REPORT FOR THE HEARING
delivered in Case 313/85 *

I — Facts and procedure

1. By written agreement of 28 December 1956, Iveco Fiat granted Van Hool an exclusive concession within the territory of the Benelux States to construct Fiat chassis for coaches and buses, to assemble Fiat mechanical units in coaches, buses and industrial vehicles, and to sell Fiat spare parts for those three kinds of vehicle.

On 1 January 1958 Iveco Fiat and Van Hool concluded another agreement granting Van Hool exclusive rights to sell Fiat industrial vehicles within the territory of the Benelux States. That agreement was taken over, at least as regards its essential terms, as from 30 December 1961 by Catrabel, a newly created company.

2. Article 9 of the 1956 agreement stipulated that the latter was to be valid from 1 January 1957 until 31 December 1957 and that its renewal was to be subject to written confirmation by Fiat. Article 16 of the 1958 agreement contains a similar clause. The 1956 agreement was subsequently renewed in writing from year to year until 31 December 1961. Notwithstanding the fact that it was not expressly renewed after 1961, the parties continued to maintain business relations for 20 years. As a result of certain disagreements between the two companies in 1981, Iveco Fiat broke off business relations with Van Hool as from 1 January 1982.

3. Article 10 of the 1956 agreement contains a clause on the choice of court according to which only the Turin district court is to have jurisdiction, under Italian law, in the event of a dispute. A similar clause is set out in Article 18 of the 1958 agreement.

4. In proceedings instituted before the Tribunal de Commerce [Commercial Court] Malines, by Van Hool, Iveco Fiat objected that that court lacked jurisdiction on the ground that the jurisdiction clause was also applicable to contractual relations between the parties after the expiry of the original agreement concluded in 1956.

By decision of 6 July 1983 the court declared that it had jurisdiction on the ground that the conditions governing the validity of jurisdiction agreements, laid down by the first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention') had not been satisfied. That decision was upheld by judgment of 15 February 1984 of the cour d'appel [Appeal Court] of Antwerp.

5. Iveco Fiat lodged an appeal against that judgment with the Belgian Court of Cassation, which, by order of 4 October 1985, decided to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

Are the requirements of Article 17 of the Convention of 27 September 1968 satisfied by a written agreement which contains a jurisdiction clause but whose expiry date has passed where that agreement has continued to serve as the legal basis for the contractual relations between the parties although the condition stipulating that the agreement

* Language of the Case: Dutch.

could be renewed only in writing was not fulfilled?

6. The order of the Belgian Court of Cassation was received at the Court Registry on 18 October 1985.

7. Pursuant to Article 5 of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968, and in accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted on 3 January 1986 by Iveco Fiat, the appellant in cassation, represented by Marc Willemart and François Xavier de Dorlodot, of the Brussels Bar; on 6 January 1986 by Van Hool, the respondent in cassation, represented by Aimé de Caluwé, of the Brussels Bar; on 10 January 1986 by the Commission of the European Communities, represented by Hendrik van Lier, a member of its Legal Department, assisted by Silvio Pieri, an Italian Official in service with the Commission under the exchange programme between national and Community public servants, and on 23 January 1986 by the United Kingdom, represented by B. E. McHenry, of the Treasury Solicitor's Department.

8. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

9. Pursuant to Article 95 (1) and (2) of the Rules of Procedure, the Court decided on 29 April 1986 to assign the case to the Fifth Chamber.

II — Written observations submitted to the Court

1. According to *Iveco Fiat*, scrutiny of Article 17 and of Mr B. Jenard's Report on the Convention (Official Journal 1979, C 59, p. 1) ('the Jenard Report') shows that agreement between the parties to confer jurisdiction is the essential factor and that the necessary formalities must ensure that such agreement exists. The need to avoid excessive formality in international commercial transactions is confirmed by the amended version of Article 17 set out in the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1978, L 304, p. 1), which provides that an agreement conferring jurisdiction may be concluded, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.

Consideration of the relevant case-law shows that the purpose of Article 17 is to ensure that agreements between the parties are clearly established and that writing does not constitute an essential procedural requirement on which the very existence of the agreement depends. Such a consensus between the parties existed in the 1956 agreement and, moreover, continued to govern business relations between them notwithstanding the fact that the agreement was not renewed in writing. By continuing to rely — expressly, moreover — on the 1956 agreement, the parties made it clear that they were in agreement that it should be retained together with all its terms, including the jurisdiction clause. The same considerations hold true for the 1958 agreement, on the assumption that it continued to govern relations between the parties to a certain extent.

The answer to the question submitted should therefore be as follows:

The first paragraph of Article 17 of the Convention must be interpreted as meaning that the formal requirement it lays down is satisfied where it is established that a written agreement was concluded which expressly confers jurisdiction on a court and which continued to govern relations between the parties until they came to an end, even though it was not renewed in writing.

2. According to *Van Hool*, it may be inferred from the question submitted by the Court of Cassation that there was a written agreement between the parties containing a clause on the choice of Court, that the agreement expired, that it was renewable only in writing, that it was not so renewed, and that the agreement constituted the legal basis for contractual relations between the parties.

Consideration of the wording of Article 17 makes it possible to state, for the purposes of the answer to be given to the question submitted, that when proceedings were instituted before the national court, there was no written agreement on the choice of court. Consideration of the relevant case-law may seem devoid of purpose in view of that fact that, in all the cases brought before the Court, there was a written document or a written reference to a jurisdiction clause. In the case of indirect or implied references to earlier correspondence, an express reference to a jurisdiction clause is required (judgment of 14 December 1976 in Case 24/76 *Salotti* [1976] ECR 1831). In its judgment of 14 July 1983 in Case 201/82 (*Gerling* [1983] ECR 2503) concerning a jurisdiction clause stipulated by a policy holder to be for his benefit and for the benefit of a third party, the Court held that the condition as to writing had to be satisfied and the consent of the insurer in that respect had to be clearly manifested. In its judgment of 11 July 1985 in Case 221/84 (*Berghöfer* [1985] ECR 2699), the Court held that, in the case of an oral agreement conferring jurisdiction, written confirmation must have been transmitted by one of the parties to the other without objection by the latter. In this case, it is clear that the parties have not stipulated a jurisdiction clause, since the clause inserted in the agreement was not renewed after 1961; moreover, since then, the parties no longer confirmed the agreement in writing and, logically, the other party did not receive notification of such an agreement.

According to the relevant case-law, the purpose of the conditions of validity referred to in Article 17 is to ensure that the consensus between the parties is in fact established and is clearly and precisely demonstrated. The formal requirements, namely that the agreement should be in writing or that an oral agreement should be evidenced in writing, which are proof of consensus are not fulfilled in this case.

A distinction should be drawn between tacit renewal of an agreement and the *de facto* maintenance of the agreement. In the case of tacit renewal, the agreement is maintained with the terms that were previously in force. This case, where renewal could only be in writing, is concerned with the *de facto* maintenance of an agreement which is governed by the national law and which cannot be treated as a written reference for the purposes of Article 17.

Van Hool therefore suggests that the question should be answered as follows:

The condition referred to in Article 17 is not fulfilled where the parties pursue relations on a *de facto* basis, even where a clause previously conferred jurisdiction on a given court. These conditions are fulfilled only in so far as relations between the parties were tacitly renewed in the technical sense.

3. The *United Kingdom* recalls that the order for reference and the cour d'appel's judgment indicate clearly that the 1956 and 1958 agreements embodied an express jurisdiction clause, and that the parties continued to pursue their business relations on the legal basis of those agreements, notwithstanding the fact that neither agreement had been extended in writing, which was an express term of both agreements.

There is no doubt that the jurisdiction clauses contained in the agreements concluded in 1956 and 1958 satisfy the formal requirements of Article 17 since the consent of both parties can be effectively established. However, the Court of Cassation is concerned with the question whether an agreement concluded in writing continues to bind the parties when they have continued to apply and implement the agreement beyond the express date of its expiry. The answer is not provided by Article 17 of the Convention, which does not govern the formation and expiry or discharge of agreements, but falls to be determined under the particular law which applies to the agreement.

The question whether a third party may rely on a clause conferring jurisdiction which is made for his benefit (see the judgment of 14 July 1983 in Case 201/82, cited above) must be considered in the light of national law, and not Article 17. Similarly, the validity of an assignment to a third party of an agreement which contains a jurisdiction clause is a matter for the relevant national law (judgment of 19 June 1984 in Case 71/83 *Tilly Russ* [1984] ECR 2417).

The jurisdiction clause in the 1956 and 1958 agreements did satisfy the formal requirements of Article 17. If, as a matter of national law, those agreements could be deemed not to have expired, to construe Article 17 so as to invalidate the jurisdiction clause would infringe the principle of good faith in the case of the party relying on that clause.

The answer to the question submitted for a preliminary ruling should therefore be as follows:

The requirements of Article 17 of the 1968 Convention are satisfied by a written agreement which contains a jurisdiction clause even where the expressed expiry date of the agreement has passed, provided that by virtue of the relevant national law the provisions of the agreement continue to be binding on the parties.

4. The *Commission* states that, according to the Jenard Report, there must be true agreement between the parties to confer jurisdiction if the jurisdiction clause is to be valid. In order to ensure legal certainty, some formal requirements should be expressly prescribed but excessive formality in commercial matters should be avoided.

The Court has always interpreted Article 17 autonomously and in accordance with Community law, by reference to the objectives and the scheme of the Convention and the general principles recognized by national laws. The Court preferred a fairly broad interpretation to a strict and literal interpretation. Admittedly, in its judgment of 14 December 1976 in Case 24/76, the Court held that consensus between the parties must be clearly and precisely demonstrated. However, in another judgment given on the same date in Case 25/76 (*Segoura* [1976] ECR 1851), it acknowledged the validity of an oral juris-

diction clause not confirmed by a specific document in writing, in so far as the oral agreement came within the framework of a continuing trading relationship between the parties which was based on the general conditions of one of them. Similarly, in its judgment of 19 June 1984 in Case 71/83, cited above, concerning a bill of lading signed by the carrier alone, the Court recognized the validity of a jurisdiction clause provided that the bill of lading came within the framework of the continuing business relationship between the shipper and the carrier, which was governed by general conditions containing the jurisdiction clause drawn up by the author of the written confirmation, in that case the carrier. In those judgments, the Court considered that it would be contrary to good faith to deny the existence of a jurisdiction agreement.

The new version of Article 17 in the Convention of Accession of 9 October 1978 is based, as is clear from Professor P. Schlosser's Report on that Convention (Official Journal 1979, C 59, p. 71), on the need, already taken into account in judicial decisions, to comply with the formal requirements peculiar to international trade. Although that Convention has not yet come into force, it should be used as a basis for the interpretation of Article 17 in order to ensure, in the interests of legal certainty, a smooth transition from one Convention to the other.

It is clear from the documents before the Court that after the expiry of the original written agreement, the parties concluded an oral agreement that was different from and independent of the original agreement. The jurisdiction clause in the first agreement was therefore rendered nugatory. However, the Court should confine its attention to the question referred to it, which is based on the hypothesis that the original agreement, although it had expired and had not been renewed in writing, continued to serve as the legal basis for contractual relations between the parties.

The first possibility which must be considered is that the parties have agreed orally to amend the clause in the original agreement which provides for the renewal thereof in writing, and have subsequently agreed to extend the validity of the original agreement. The written jurisdiction clause in the first agreement satisfied the requirements of Article 17. In the event of the extension or renewal of the original agreement, whether orally or in writing, that clause remains valid. The meaning and purpose of Article 17, namely to ensure the existence of consent and to parry the effects of contractual terms which may pass unnoticed, whilst avoiding excessive formality which is contrary to commercial practice, are adhered to in so far as the parties have renewed the original agreement with all its terms, including the jurisdiction clause.

The possibility of renewing orally or tacitly an agreement which stipulates that it may be extended or renewed only in writing depends on the relative importance attached to the principles of freedom of contract and '*pacta sunt servanda*'. That is a matter for the national courts to decide since the Convention contains procedural, not substantive rules of law.

A second possibility which may be considered is that an agreement which has expired without being duly renewed serves

as the legal basis for contractual relations between the parties, is maintained by them as a *de facto* agreement or is used by them as a framework agreement. The third eventuality corresponds to a long-term, continuing trading relationship governed by general conditions, including a jurisdiction clause, which were approved in writing when they were applied for the first time. According to the relevant case-law, the jurisdiction clause continues to be applicable in contractual relations between the parties, notwithstanding the expiry of the original agreement and the absence of fresh approval or confirmation in writing. However, in the event of the conclusion of a new oral agreement, which is independent of the original agreement, the jurisdiction clause may no longer be relied upon since the formal requirements of Article 17 are not fulfilled.

Accordingly, the Commission suggests that the question referred to the Court should be answered in the following manner:

If the parties have concluded in writing an agreement for a fixed period containing a jurisdiction clause and another clause stipulating that the agreement may only be renewed in writing, and if, following the expiry of the period for which the original agreement was concluded, the parties continued to apply it, without renewing it in writing, the jurisdiction clause fulfils the conditions of Article 17 of the Convention and continues to apply and to be valid in the following cases:

where the parties have agreed to amend the original framework agreement in such a way as to make it possible to renew it orally (provided that such amendment is lawful and valid under the national law governing the agreement) and have subsequently renewed the agreement orally;

where the parties have agreed to treat the original agreement as a framework agreement or as a set of general terms which apply automatically to any oral agreements concluded or to be concluded between the parties in connection with a continuing trading relationship.

F. Schockweiler
Judge-Rapporteur