4. Article 17 of the Convention of 27 September 1968 must be interpreted as meaning that the legislation of a Contracting State may not allow the validity of an agreement conferring jurisdiction to be called in question solely on the ground that the language used is not that prescribed by that legislation.

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans O'Keeffe

Bosco Due Everling Chloros

Delivered in open court in Luxembourg on 24 June 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 20 MAY 1981

My Lords,

This case was referred to the Court by the Hof van Cassatie, Brussels by order dated 9 June 1980 in accordance with Article 3 of the Protocol of 3 June 1971 on the Interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgments ("the Convention"). It concerns three articles of the Convention: Articles 17 and 18, on prorogation of jurisdiction; and Article 22, on the consolidation of related actions.

The appellant in the proceedings before the court making the reference, Elefanten Schuh GmbH, is a company incorporated under German law. I refer to the appellant as "the German Company." It maintains its registered office in Kleve and is engaged in the shoe business. The respondent, Pierre Jacqmain, lives in Schoten in Belgium.

On 1 February 1970 the German Company engaged Mr Jacqmain as its commercial representative in Belgium

(other than the provinces of Luxembourg, Namur and Hainaut). This Court has not seen the contract of employment but it is common ground that this was written in German and that it provided that any disputes arising thereunder would fall within the exclusive jurisdiction of the courts of Kleve in Germany.

From some time in 1974 Mr Jacqmain's basic salary was paid by Elefant NV, the appellant's Belgian associate which I refer to as "the Belgian Company." From the end of 1974 the Belgian Company paid his commission also. From 1 September 1975, he worked under the authority, direction and control of the Belgian Company. In December 1975 he was dismissed without notice.

Mr Jacqmain then instituted proceedings against the German and the Belgian Companies in the Arbeidsrechtbank at Antwerp. He put his claim under Belgian law. He sought damages for the termination of his contract under Article 20 of the Royal Decree of 20 July 1955, (M.B. 3-4 October 1955) and compensation for the extinction of his franchise pursuant to Article 15 of the Law of 30 July 1963, (M.B. 7 August 1963) together with cost of living increases, interest, pay for annual and public holidays and reimbursement of telephone charges.

The German Company contended that the Arbeidsrechtbank was without jurisdiction, in view of the choice of forum clause in the contract of employment. The tribunal rejected this argument, basing its rejection on Articles 627 (9) and 630 of the Belgian Judicial Code. The former confers exclusive jurisdiction in labour disputes on the court or tribunal for the place in which the enterprise in question conducts its business or in which the relevant professional or commercial activity is conducted. The latter provides that any agreement contrary to Article 627 shall be null and void.

The Arbeidsrechtbank also rejected an argument, advanced by the Belgian Company, that Mr Jacqmain's contract was with the German Company alone. Citing many authorities, it took the view that under Belgian law any person under whose authority, direction or control an employee works, for reward, is treated as a party to his contract of employment; and concluded that in the circumstances of the case the German and the Belgian Companies shared liability jointly and severally. It awarded Mr Jacqmain damages amounting to BFR 3 064 160 plus interest, together with ancillary relief.

The two companies appealed to the Arbeidshof at Antwerp, where they relied again on the choice of forum clause in the contract of employment. That court accepted that Article 17 of the Convention authorizes the parties to a written contract to confer jurisdiction on a court of a Contracting State, even in the face of Articles 627 (9) and 630 of the Belgian Judicial Code. Nevertheless, it dismissed the companies' contention that the Belgian courts had no jurisdiction. It found that the written contract of employment between Mr Jacqmain and the appellant was void

because it did not comply with Articles 5 and 10 of a Decree made by the Cultural Council of the Dutch-speaking Community governing the use of languages on 19 July 1973. Article 5 provides that employers of any persons working in the Dutch-speaking areas of Belgium shall use the Dutch language in all documents addressed to their staff or prescribed by law (including, it seems, contracts of employment). Article 10 provides that any document which fails to comply with the foregoing provisions shall be null and void. On the substance of the case, the court upheld the judgment of the Arbeidsrechtbank, with only a minor modification.

The two companies sought to appeal further to the Hof van Cassatie. That court ruled that the Belgian Company's appeal was inadmissible because it was out of time.

The Hof van Cassatie was of the opinion, in favour of the German Company, that a clause in a contract whereby the parties agree to submit disputes to a particular court could not be affected by rules adopted by a Member State concerning relations between employers and employees, since Article 17 of the Convention of 27 September 1968 applied in a uniform manner in all Contracting States.

It was, however, contended on behalf of Mr Jacqmain that the Arbeidsrechtbank at Antwerp had jurisdiction under Article 18 of the Convention because the appellant had entered an appearance before that tribunal for the purpose of making submissions both on jurisdiction and on the substance of the case.

Furthermore, Mr Jacqmain's representative questioned whether it was open to the German Company to invoke the choice of forum clause, since the proceedings were originally instituted against two companies, one of which (the Belgian Company) was not a party to the contract in which that clause was contained. It was suggested that, since the proceedings against the Belgian Company were admissible, Mr Jacqmain could rely, as against the German company, on Article 22 of the Convention. This envisages that whenever related actions are brought in courts of different Contracting States, any court other than the one first seised may decline jurisdiction if the law of its own state permits the consolidation of related actions and the court first seised has jurisdiction over both actions. Belgian law, specifically Articles 566 and 634 of the Judicial Code, permits the consolidation of related actions.

In the light of the issues raised the Hof van Cassatie referred to this Court six questions. The *first* reads as follows:

"1. (a) Is Article 18 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applicable if the parties have agreed to confer jurisdiction on a court within the meaning of Article 17?"

Articles 17 and 18, so far as relevant to this case read as follows:

"17. If the parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, 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 particular legal relationship, that court or those courts shall have exclusive jurisdiction.

Agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16."

"18. Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16."

The Commission and the Government of the United Kingdom, contend in their observations to this Court, that this question must be answered in the affirmative. I am of the same opinion.

It seems to me that the opening words of Article 18 "apart from" in the English version, "outre les cas" in the French version, clearly indicate that a basis of jurisdiction is being established by the Article which is additional to those derived from the provisions of the Convention. It is not limited to situations where jurisdiction is not otherwise derived from the Convention. The German and Italian versions I believe to give the same indication.

The jurisdiction established by Article 18 is stated not to apply where another court has exclusive jurisdiction under Article 16. There is no such express reservation in respect of Article 17 and I can see no reason to imply one. One would not expect Articles 17 and 18 to be mutually exclusive and in the alternative, since they represent two ways in which a party may consent to jurisdiction, the one by contract, the other by the act of entering an appearance.

That this is the right approach to the interpretation of the Convention may, as is suggested in the observations submitted to the Court, receive support from the fact that, in a number of bilateral conventions between Member States which are specified in the observations, it is assumed or accepted that the entry of appearance by a Defendant may confer jurisdiction even where the parties have agreed to submit their disputes to another forum. It is my understanding that this principle is also accepted in the national laws of many, if not all, of the Member States.

The *second* question posed by the Hof van Cassatie reads as follows:

"Is the rule on jurisdiction contained in Article 18 applicable if the defendant has not only contested jurisdiction but has in addition made submissions on the action itself?"

This question appears to arise from the fact, as I understand it to be, that in the Dutch, as in the German and the Italian,

versions the second sentence of Article 18 contains words to the same effect as in the English version, namely that jurisdiction is not conferred if appearance is entered "solely to contest the jurisdiction". These words would suggest that the defendant must have entered appearance for no other purpose than to contest the jurisdiction. If there is an additional, albeit a subsidiary purpose, then the first sentence of Article 18 continues to apply. On the other hand the French text reads "Cette règle n'est pas applicable si la comparution a pour objet de contester la compétence". There is no equivalent of the word "solely". I understand that the Irish text is to the same effect.

It can, of course, be argued that properly construed these words in the French version produce the same result and that the intention is that the appearance must be entered only to contest the jurisdiction. I am not satisfied that this is necessarily so.

This Court has already observed that the Brussels Convention must be interpreted having regard both to its principles and objectives and to its relationship with the EEC Treaty (see e.g. Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473 at p. 1484). Where there is doubt about the specific words used, and where there is or may be a divergence between the different versions of the Convention it is clearly right to have regard to the objects and purposes of the Convention.

It would seem to be contrary to the spirit and intention of the Convention to place difficulties in the way of litigants. Substantial difficulties can arise in practice if a defendant is limited to entering an appearance on the question of jurisdiction alone. If he fails on that issue, he may deprive himself of the chance of contesting the claim against him on the merits or even on other procedural grounds. He cannot rely on those, either, if proceedings for enforcement of the judgment against him are begun in the state where he is or where he has assets, since Article 28 of the Convention provides, subject to exceptions, that the jurisdiction of the court of the state in which judgment is given may not be reviewed. Moreover cases can arise in which the jurisdictional point is complex but the point on the merits is short. It would seem an unattractive result that a defendant who desires to contest the jurisdiction should be barred from raising a point on the merits which could speedily be dealt with if he failed on jurisdiction. This is particularly so in a case where a defendant desires to secure property seised or threatened with seizure, not least in the commercial field. It is no less unattractive a result that a court which concludes in the course of argument that it does not have jurisdiction should be required to take jurisdiction merely because a defendant has, in entering an appearance, raised a subsidiary point on the merits or some other procedural objection.

English law takes a stricter view on this question, as I understand it, than the law

of certain other Contracting States where a defendant is not necessarily to be taken to have submitted to the jurisdiction merely because he advances arguments on the merits. There must be knowingly a conscious acceptance of jurisdiction. I refer to, without repeating, the extracts from commentaries included in the observations of the United Kingdom Government.

It is perhaps right to observe that the International Court of Justice took a similar view to that more generally adopted by Member States when it was called upon to decide, in accordance with general principles of law, whether the Iranian Government should be taken to have conferred jurisdiction on the Court by submitting to it for decision several questions which were not objections to its jurisdiction. The Court ruled that "the principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court" *(Anglo-Iranian Oil Company Case,* 1952 I.C.J. Rep. 89 at 113-4).

In my opinion the answer to the second question is that a court of a Contracting State does not obtain jurisdiction, by virtue of Article 18 of the Convention, if the defendant enters an appearance for the purpose of contesting that jurisdiction, but avails himself of the opportunity of raising a subsidiary point on the merits of the case. So long as the initial purpose is to protest the jurisdiction, the defendant does not forfeit the right to object by raising arguments on the merits in the alternative.

The Hof van Cassatie asks the Court to answer its *third* question only if the second is answered in the affirmative:

"If it is, must jurisdiction be contested *in limine litis*?"

On the one hand, it is clear that the Convention does not regulate matters of procedure. In principle, therefore, the *lex fori* must determine the stage and manner in which any plea is to be raised. M. Jenard made this point explicitly in his Report O. J. 1979, C. 59/1 at p. 38. Indeed, the Contracting States' laws on this point differ quite considerably. For instance, Article 854 of the Belgian Judicial Code, as I understand it, requires the defendant to take any objection to jurisdiction *in limine;* whereas the German Code of Civil Procedure enables him to take the objection at any stage before the first oral hearing. The Brussels Convention does not set out to harmonize such rules.

On the other hand, it must be acknowledged that the second sentence of Article 18, by its very wording, requires that the appearance be entered for the purpose of contesting the Court's jurisdiction. It cannot be maintained that the appearance was entered for that purpose when the jurisdiction was challenged after the appearance was made. Furthermore, a defendant who raises the plea at a late stage can scarcely

contend that his arguments, directed to the merits of the case, were subsidiary or alternative to the issue of jurisdiction. It follows, if my opinion on the second question be accepted, that such a defendant would forfeit his right to plead to the jurisdiction. He would be met with the objection that his previous appearance amounted to a voluntary submission.

These considerations are not difficult to reconcile. The second sentence of Article 18 presupposes, in my view, that the defendant's object in the entry of an appearance was to contest the jurisdiction. Accordingly the jurisdiction must be challenged no later than the date when the appearance is made. But it is for the *lex fori* to determine what constitutes an appearance.

The *fourth* and *fifth* questions posed by the Hof van Cassatie read as follows:

"(a) In application of Article 22 of the Convention can related actions which, had they been brought separately would have had to be brought before the courts of different Contracting States, be brought simultaneously before one of those courts, provided that the law of that court permits the consolidation of related actions and that court has jurisdiction over both actions?

(b) Is that also the case if the parties to one of the disputes which has given rise to the actions have agreed, in accordance with Article 17 of the Convention, that a court of another Contracting State is to have jurisdiction to settle that dispute?"

As the Government of the United Kingdom has observed, the wording of these questions gives rise to some difficulty. It is not merely that the first begins with the presumption that the actions, if brought separately, would have had to be brought in courts of different Contracting States, and ends with the presumption that a single court has jurisdiction over both actions. That obstacle could, perhaps, be overcome by reading the final proviso as a reference to national law which "permits the consolidation of related actions and thereby invests the court with jurisdiction over both actions". The central difficulty, to my mind, is the fact that both questions ask the Court whether Article 22 permits the assumption of jurisdiction in specified circumstances.

Article 22, however, is not concerned with the assumption of jurisdiction in related actions. For the rules on that subject one must refer to Article 6. Article 22 is concerned with the circumstances in which one court may stay proceedings or decline jurisdiction in favour of another, "the court first seised". It does not seem reasonable to infer from the wording of these questions that the Hof van Cassatie requires guidance on the circumstances in which it may stay proceedings or decline jurisdiction in favour of the Courts of Kleve, or any other "court first seised"; for nothing in the file suggests that the courts of any Contracting State other than Belgium have been seised of the case: rather the contrary.

While this Court is, of course, free to read questions with such modifications of wording as may be necessary to enable it to perform its function, it seems to me that it would not be appropriate

in the present case to consider the relationship between Articles 6 and 17 of the Convention, since Article 6 is not referred to in the questions. In these circumstances it seems to me that the right course is to say that the fourth and fifth questions call for no answer in this case.

By its *final* question the Hof van Cassatie asks:

"Does it conflict with Article 17 of the Convention to rule that an agreement conferring jurisdiction on a court is void if the document in which the agreement is contained is not drawn up in the language which is prescribed by the law of the Contracting State upon penalty of nullity and if the court of the State before which the agreement is relied upon is bound by that law to declare the document to be void of its own motion?"

The Court has already made clear that Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of consensus which must be clearly and precisely demonstrated. It has also indicated certain criteria which may establish, or which are necessary to establish, that there has been an agreement in writing or evidenced by writing. (See e.g. Case 24/76 *Estassis Salotti* v *RÜWA* [1976] ECR 1831 and Case 25/76 *Galeries Segoura SPRL* v *Rahim Bonakdarian* [1976] ECR 1851.) In so far as conditions are prescribed in the Convention they must be interpreted independently of any particular national law. However, as was said by Mr Advocate General Capotorti in his opinion in Case 25/76 at p. 1868 "All this is, of course, without prejudice to national requirements in other respects, whether of form or substance, which do not come within the ambit of the Convention rules subject to Community interpretation". The question in the present case, as I see it, is which national law decides those other requirements as to whether there is a valid agreement.

One possibility is the national law of the forum in which proceedings are brought, being a forum other than that specified in writing upon which a defendant relies to challenge jurisdiction. As a general proposition it does not seem to me that that can be right. Such law may have no connection whatever with the agreement reached and the forum may have been chosen by a plaintiff simply because such national law would, if applied, render null the agreement relied upon. Another possibility is that the forum in which proceedings are brought should apply its own rules of private international law to choose the national law appropriate to determine the question. This clearly has more attraction since it seeks to choose a law which has a connection with the agreement alleged. It does, however, produce the result that different laws may be chosen by the courts of different Contracting States because of the different rules which they apply under their own conflict of laws rules. This is

contrary to that maximum degree of legal certainty for those engaged in civil and commercial transactions across the borders of Contracting States upon which M. Jenard lays emphasis in his report on the Convention. It is also contrary to the principle stated by Mr Advocate General Capotorti in the opinion cited previously namely that "it is clearly important that there should be uniform treatment in all Member States of private parties between whom there exist agreements assigning jurisdiction; this purpose would not be served if reference were made to this or that substantive law applicable to the form of instruments according to the private international law of each Member State" (page 1845).

The United Kingdom Government proposes a compromise solution — namely that if there is a separate agreement conferring jurisdiction, or an agreement conferring jurisdiction which is part of a wider contract, but which can be severed from it, then the court before which the question arises should decline jurisdiction so long as the formalities specified by Article 17 are satisfied. I find this difficult to accept partly because such an approach does not identify the national law which is to decide issues as to validity other than those subject to the formal rules set out in Article 17 itself. It also opens up questions which can be difficult, and as to which different courts might reach different opinions, as to whether the jurisdiction clause is "clearly severable". It leaves a residuary category where the jurisdiction clause is left to stand or fall with the vallidity of the contract as a whole, to be determined in accordance with the conflict of laws rules of the forum first seised of the question. This militates against that "principle of uniformity which the Convention seeks to establish" to which Mr Advocate General Capotorti refers in another context in his opinion in the *Segoura* case at page 1868.

In my opinion, having regard to the objects and purposes of the Convention, Article 17 is to be read as implicitly laying down the rule that where a particular forum is referred to in writing, in what is alleged to be, or to be evidence of, a valid agreement, the law of that forum must decide whether the agreement is valid. Only in this way can any principle of uniformity be satisfied.

I do not consider that this view is vitiated by an argument that it is anticipating the Convention on the Law Applicable to Contractual Obligations opened for signature on 19 June 1980 (OJ 1980, L 266/1) which provides in Article 8(1) that "the existence and the validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid", although that Convention is not dealing with the choice of jurisdiction clauses. Nor is the argument vitiated by the fact that it produces the same result as that set out in the draft of the Hague Convention on "for contractuel:" "pour toutes les questions non reglées par les dispositions de la présente Convention . . l'accord d'élection de for est régi par la loi interne de l'État du tribunal élu" (Actes et documents de la conférence de

droit international privé de la Haye 10e Session 1964 IV, p. 18).

A further question arises as to which court decides the validity of the agreement under the national law of the named forum. One possibility is that the court in which the question is raised should immediately refer the matter to the named forum for decision under its own national law. There are advantages in this but I do not consider that it is right. It seems to me that the court seised of the challenge of jurisdiction must itself decide the validity of the agreement (other than in relation to the provisions as to form specified in Article 17 itself) under the national law of the named forum. If it decides that under such law the agreement is valid it will, subject to jurisdiction being established in some other way under the Convention, refer the dispute at that stage. If it decides that the agreement is invalid it will continue to adjudicate upon the dispute.

It is to be noted that Article 27 of the Convention permits the non-recognition of a judgment if such recognition is contrary to public policy in the State in which recognition is sought. There is no reference to "ordre public" in that section of the Convention dealing with exclusive jurisdiction. It seems to me that the court seised of the question as to whether there is a valid agreement is not entitled to refuse to give effect to it if it decides that the agreement is valid under the domestic law of the forum named. Once the judgment has been given by the nominated forum "ordre public" may become relevant if the successful party seeks to enforce the judgment in another Contracting State, including the State in which the question was first raised; but it is not an issue to be raised at an earlier stage.

For these reasons I am of the opinion that the Hof van Cassatie's questions should be answered as follows:

1. (a) Article 18 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applies although the parties have agreed to confer jurisdiction on a court within the meaning of Article 17.

   (b) The rule on jurisdiction contained in Article 18 of the Convention applies whenever the defendant manifests by his appearance before the Court his submission to its jurisdiction. It is for the national court to determine as a question of fact whether the defendant has done so.

A defendant's act in advancing arguments on the substance of the action does not necessarily indicate that he has submitted to the jurisdiction, if these arguments are alternative to his primary submission that the court has no jurisdiction.

(c) To exclude the rule contained in the first sentence of Article 18 the Court must be satisfied that a defendant entered an appearance to contest the jurisdiction even if he adds submissions in the alternative. It is not sufficient that the defendant decides to protest the jurisdiction at a later stage. It is for national law to determine what constitutes an entry of appearance, what evidence establishes, and what procedure must be followed to establish, that the defendant did enter an appearance to contest the jurisdiction.

2. (a) ...

(b) ...

3. A court of one Contracting State is not entitled to disregard an agreement, satisfying the conditions of Article 17 and valid under the law of the State chosen for the forum, conferring exclusive jurisdiction in relation to a dispute on the courts of another Contracting State on the ground that such an agreement is void by the law of the first such State.