OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 17 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

1. In the present case the Court is called upon to resolve a question of interpretation of Article 17 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. I take the liberty of reminding the Court that the question is concerned with the article governing jurisdiction by consent: it covers the situation when 'the parties, one or more of whom is domiciled in a Contracting State, 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 connexion with a particular legal relationship, and confers exclusive jurisdiction on the court or courts designated provided that the agreement between the parties takes the form of an 'agreement in writing or ... an oral agreement confirmed in writing'. The meaning of this formal requirement is in fact the subject of the questions referred to the Court by the Bundesgerichtshof of the Federal Republic of Germany.

The parties in the main action, the German company RÜWA, as vendor, and the Italian company Estasis Salotti, as purchaser, had on 31 October 1969 concluded a sales contract in Milan on the vendor's letter-head, on the back of which were printed the general conditions of sale laid down by the company. There was no mention in the contract of those conditions and no reference to them; it stated that the purchaser was placing an order with the vendor for the 'machines offered, in accordance with your letter of 18 September 1969'. In fact, the letter of 18 September was sent with seven offers of sale, dated 11 September, each of which referred to the general conditions of sale printed at the back of the letter, but there was no corresponding reference in the letter.

Subsequently the purchaser refused to take delivery of the machines and the vendor brought proceedings against it before the German court designated in the jurisdiction clause contained in its general conditions of sale. The court, applying Articles 1341 and 1342 of the Italian civil code, which require specific acceptance in writing of printed clauses excluding jurisdiction, upheld the objection of lack of jurisdiction raised by the purchaser. The appeal court held that it was bound by paragraph 38 of the German code of civil procedure in determining the validity or otherwise of the assignment of jurisdiction relied upon by the vendor, and recognized the German court as having jurisdiction in the matter.

In further appeal proceedings, the Bundesgerichtshof referred the following questions for a ruling by the Court of Justice pursuant to Article 3 of the Protocol of 3 June 1971 on the interpretation of the Convention of 27 September 1968.

(1) Does an agreement assigning jurisdiction, which is included among general conditions of sale printed on the back of a contract signed by both parties, fulfil the requirement of a writing under the first paragraph of Article 17 of the Convention?
(2) In particular, is the requirement of a writing under the first paragraph of Article 17 of the Convention fulfilled if the parties expressly refer in the

1 — Translated from the Italian.

contract to a prior offer in writing in which reference was made to general conditions of sale including an agreement assigning jurisdiction and to which these conditions of sale were annexed?

2. The general question of the choice between an independent interpretation of the provisions of the Convention and reference to the substantive law applicable in accordance with the private international law of the court before which the matter is brought — to which attention was drawn by the Court of Justice in its judgment in *Industrie Tessili* v *Dunlop* — also arises in the present case. Form is, of course, only one aspect of a private agreement providing for the assignment of jurisdiction, and the connexion between the various aspects of the agreement becomes even more evident when the assignment of jurisdiction is the subject of only one of a group of clauses of the contract relating to questions of substance. This explains why, in the context of national law, it has been held by some authorities that the form of the agreement or of the clause assigning jurisdiction must be determined in accordance with the rule of private international law governing the form of contracts (which, in the majority of the States, is based on the principle *locus regit actum*). Does this view have any bearing on the question of interpretation which the Court now has to decide?

In my view it does not, for two reasons. In the first place, Article 17 of the Convention, which is concerned with the requirements which, in order to produce the effect desired by the parties, must be satisfied by the clause or the agreement assigning jurisdiction, is, in my view, strictly concerned with the procedural function proper to the Convention and does not prejudice in any way either such questions of substance as may be inherent in that expression of intent (capacity to act and any deficiencies vitiating the agreement), or the question of the form to be observed for the agreement of which the clause forms part. In other words, Article 17 does no more than lay down conditions required to produce the procedural effect of assigning jurisdiction. In the second place, it is clearly important that there should be uniform treatment, in all the 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. For this reason Article 17 of the Brussels Convention must be interpreted independently of national law.

3. The wording of Article 17 of the Brussels Convention closely resembles that of Article 3 (2) of the Germano-Belgian Convention of 30 June 1958, which came into force on 27 January 1961, an article which was in turn based on the rule in Article 2 of the Hague Convention of 15 April 1958 on the jurisdiction of the selected forum in international sales of goods.

As emphasized in the Jenard report on the Brussels Convention, insistence on writing was intended to ensure legal certainty. This means that what was required was clear proof that the parties were *ad idem* on the clause specifying the court having jurisdiction so as to avoid those uncertainties and conflicting views on the existence and terms of the contract in question which might arise if the principle were accepted that there should be no requirement whatever as to form.
Again according to the Jenard report, the provision in Article 17 ought to make it possible to enforce those requirements without creating such unneccessary formalities as to impede business practices. In fact, the authors of the Convention tried to ensure that, in the interests of trade, legal formalities should be rapid and flexible in operation, especially by enabling the contracting

parties to make a valid, even though oral, agreement on the assignment of jurisdiction, provided that it is 'confirmed in writing'. The procedure for confirmation is not specified in clear terms and may make interpretation somewhat difficult, especially when there is confirmation by only one of the parties but this goes beyond the ambit of the present case. I shall have occasion to return to this point in my opinion in Case 25/76.

The central issue raised by the present case is a different one; it is that of clauses for jurisdiction by consent drawn up in advance, in writing, for its own benefit by one of the contracting parties, and in most cases pre-printed on blanks or forms used for contracts or offers of contracts. We know that, in some cases, to avoid the possibility of those clauses being accepted by the other party without his being fully aware of the extent of his commitment, national regulations prescribe what might be called more substantial requirements as to form: not only must there be writing, a requirement which is obviously fulfilled when the clause has been drawn up in advance, especially when it is printed, but also a specific acceptance in writing. The Convention does not contain a provision of this kind. Moreover, the reservation by Luxembourg laying down that an agreement conferring jurisdiction shall be valid with respect to a person domiciled in that State only if that person has expressly and specifically so agreed (second paragraph of Article I of the Protocol annexed to the Convention) shows that specific acceptance in writing is not necessarily required by Article 17. This, again, is probably the result of anxiety not to obstruct business practice with requirements of form which might appear unnecessarily restrictive. But the Jenard report, quoting the report accompanying the Germano-Belgian Convention of 1958, contains a very significant reference to this subject, in a sentence stating that the object is to 'render ineffective clauses in contracts which are liable to escape notice'. And it adds: 'Account will, therefore, be taken of such clauses only when they are the subject of an agreement, which assumes the parties to be *ad idem*. Accordingly, clauses which appear on printed matter used for correspondence or invoices and which have not been accepted by the party against whom they are to be applied will be of no effect.

There can be no doubt that, since they refer to 'clauses which are liable to escape notice' the passages quoted refer, by implication, to clauses pre-determined by one of the parties.

In my opinion, the principle embodied in the Jenard report can be described as follows: although the contracting party who did not participate in laying down the clauses in advance has the opportunity to acquaint himself with them (by reading, for example, what is printed at the back of a form), this does not suffice; there must be proof of a consensus, that the parties are *ad idem*, which is obviously something more than merely knowing or being in a position to know the clauses which the other party has drafted for his own benefit. I have no doubt that this principle is a fair one: it not only accords with the general principle, on which Article 17 is based, that the weaker party should be protected but it also covers the extreme case where failure to comply with a requirement of form may indicate total absence of agreement.

In practice, this possibility is especially likely to exist where the pre-determined clauses are not contained in the text of the contract; I have already quoted the example which, incidentally, applies in the present case, of clauses printed on the back of the sheet on which the contract is written. In a case of that kind, the contract might contain a reference to the clauses but use of this technique of reference creates further difficulty. I make no attempt to give here an

exhaustive list of the ways in which the reference may be formulated, but shall confine myself to saying that it must be sufficiently clear to make it reasonable to assume that the party against whom the assignment of jurisdiction is being invoked has agreed to it.

Finally, in cases where the clause assigning jurisdiction has been formulated in advance and, in particular, when it is included in the general conditions of sale, the requirement of written form laid down by Article 17, which acts as a guarantee that there is a consensus, involves strict proof of the purchaser's agreement to the assignment of jurisdiction. This strictness is justified by the seriousness at the international level of removing one of the parties to the contract from the jurisdiction natural to him as indicated in Articles 2 and 5 of the Brussels Convention.

4. In the light of the general considerations set out above, I can now consider the two questions submitted by the Bundesgerichtshof.

To deal with the first question, I would say that when the clause assigning jurisdiction is included in the general conditions of sale printed on the back of the sheet containing the text of the contract, then in order to prevent the purchaser from having that clause set up against him without his being aware of it at the time when the contract is signed and, accordingly, to ensure that the parties have agreed upon such assignment, there must, in the body of the instrument signed at the foot by the purchaser, be a clear reference to such clause or at least to the general conditions of sale. The mere fact that a contract has been drawn up on a form on the back of which the vendor's pre-determined conditions, including the clause assigning jurisdiction, are printed does not amount to proof that the purchaser was in fact aware of the assignment clause or, even if he has become aware of it in some other way, that he intended to accept it.

Bearing in mind, therefore, that the written form required by Article 17 serves mainly to ensure that the agreement on jurisdiction by consent is a real one, it is impossible to regard the provision contained in that article as having been observed in the case under consideration. To take a different view would be to place at risk the principle of legal certainty which was the purpose of the rule in question. Nor, in my view, is it unnecessarily formal to require a clear and express reference if not specifically to the clause itself at least to the general conditions in which the assignment clause appears.

5. The second question is concerned with a more complicated situation, in which the parties expressly refer to a prior offer in which reference was made to the general conditions annexed thereto and containing the clause relating to the court having jurisdiction.

It is not possible to state with certainty whether an indirect reference to an assignment clause fulfils or does not fulfil the requirements of Article 17. It is a question for determination in each individual case whether the reference is made in sufficiently clear terms and in such a way as to meet objectively the requirement of certainty which the rule in question is intended to enforce.

In order, therefore, that the question put by the Bundesgerichtshof may be answered correctly, it is necessary to go more closely into the circumstances on which its question is based.

The letter of 18 September 1969, which accompanied the seven offers of sale and which was referred to in the contract of the following 31 October, did not in fact include any reference to the general conditions of sale which appeared at the back of the individual offers but merely

referred to the offers. These in turn referred to the conditions of sale printed at the back of each offer. Beginning, therefore, with the contract, there is a series of three references: by the contract to the letter, by the letter to the offers of sale, and by each offer to the general conditions of sale. And it must be borne in mind that the assignment clause was only one of the general conditions, that is to say, it was not particularly prominent.

Can such an indirect reference be regarded as sufficient to satisfy the requirements of form laid down in the first paragraph of Article 17?

If the point were to be decided by applying the municipal law of the States which subscribed to the Convention the answer might differ according to the national legal system involved. There can be no doubt that the assignment would not have been validly effected under Italian law because Article 1341, quoted above, of the Civil Code lays down that the general conditions of contract determined in advance by one of the parties cannot be set up against the other party unless it is the subject of a specific agreement in writing. It seems likely that the situation would be the same under French law as under Italian law. In fact, Article 48 of the new Code of Civil Procedure, which came into force on 1 January 1976, provides that any clause derogating from the rules of territorial jurisdiction shall be deemed not to be in writing unless it has been the subject of agreement between persons who have all contracted in their capacity as traders and unless it has been set out *in very clear terms* in the obligations undertaken by the party against whom it is being invoked.

On the other hand, the position in German law may enable the assignment clause to be invoked in pursuance of paragraph 38 of the Code of Civil Procedure, as interpreted in the present case by the Oberlandesgericht Köln whose decision is being contested in proceedings before the court which submitted the present questions.

I do not propose to comment on the question in respect of cases in which a contract of sale is entered into in the context of continuous business transactions between two undertakings, in the scope of which the application of a clause assigning jurisdiction is customary; this does not appear to apply in the present case. In my view, a method of reference so complex and, by its nature, generally so indirect as that revealed by the circumstances underlying the question referred by the Bundesgerichtshof cannot be regarded as sufficient to meet the requirements of form laid down in the first paragraph of Article 17 of the Brussels Convention. It is in fact incapable of satisfying the requirement of certainty in the purported agreement between the party which has laid down the general provisions of sale in advance and the party against whom the clause assigning jurisdiction is invoked.

6. My recommendation is therefore that the Court should reply in the following terms to the two questions which has been submitted by the Bundesgerichtshof.

(a) The requirement of confirmation in writing laid down in 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 is not fulfilled if the clause relating to jurisdiction by consent is

included in the conditions printed on the back of a contract signed by both parties unless there is a clear reference to those conditions in the body of the contract;

(b) Nor are the requirements of Article 71 sufficiently met by a reference in the contract to a prior document which, without itself containing the text of the general conditions of sale, which include the assignment clause, and without including a reference to that clause, does no more than refer to another document which contains a reference to the conditions of sale appearing on the back thereof.