OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 7 October 1986 *

Mr President,
Members of the Court,

1. Pursuant to Article 3 (1) of 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 (Official Journal 1978, L 304, p. 36) (hereinafter referred to as 'the Convention'), the Belgian Court of Cassation has asked the Court of Justice for an interpretation of Article 17 of the Convention in connection with a dispute concerning the enforcement of an agreement containing a clause conferring jurisdiction on a court of a State of which one of the parties is a national.

In the light of the documents before the Court, the facts of the case are as follows.

2. Two undertakings, Iveco Fiat SpA ('Fiat'), having its registered office in Turin (Italy) and Van Hool NV ('Van Hool'), having its registered office in Koningshooikt-Lier (Belgium), entered into a one-year agreement on 28 December 1956 with effect from 1 January 1957 whereby Fiat granted Van Hool exclusive rights within the territory of the Benelux States to assemble or sell certain Fiat motor vehicles or spare parts.

A further agreement was concluded on 1 January 1958 extending cooperation between the two undertakings to another category of Fiat motor vehicles. Van Hool's place in that relationship was subsequently taken, according to the terms of an agreement concluded on 30 December 1961, by another undertaking, Catrabel PVBA ('Catrabel'), whilst Van Hool continued to exercise the other exclusive rights resulting from the agreement concluded in December 1956.

Both the 1956 agreement (Article 10) and the 1958 agreement (Article 18) [1] contained a clause conferring exclusive jurisdiction in disputes arising from the performance of the agreements concerned on the Tribunale di Torino [the district court of Turin].

However — and this is where the problem arises — the agreement concluded in 1956 stipulated in Article 9 that in order to be renewed beyond 31 December 1957 'written confirmation by Fiat' was necessary, and a similar clause was to be found in Article 16 of the agreement concluded on 1 January 1958 granting the concession subsequently taken over by Catrabel.

Fiat wrote to Van Hool renewing the 1956 agreement for a period of one year until 31 December 1958, and continued to renew it from year to year until 31 December 1961.

From 1962 onwards, Fiat ceased to express in writing its intention to renew the agreement from year to year, although both undertakings continued to maintain business

* Translated from the Portuguese.

1 — And Article 14 of the agreement concluded with Catrabel in 1961.

relations until the end of 1981 on the terms, it would appear, of the original agreement.

However, as a result of certain disagreements which had arisen in the meantime, Fiat broke off business relations with Van Hool as from 1 January 1982.

Since business relations were broken off unilaterally, Van Hool brought an action against Fiat in the Tribunal de commerce [Commercial Court] of Malines, in Belgium. In those proceedings Fiat objected that the Tribunal de commerce lacked jurisdiction on the ground that, in Fiat's view, the clause conferring jurisdiction on the Turin court was applicable to the contractual relations which had continued to exist between the parties after 31 December 1961, the last year for which the agreement had been renewed in writing by Fiat. The Tribunal de commerce of Malines considered, however, that it had jurisdiction on the ground that the conditions laid down by the first paragraph of Article 17 of the Convention governing the validity of jurisdiction clauses had not been satisfied. That decision was later upheld by the cour d'appel [Appeal Court] of Antwerp, against whose judgment Fiat lodged an appeal with the Belgian Court of Cassation.

The Court of Cassation decided to stay the proceedings until the Court of Justice of the European Communities 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 continued to serve as the legal basis for the contractual relations between the parties although the condition stipulating that the agreement could be renewed only in writing was not fulfilled?'

3. The first paragraph of Article 17 of the Convention provides that 'if the parties . . . have . . . agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction'.

According to that article, however, the agreement conferring jurisdiction must be *in writing* or *evidenced in writing.*

The origin of those formal requirements is of course, as was pointed out in the Jenard Report on the Convention (Official Journal 1979, C 59, p. 1) the fundamental concern 'to ensure legal certainty'.

The Court has already on several occasions clearly stated in its decisions the reasons for, and the meaning of, those requirements. The purpose of the conditions laid down in Article 17 for the validity of jursidiction clauses is to ensure that the parties 'have actually consented' to such a clause, which in addition derogates from the general rules for determining jurisdiction, and that their consent 'is clearly and precisely demonstrated'. [2]

In the words of Advocate General Capotorti (Opinion in *Estasis Salotti*) what is required is 'clear proof that the parties were *ad idem* on the clause specifying the court having jurisdiction'.

2 — Case 24/76 *Estasis Salotti* v *RÜWA* [1976] ECR 1831; Case 25/76 *Segoura* v *Bonakdarian* [1976] ECR 1851; Case 784/79 *Porta Leasing* v *Prestige International* [1980] ECR 1517; Case 201/82 *Gerling* v *Amministrazione del Tesoro dello Stato* [1983] ECR 2503; Case 71/83 *Tilly Russ* v *Nova* [1984] ECR 2417; judgment of 11 July 1985 in Case 221/84 *Berghoefer* v *ASA* [1985] ECR 2699.

For that reason, the Court has consistently held that the requirements set out in Article 17 governing the validity of jurisdiction clauses 'must be strictly construed'.

There is no doubt, as was also made clear in the Jenard Report, that the authors of the Convention were concerned to avoid 'excessive formality which is incompatible with commercial practice'.

Article 17 may thus be said to be the result of a compromise between the requirements of *legal certainty* and *commercial flexibility*, which, moreover, led to recognition of a mere oral agreement as valid if *evidenced in writing*.

In my view, however, those requirements are not of equal importance under the Convention. As is clear from the case-law of this Court, in any attempt to compromise between certainty and flexibility priority must be given to the former, inasmuch as the requirements of speed and facility in commercial practice cannot justify the acceptance of any doubts or ambiguities concerning the consent of the parties to the insertion in an agreement of a jurisdiction clause which derogates from the general criteria for determining jurisdiction set out in Articles 2, 5 and 6 of the Convention. 'The requirement of writing serves to draw the attention of the parties to the risks involved in the jurisdiction clause' (Opinion of Advocate General Mancini in Case 201/82 *Gerling* v *Amministrazione del Tesoro* [1983] ECR 2503 at p. 2521).

In some respects the difficulty here may be likened to a problem of linear programming, in which a variable factor — certainty — must be given *maximum effect* within the parameters of concern to ensure the normal development of business relations, in accordance with the criteria of current practice and the requirements of good faith.

In my view, that is the meaning of Article 17, having regard to its wording, although it might be construed differently if the new version of Article 17 had come into force, namely that contained 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 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. That version of Article 17 provides that an agreement conferring jurisdiction may be either 'in writing' or an oral agreement 'evidenced in writing' or, 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'.

In the light of that, it would also be possible to take the opposite approach to the one which I have adopted, recognizing the standards and requirements of commercial practice as the principal variable factor which is *restricted* in its development by the need to ensure an appropriate degree of legal certainty for the parties.

As matters stand, however, and as the new version of that article has not yet come into force, it is premature in my view to take that alternative approach.

Moreover, the approach which I have adopted strikes me as being the one which comes closest to an interpretation of the Convention which takes account, as the

Court has advocated,[3] of its *structure* and *objectives.*

I also believe that recognition of an oral agreement evidenced in writing is the essential feature of the concessions made in Article 17 of the Convention to flexibility in commercial practices with regard to jurisdiction clauses, and great stringency and caution must be exercised with the regard to the requirements relating to evidence of actual consent by the parties.

4. In the decisions to which I have referred, the Court laid down on several occasions the conditions in which jurisdiction clauses exhibiting certain characteristics must be regarded as valid for the purposes of Article 17 of the Convention.

However, there is an important factor which distinguishes this case from those in which the judgments referred to earlier were given, and which raises a fresh question that is still unresolved.

The question referred to the Court of Justice by the Belgian Court of Cassation is concerned — notwithstanding the terms in which it is couched — with the question whether a jurisdiction clause in a written agreement which has expired and, contrary to its terms, has not been renewed in writing, although the parties have continued to maintain normal business relations, satisfies the requirements of Article 17.

That raises the problem of the scope *ratione temporae* of the agreement containing the jurisdiction clause, which has not arisen in any of the previous cases.

Those cases were concerned with agreements which did not give rise to any questions relating to the existence of any clauses restricting their duration.

How then are the general principles referred to earlier to be applied to the question at issue?

5. It is indisputable that, in the case under consideration, the parties inserted in the original written agreement between them — without there being any risk of its passing unnoticed — a jurisdiction clause which clearly satisfied the formal requirements laid down in Article 17 of the Convention.

If that agreement had been concluded for an indeterminate period or had been properly renewed in writing in the stipulated manner, no problem would arise.

Moreover, the problem would be entirely different if the agreement did not contain a clause providing for renewal in writing and either made provision for tacit renewal or was silent as regards the form of renewal.

Nor would there be any problem as regards any dispute which might have arisen during the initial period of validity of the agreement or during any of the periods for which it was renewed in writing.

As the Court is aware, however, that is not the case. The validity of the jurisdiction clause was not called in question until the final breach occurred between the parties, that is to say the termination of business relations between them 20 years after the agreement was last renewed in writing.

There is no doubt as to the *existence* of a valid jurisdiction clause, but there is doubt

3 — Case 201/82 *Gerling* v *Amministrazione del Tesoro* [1983] ECR 2503 at p. 2515.

as to its *validity* at the time when a party sought to rely on it in legal proceedings.

Even if the problem had arisen after contractual relations between the parties had come to an end (as a result of a breach during the period of validity of the agreement, expiry of the stipulated period or any other cause), but still in connection with a dispute concerning the performance of the original agreement, there would not, in principle, be any particular difficulties to resolve. In that respect the question of which court has jurisdiction would naturally be covered by a jurisdiction clause (on the assumption that it was validly stipulated in accordance with Article 17) expressly adopted by the parties and intended to apply in any dispute concerning the performance of the agreement in which the clause was inserted. The validity of the clause naturally extends beyond that of the agreement or, to put it another way, continues to be valid after the expiry of the agreement. That possibility could arise even in the circumstances of this case. I believe, however, that it is not necessary to take that possibility into consideration in the answers to be given to the Court of Cassation since there is general agreement on the matter and the question submitted by the Belgian court may be taken as referring by implication only to disputes arising after the expiry of the written agreement.

The distinguishing feature of the case before the Court is undoubtedly the considerable period which elapsed after the original agreement was last renewed in writing and during which the parties continued to maintain business relations 'within the framework' of that agreement.

A further complication arises where, as in this case, there is no unanimity between the parties to the proceedings concerning the scope or the nature of those relations.

Admittedly, the Court of Cassation found in its judgment requesting a preliminary ruling that the original agreement 'has continued to serve as the *legal basis*[4] for the contractual relations between the parties'. But the wording — particularly in the context in which it is set, since the national court recognizes in the same question that the agreement has expired — is not unequivocal and is capable of supporting various interpretations.

On the other hand, although Fiat states, in its written observations, that 'business relations between the parties *continued to be governed*[4] by the said cooperation agreement', Van Hool maintains that, as from 31 December 1961, the parties continued to deal with one another merely on the basis of '*de facto* contractual cooperation', that is to say by applying rules differing from those laid down in writing in previous agreements, since some of the terms of those agreements (concerning the territorial limits of the concession and fixing the minimum purchase quotas, prices and means of payment) were amended subsequently.

Naturally, the parties endeavour to reinforce their respective standpoints by relying on facts and documents relating to the 'grey' period between the end of 1958 and the end of 1981. Fiat has produced the letter of 5 November 1968, the document dated 20 November 1968 and the note of 7 September 1983 addressed to the experts appointed by the Tribunal de commerce de Malines, all emanating from Van Hool, and also the agreements entered into with Catrabel which remained in force until

4 — Emphasis added.

1981. Van Hool has produced Fiat's letter of 27 March 1964.

6. It is not for the Court of Justice to take the place of the national court by fixing on the basis of facts concerning the conduct of the parties which it is for the national court to establish, the nature of the legal uncertainty between the last time the original agreement was renewed in writing and the termination of the business relations which the parties continued to maintain for a number of years thereafter.

Similarly, it is not for the Court to resolve the general question of whether the original agreement was valid following its last renewal in writing, or to state its views concerning the terms on which the agreement was validly concluded or otherwise.

As the United Kingdom and the Commission rightly point out in their written observations, those are matters which fall outside the ambit of Article 17 and, consequently, are not governed by its interpretation. They must be resolved by the national court in accordance with the law which is applicable to the agreement in the light of national rules on the conflict of laws.

It is the task of the Court of Justice, according to the circumstances of each case, to interpret Article 17 within its sphere of application, particularly in relation to the formal requirements which that provision lays down with regard to jurisdiction clauses, thereby making it possible to determine whether such clauses — and such clauses alone — are valid in the light of those requirements.

Having said that, however, it is necessary to see matters in their proper perspective: in view of the specific nature of the formal requirements laid down in Article 17 regarding jurisdiction clauses, it is necessary, in order to determine the validity of those clauses, to consider separately the other terms of the agreements in which those clauses are inserted.

The fate of jurisdiction clauses is not necessarily linked to that of the agreements in which they are inserted. That is the principle which may be elicited from the consistent case-law of the Court in this field.

For that reason, I would not go as far as the United Kingdom appears to in its written observations in these proceedings. The scope *ratione temporae* of a jurisdiction clause cannot be linked automatically to the continued existence of the agreement of which it forms part, on the assumption that that question 'can only be determined under the relevant national law'.

For instance, the competent court may decide that the original agreement was indisputably valid after it was last renewed and therefore constituted the 'legal basis' for business relations between the parties. That will not *necessarily* mean that the jurisdiction clause was still valid, in the light of the requirements in Article 17, as interpreted by the Court of Justice.

As a rule, this Court is bound by the nature of the Convention, which is based on the principle of direct jurisdiction, to provide an independent interpretation of its provisions in the light of its scheme and context. That is, moreover, as has already been observed (see the Opinion of Advocate General Capotorti in *Estasis Salotti* [1976] ECR 1831 at p. 1845 and *Segoura* [1976] ECR 1851 at p. 1867), a necessary condition in order to ensure that the Convention is applied uniformly in the various Contracting States

and, consequently, in order to ensure equal treatment of natural and legal persons in the Community by the various national courts.

The question whether a jurisdiction clause complies with the formal requirements of Article 17 of the Convention is 'a matter of Community law for this Court in the last resort' (see the Opinion of Advocate General Sir Gordon Slynn in *Tilly Russ* [1984] ECR 2417 at p. 2438) and is to be resolved in accordance with the requirements of an 'interpretation subject to Community law'.

7. Before I reach my conclusion, I must rapidly recapitulate the essential facts of the case *sub judice*, as reflected in the question submitted by the Belgian Court of Cassation.

Two undertakings, each having its registered office in a different Member State of the Community, concluded at the end of 1956 a one-year written agreement in which one party assigned an exclusive concession to the other and which contained a clause providing for renewal of the agreement in writing and a clause conferring jurisdiction.

The agreement was last renewed in writing in 1961; however the parties continued to maintain normal business relations *on the basis or within the framework* (which had, it would appear, been amended) of the agreement previously concluded, until in 1981 one of the parties decided to bring those relations to an end, with the result that the other party was obliged to institute legal proceedings against the first party.

8. That statement of the essential facts which are set out in the documents before the Court (and in particular in the judgment of the Court of Cassation) does not, as I said earlier, dispel certain doubts or ambiguities concerning the facts of the case. Allow me, however, in the light of the considerations which I have set forth, to consider two possibilities and to draw symmetrical conclusions from them.

The first possibility is that the original agreement is regarded by the court having jurisdiction as legally valid and applicable even though it has not been renewed in writing; that is the sense in which the reference to the fact that it continued to serve as the 'legal basis' for the contractual relations between the parties is to be understood.

That possibility arises — as the Commission points out in its observations — where, for instance, the national law applicable to the agreement recognizes the validity of a mere oral revocation of the original clause providing for renewal of the original agreement in writing and the parties subsequently renew it either orally or tacitly. In that case, as the Commission concedes, the jurisdiction clause in the original agreement could be regarded simply as valid in every respect. That would be consistent with the requirements of flexibility in commercial practice also because oral renewal, which relates to the written agreement as a whole, would encompass all of its terms, which were undoubtedly inserted with the consent of the parties. Renewal of the agreement in writing would also have the same effect, without there being any need for express or specific confirmation of the jurisdiction clause.

However, I consider that, whilst that is the first element to be taken into account in the answer to be given to the question submitted to the Court, it is not the sole element and, perhaps for that reason, is not decisive.

Attention must be drawn to the following circumstances, which have been established or may have arisen in this case, and which should be taken into account over and above purely legal considerations in assessing the facts: the original agreement was no longer renewed in writing beyond a certain date; a considerable period (20 years) elapsed between the last date on which the agreement was renewed in writing and the termination of business relations between the parties; it is unclear to what extent the parties relied during that period on the original agreement, whether its terms were expressly relied upon as between the parties or in the proceedings or whether the agreement only continued to serve as a vague and general frame of reference; it may be true, as one of the parties alleged, that there was an agreement between them (Oral or written? How important was it?) to replace the requirement of written renewal with a system of tacit renewal; throughout the period in question the written terms of the agreement may have been amended in various ways without its being possible to ascertain the precise manner in which they were amended (orally or in writing, expressly or tacitly).

Hence, even on the assumption that the original agreement continued to be legally valid, there are doubts as to the manner in which it continued to serve as the 'legal basis' for relations between the parties.

In view of the circumstances, and notwithstanding the terms in which it was originally couched, the form of the jurisdiction clause does not constitute sufficient evidence of valid consent by the parties for the purposes of Article 17 of the Convention. It should be noted that, in the circumstances of this case, legal certainty requires two things: in the first place Article 17 of the Convention requires an 'agreement in writing or . . . oral agreement evidenced in writing', which must be strictly interpreted by the Court, and secondly the agreement concluded between the appellant and the respondent in the main proceedings requires renewal to be confirmed in writing. In those circumstances, a rigorous assessment is essential in determining whether the formal requirements for the validity of the jurisdiction clause are satisfied.

The second possibility is that the original agreement is not regarded as valid and applicable (and may not therefore be relied upon as it stands against either of the parties) under the applicable national law, but continues to serve as a legal framework for business relations between the parties, with the result that it may be said, for instance, to the extent to which the applicable national law permits them to do so, that the parties accept the agreement as a set of general conditions governing current business relations between them and any oral agreements which they may make.

The result is that if the parties actually rely upon that agreement, whether in legal proceedings or otherwise, and comply with its terms, which they originally stipulated in writing freely and in full knowledge of the facts, they can no longer seriously maintain that they were unaware of those terms, and it would thus be contrary to the principle of *good faith* if one of the parties were able to invoke the requirements of Article 17 in order to escape the application of a jurisdiction clause (with regard to the principle of good faith in this area, I would refer to the case-law cited earlier).

That second possibility assumes quite a different form if the national court finds, in the light of national legislation interpreted

and applied by it in the specific circumstances of the case, that the agreement ceased to have any force after the expiry of the period for which it was last renewed in writing.

The agreement before the Court would then be entirely distinct from the agreement that preceded it; it would be based on an oral or tacit agreement and might or might not be in conformity with national law but, in any event, would be incapable of satisfying the requirements of Article 17 of the Convention (even on the assumption that the terms of the two agreements are identical), not being evidenced in writing.

If it were otherwise, there would be a risk (as in the case of the first possibility) of recognizing as valid for the purposes of Article 17 what is no more than an implied reference to a written agreement which was concluded earlier (and has in this case expired); this the Court has refused to do, albeit in another context (see the judgment in *Salotti* [1976] ECR 1831 at p. 1842).

9. In conclusion, therefore, I suggest that the Court of Justice answer the question submitted to it for a preliminary ruling by the Belgian Court of Cassation as follows:

'A jurisdiction clause validly inserted in a written agreement which continued to serve as the legal basis for relations between the parties after the period of validity of the agreement had expired because the condition stipulating that the agreement could be renewed only in writing was not fulfilled must be deemed to be in conformity with the requirements of the first paragraph of Article 17 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters provided that:

•

the original agreement is still valid under the national law applicable, notwithstanding the fact that it has not been renewed in writing, and the conduct of the parties does not support the conclusion that they ceased to regard it as a frame of reference for business relations between them so as to remove or seriously reduce the scope of the original guarantees concerning their consent to the insertion of the jurisdiction clause;

the original agreement, although it is deemed to have expired under the national law applicable, continued to serve in practice as a set of general conditions and as a legal frame of reference for the parties in current business relations between them, with the result that it would be contrary to the principle of good faith for either of them to challenge the application of the jurisdiction clause'.