei der Gewinnzusage oder vergleichbaren Mitteilung der Beklagten nicht um einen Vertrag, sondern um ein einseitiges Rechtsgeschäft oder eine geschäftsähnliche Handlung.¹⁶ Die vertragliche Natur des Klageanspruchs kann auch nicht daraus hergeleitet werden, daß eine untrennbare Verbindung zwischen der Gewinnzusage und der Warenbestellung bestanden hätte.¹⁷ Es ist nicht ersichtlich, daß die Klägerin bei der Beklagten Waren bestellt oder die Beklagte die Auszahlung des Gewinns von einer Warenbestellung abhängig gemacht hätte.

bb) Die an die Klägerin gerichtete Gewinnbenachrichtigung der Beklagten zielte jedoch auf eine Vertragsanbahnung. Die Klägerin, die unstreitig Verbraucherin im vorbeschriebenen Sinn war, sollte hierdurch veranlaßt werden, bei der Beklagten Waren zu bestellen (Art. 13 Abs. 1 Nr. 3 zweite Alternative und lit. a EuGVÜ). Denn sie wurde in dem Schreiben der Beklagten vom 30. 6. 2000 aufgefordert, von der Klägerin angebotene „Schnäppchen“ zu nutzen. Auch das in Art. 13 Abs. 1 Nr. 3 lit. b EuGVÜ bestimmte Erfordernis, daß der Verbraucher in dem Staat seines Wohnsitzes die zum Abschluß des Vertrages erforderlichen Rechtshandlungen vorgenommen hat, war – zumindest dem Rechtsgedanken nach – erfüllt. Die Klägerin versah entsprechend den Anweisungen der Beklagten im Schreiben vom 30. 6. 2000 den Ziehungsbescheid mit der Zuteilungsmarke und schickte ihn am 7. 7. 2000 zurück.

cc) Sind aber die Voraussetzungen des Art. 13 Abs. 1 Nr. 3 EuGVÜ gegeben, dann konnte die in der Bundesrepublik Deutschland wohnende Klägerin ihre „Klage eines Verbrauchers“ gegen die in den Niederlanden ansässige Beklagte wahlweise vor den niederländischen (Art. 14 Abs. 1 erste Alternative EuGVÜ) oder – wie geschehen – vor den deutschen Gerichten (Art. 14 Abs. 1 zweite Alternative EuGVÜ) erheben.

c) Wäre hingegen für die Zuständigkeit für Verbrauchersachen (Art. 13 ff. EuGVÜ) entscheidend auf den – hier nicht erfolgten – Abschluß eines Vertrages abzustellen, wären die deutschen Gerichte jedenfalls aufgrund des Gerichtsstandes der unerlaubten Handlung zuständig.

aa) Gemäß Art. 3 Abs. 1 i.V.m. Art. 5 Nr. 3 EuGVÜ können in einem Vertragsstaat ansässige (natürliche oder juristische) Personen auch vor den Gerichten eines anderen Vertragsstaats verklagt werden, wenn eine unerlaubte Handlung oder eine Handlung, die einer unerlaubten Handlung gleichgestellt ist, oder wenn Ansprüche aus einer solchen Handlung den Gegenstand des Verfahrens bilden, und zwar vor dem Gericht des Ortes, an dem das schädigende Ereignis eingetreten ist (Art. 3 Abs. 1 i.V.m. Art. 5 Nr. 3; Art. 53 Abs. 1 Satz 1 EuGVÜ). Der Begriff der „unerlaubten Handlung“ im Sinne des Art. 5 Nr. 3 EuGVÜ ist als autonomer Begriff anzusehen. Um eine einheitliche Lösung in allen Mitgliedsstaaten zu gewährleisten, ist davon auszugehen, daß sich der Begriff der „unerlaubten Handlung“ auf Klagen bezieht, mit denen eine Schadenshaftung des Beklagten geltend gemacht wird und die nicht an einen Vertrag im Sinne von Art. 5 Nr. 1 EuGVÜ anknüpfen.¹⁸ So läge der Streitfall, wenn für den Gerichtsstand des

Erfüllungsortes (Art. 5 Nr. 1 erster Halbsatz EuGVÜ) und, was hier in Frage steht, die Zuständigkeit für Verbrauchersachen (Art. 13 ff. EuGVÜ) die Anknüpfung an die mit der Gewinnzusage betriebene Vertragsanbahnung nicht genügte. Die Haftung wegen Gewinnzusage (§ 661a BGB) wäre dann als nichtvertragliche deliktische oder deliktsähnliche Haftung – nicht als eine solche wegen zurechenbar gesetzten Rechtsscheins¹⁹ – aufzufassen.

Mit der Einführung des § 661a BGB wollte der Gesetzgeber einer verbreiteten und wettbewerbsrechtlich unzulässigen Praxis entgegenwirken, daß Unternehmer Verbrauchern Mitteilungen über angebliche Gewinne übersenden, um sie zur Bestellung von Waren zu veranlassen, die Gewinne auf Nachfrage aber nicht aushändigen.²⁰ Damit wurde – österreichischem Vorbild folgend²¹ – eine Tendenz der Richtlinie 97/7/EG²² aufgegriffen, wettbewerbsrechtliche Verstöße allgemein-zivilrechtlich zu ahnden.²³ Die unlautere Werbung mittels Vortäuschung scheinbarer Gewinne sollte unterbunden werden, indem dem Verbraucher gesetzlich eingeräumt wurde, den Unternehmer beim Wort zu nehmen und die Leistung des mitgeteilten Gewinns zu verlangen.²⁴ Darin ist jedenfalls eine Haftung wegen „unerlaubter Handlung“ – im oben beschriebenen weitgefaßten Sinn des Art. 5 Nr. 3 EuGVÜ – zu sehen. Der Unternehmer wird für sein – in der Regel vorsätzlich abgegebenes²⁵ – täuschendes Versprechen „bestraft“, indem er gemäß § 661a BGB hierfür dem Verbraucher auf Erfüllung haftet.²⁶ Diese deliktische Qualifikation einer Klage aus Gewinnzusage wahr zugleich die Parallelität zu den Wettbewerbsachen,²⁷ die nach allgemeiner Auffassung unter den Gerichtsstand der „unerlaubten Handlung“ im Sinne des Art. 5 Nr. 3 EuGVÜ fallen.²⁸

NJW 1988, S. 3088, 3089 m. Anm. Geimer; vgl. auch BGH (D) 11. 2. 1988 - I ZR 201/86, NJW 1988, S. 1466, 1467.

¹⁹ Vgl. Lorenz aaO, S. 3306, 3308.

²⁰ Vgl. Begründung der Bundesregierung zu dem Entwurf eines Gesetzes über Fernabsatzverträge und andere Fragen des Verbraucherrechts sowie zur Umstellung von Vorschriften auf Euro (im folgenden: Begründung Fernabsatzgesetz), BT-Drucks. 14/2658, S. 48 f., Gegenäußerung der Bundesregierung zu der Stellungnahme des Bundesrates (im folgenden: Gegenäußerung), BT-Drucks. 14/2920, S. 15; Lorenz aaO S. 3306 m.w.N.

²¹ Lorenz, IPRax 2002, S. 192.

²² Richtlinie 97/7/EG des Europäischen Parlaments und des Rates vom 20. 5. 1997 über den Verbraucherschutz bei Vertragsschlüssen im Fernabsatz (ABl. L 144, S. 19).

²³ Lorenz, NJW 2000, S. 3306; vgl. auch Beschlussempfehlung und Bericht des Rechtsausschusses zu dem vorgenannten Gesetzentwurf (im folgenden: Bericht), BT-Drucks. 14/3195, S. 33 f.; Ring aaO, Rn. 167-169.

²⁴ Begründung Fernabsatzgesetz aaO, S. 49; Bericht aaO, S. 34.

²⁵ Vgl. Lorenz aaO, S. 3306, 3307.

²⁶ Vgl. Gegenäußerung aaO; Rauscher/Schülke, EuLF 2000/01 (D), S. 334, 337.

²⁷ Vgl. Lorenz aaO, S. 3308 und 3309; s. aber dagegen ders. IPRax 2002, S. 192, 194 f.; Rauscher/Schülke aaO.

²⁸ Vgl. BGH (D) 11. 2. 1988 aaO; Gottwald, in: MünchKomm ZPO, 2. Aufl., 2001, Schlussanhang IZPR Art. 5 EuGVÜ Rn. 37; Wiczorek/Schütze/Hausmann, ZPO, 3. Aufl., 1994, Anh. § 40 Art. 5 EuGVÜ Rn. 51; Albers aaO, Rn. 17; Hüfstege, in: Thomas/Putzo, ZPO, 22. Aufl., 1999, Art. 5 EuGVÜ Rn. 10; Auer, in: Bülow/Böckstiegel/Geimer/Schütze, Der internationale Rechtsverkehr in Zivil- und Handelssachen (Stand: Oktober 2001), Art. 5 EuGVÜ Rn. 100; Geimer/Schütze, Europäisches Zivilverfahrensrecht, 1997, Art. 5 EuGVÜ Rn. 151; Schlosser, EuGVÜ, 1996, Art. 5 Rn. 16; Kropholler, Europäisches Zivilprozessrecht, 6. Aufl., 1998, Art. 5 EuGVÜ Rn. 57; Lorenz, IPRax 2002, S. 192, 194.

¹⁶ Vgl. Lorenz, NJW 2000, S. 3305, 3307; Palandt/Sprau, BGB, 61. Aufl., 2002, § 661a Rn. 2; Ring, Fernabsatzgesetz 2002 Art. 2 Abs. 4 Rn. 172.

¹⁷ Vgl. EuGH 11. 7. 2002 – C-96/00 – Rudolf Gabriel, aaO, S. 2699.

¹⁸ St. Rspr. des EuGH. EuGH 11. 7. 2002 – C-96/00 – Rudolf Gabriel aaO; EuGH 27. 9. 1988 – 189/87 – Kalfelis, Slg. 1988, S. 5565, 5585 =

Der Anspruch aus Gewinnzusage wäre im übrigen auch dann dem Gerichtsstand der unerlaubten Handlung (Art. 5 Nr. 3 EuGVÜ) zuzuordnen, wenn es sich um einen gesetzlichen Fall der culpa in contrahendo handelte.²⁹

bb) Der gemäß Art. 5 Nr. 3 EuGVÜ maßgebliche Ort, „an dem das schädigende Ereignis eingetreten ist“, liegt sowohl an dem Ort, an dem der Schaden eingetreten ist, als auch an dem Ort des ursächlichen Geschehens.³⁰ Dementsprechend konnte die Beklagte an dem für den Wohnsitz der Klägerin zuständigen Gericht verklagt werden. Dort trat nämlich mit dem Empfang des scheinbaren Gewinnversprechens der Erfolg der unerlaubten Handlung (Art. 5 Nr. 3 EuGVÜ) ein.³¹

3. Einer Vorlage wegen der hier vorgenommenen Auslegung der Art. 13 und 5 Nr. 3 EuGVÜ nach Art. 2 f. des Protokolls vom 3. 6. 1971 bedarf es nicht. Zwar ist die Auslegungsfrage in der für den vorliegenden Rechtsstreit erheblichen Form noch nicht Gegenstand einer Entscheidung des Gerichtshofes gewesen. Eine Vorlage ist aber – ebenso wie im Falle des Art. 177 Abs. 3 EWG-Vertrag und des Art. 234 Abs. 3 EG-Vertrag – entbehrlich, wenn die richtige Anwendung des Gemeinschaftsrechts so offenkundig ist, daß für vernünftige Zweifel kein Raum bleibt.³² So liegt es hier. Die auf eine Gewinnzusage oder eine vergleichbare Mitteilung (§ 661a BGB) gestützte Klage ist in Anlehnung an die Urteile des Europäischen Gerichtshofs vom 11. 7. 2002 (aaO) und 17. 9. 2002 (aaO) dem internationalen Gerichtsstand für Verbrauchersachen (Art. 13 f. EuGVÜ) oder der unerlaubten Handlung (Art. 5 Nr. 3 EuGVÜ) zuzuordnen. Daß weder die eine noch die andere Vorschrift anwendbar ist und sich die Beklagte auf den allgemeinen Gerichtsstand des Art. 2 Abs. 1 EuGVÜ berufen könnte, hält der Senat im Hinblick auf die genannten Entscheidungen des Gerichtshofs für ausgeschlossen. Er ist davon überzeugt, daß die gleiche Gewißheit für die Gerichte der übrigen Vertragsstaaten und den Europäischen Gerichtshof selbst besteht.³³ (...)“

²⁹ Vgl. *Lorenz* aaO, S. 3307, 3309; EuGH 17. 9. 2002 – C-334/00 – *Tacco-mi*, Slg. 2002, I-0000 = EuLF 2002 (D), S. 306 = NJW 2002, S. 3159 f.

³⁰ EuGH 30. 11. 1976 – 21/76 – *Bier*, Slg. 1976, S. 1735, 1746 f. und vom 7. 3. 1995 – C-68/93 – *Shevill*, Slg. 1995, S. 415, 460; *Gottwald* aaO, Rn. 42; *Auer* aaO, Rn. 107.

³¹ Vgl. *Rauscher/Schülke* aaO, S. 338; *Lorenz*, NJW 2000, S. 3308, 3309.

³² EuGH 6. 10. 1982 – 283/81 – *C.I.L.F.I.T.*, Slg. 1982, S. 3415; BVerfG NJW 1988, S. 1456; BGHZ 109, S. 29, 35; BGH (D) 12. 5. 1993 – VIII ZR 110/92, BGHR EGÜbk Art. 6 Nr. 3 Zuständigkeit 1.

³³ Vgl. EuGH, BVerfG und BGHZ aaO.