OPINION OF ADVOCATE GENERAL LENZ
delivered on 8 March 1994 *

Mr President,
Members of the Court,

A — Introduction

1. In its request for a preliminary ruling, the Bundesgerichtshof (Federal Court of Justice) raises questions concerning the interpretation of two important provisions of the Brussels Convention, namely Article 5(1) on jurisdiction in respect of the place of performance and (possibly) Article 17 on jurisdiction agreements. According to the particulars given by the national court, those two provisions are applicable either in the 1978 version or in the (identical) 1982 version.

2. The questions arose in proceedings in which Stawa Metallbau GmbH seeks in the court for the place at which its registered office is located, Bielefeld, from a party to a contract with it, Custom Made Commercial Ltd, (part) payment for doors and windows of its manufacture.

3. Those articles were intended for a building complex in London. The price agreed was denominated in sterling. The contract on which the claim is based was the first one concluded between the parties. It was concluded orally in London on 6 May 1988 after negotiations conducted in English.

4. The plaintiff confirmed the conclusion of the contract by a letter of 9 May 1988 written in English. That letter contains the following passage:

'We refer to our meeting on May 6th and confirm your order for the manufacturing of windows and doors for the Project "Cranbrook Estate", subject to our terms of sale and supply.

...'.

5. That letter was accompanied for the first time by the plaintiff's general business condi-

* Original language: German.

tions written in German, Paragraph 8 of which reads as follows:

'Paragraph 8: Jurisdiction

Where the purchaser is a registered trader, a legal person governed by public law or a special entity governed by public law, the place of performance and jurisdiction for all disputes between the parties which may arise out of the contractual relationship shall be Bielefeld.'

6. The defendant did not dispute those business conditions.

7. The Bundesgerichtshof held that the contract in question was governed by the Uniform Law on the International Sale of Goods (the 'Uniform Law') forming the annex to the Hague Convention of 1 July 1964. [1] According to the first part of Article 59(1) of the Uniform Law, which is applicable in this case, the place of performance of the obligation to pay the purchase price is the seller's place of business or, if he does not have a place of business, his habitual residence.

8. As regards the procedure before the national courts, it should be observed that the plaintiff first obtained default judgment before the Landgericht (Regional Court) Bielefeld under which the defendant was ordered to pay it the sum at issue. The defendant applied to set aside that judgment, upon which the Landgericht, by interlocutory judgment, held the claim to be admissible. The Oberlandesgericht (Higher Regional Court) Hamm dismissed the defendant's appeal against that judgment. It based the jurisdiction of the German courts on Article 5(1) of the Brussels Convention, since it held that, under Article 59 of the Uniform Law, the plaintiff's head office was the place of performance within the meaning of that provision.

9. In an appeal on a point of law against the judgment of the Oberlandesgericht Hamm, the Bundesgerichtshof requested the Court of Justice for a preliminary ruling on the following questions:

'1. (a) Is the place of performance under Article 5(1) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters to be determined pursuant to the substantive law applicable to the obligation in issue under the conflicts rules of the court hearing the case where the case concerns a claim for payment of the price brought by the supplier against the customer under a contract for manufacture and supply, according to the conflicts rules of the court hearing the case that contract is governed by uniform sales law and under that law the place of performance of the obligation to pay the price is the place of establishment of the plaintiff supplier?

1 — *United Nations Treaty Series*, Vol. 834, p. 7.

(b) In the event that the Court of Justice replies in the negative to question 1(a):

How is the place of performance under Article 5(1) of the Convention to be determined in such a case?

2. In the event that according to the answers to questions 1(a) and (b) the German courts cannot derive jurisdiction from Article 5(1) of the Convention:

(a) Can a jurisdiction agreement validly be made under the third hypotheses in the second sentence of Article 17, first paragraph, of the Convention (in the 1978 version) where after the oral conclusion of a contract the supplier confirms the conclusion of the contract in writing and that written confirmation is accompanied for the first time by general business conditions containing a jurisdiction clause, the customer does not dispute the jurisdiction clause, there is no trade practice at the place where the customer is established to the effect that the absence of response to such a document is to be regarded as assent to the jurisdiction clause, the customer is not aware of any such trade practice and it is the first time that the parties have done business with each other?

(b) In the event that the Court of Justice replies in the affirmative to question 2(a):

Is it also true where the general business conditions containing the jurisdiction clause are in a language which the customer does not understand and is not that in which the contract was negotiated and concluded and where the written confirmation of the contract, written in the language in which the contract was negotiated and concluded, refers generally to the attached general business conditions but not specifically to the jurisdiction clause?

3. In the event that the Court of Justice replies in the affirmative to questions 2(a) and (b):

In relation to a jurisdiction clause contained in general business conditions which meets the requirements laid down in Article 17 of the Convention for a valid jurisdiction agreement, does Article 17 preclude further examination, under the national substantive law which is applicable in accordance with the

conflicts rules of the court hearing the case, of the question whether the jurisdiction clause is validly incorporated in the contract?'

B — Appraisal

The national court's first question

10. *I* — Article 5(1) of the Brussels Convention, which has to be considered as a result of the national court's first question, reads as follows:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question ...'.

11. As can clearly be seen from the national court's order, it wishes to clarify the concept contained in that provision of 'the place of performance of the obligation in question'. More precisely, it seeks to establish whether the meaning of that concept — 'the place of performance' — should be determined, in cases such as this, 'pursuant to the substantive law applicable to the obligation in issue under the conflicts rules of the court hearing the case'. If that question is answered in the negative, the national court wishes to know in what (other) way the place of performance should be determined.

12. *II* — In my view, in order to resolve those problems it is important to take a more detailed look at their context, namely Article 5(1) of the Convention — the source of the concept at issue — and its place in the Brussels Convention and the relevant case-law of the Court.

13. *(1)* As far as the aim of Article 5(1) is concerned, it appears from the Jenard Report [2] that the adoption of special rules of jurisdiction in the Convention was justified

'by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it'.

2 — OJ 1979 C 59, p. 1, penultimate paragraph of the right-hand column on p. 22.

14. With regard specifically to Article 5(1), the Jenard Report lists a number of examples showing the interest in defining the jurisdiction of the court for the place of performance in this way:

'The court for the place of performance of the obligation will be useful in proceedings for the recovery of fees: the creditor will have a choice between the courts of the State where the defendant is domiciled and the courts of another State within whose jurisdiction the services were provided, particularly where, according to the appropriate law, the obligation to pay must be performed where the services were provided. This forum can also be used where expert evidence or inquiries are required.' [3]

15. That interpretation of the aim of Article 5(1) has been expressly adopted by the Court. In the judgment in *Tessili* v *Dunlop*, [4] it is stated as follows with regard to the freedom of choice between courts having special jurisdiction under Article 5:

'This freedom of choice was introduced in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may be most conveniently called upon to take cognizance of the matter.' [5]

16. In other words, that is to say, those of Advocate General Mancini the court of the place of performance of the obligation in question 'has by virtue of its physical proximity to the relationship at issue the best chances of determining the nature of that relationship in the fullest possible knowledge of the facts of the case'. [6]

17. But in some instances the aim of Article 5(1) is interpreted differently.

18. Thus, for different reasons, the court of the place of performance is regarded as part of a system in which the advantages and risks with regard to jurisdiction are allocated fairly between the plaintiff and the defendant. [7] Proponents of this view seek in this way — with very different results — to turn Article 5(1) into a counterweight to the rule set out in Article 2. [8]

19. In this regard, I take the view that such a fair allocation of advantages and risks is a completely legitimate aim. Evidently, the authors of the Convention also took that

3 — Jenard Report, pp. 23 and 24 (see preceding footnote).

4 — Judgment in Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473.

5 — Paragraph 13.

6 — Opinion in Case 34/82 *Peters* v *ZNAV* [1983] ECR 1005, at 1010.

7 — For example, Schack, *Der Erfüllungsort im deutschen, ausländischen und internationalen Privat- und Zivilprozeßrecht*, Frankfurt, 1985, section 144 et seq. and at 207 and 218; Spellenberg, *Praxis des internationalen Privat- und Verfahrensrechts*, 1981, p. 75, at p. 76 et seq.

8 — See also Geimer, *Praxis des internationalen Privat- und Verfahrensrechts*, 1986, p. 85, at p. 87.

sort of consideration into account. [9] As the passages which I have just quoted from the Jenard Report show, however, the authors of the Convention started out from the premiss that Article 5(1) did in fact satisfy the principle of 'fair allocation', since it is justified on *objective* grounds connected with each individual 'dispute'. [10]

20. It may be doubted whether such an idea stands up to critical examination in the context of the whole of the scope of Article 5(1) . [11] However, what is involved is a fundamental legal-policy choice which the Court is bound to respect. As a result, the Court should not try to define the aim of Article 5(1) systematically on the basis of its own conception of what is 'fair'. Moreover, in this regard the Court takes a particularly cautious approach. It is only in the field of employment law, which is characterized by the particular social importance of employment contracts, that the Court has allowed considerations relating to the protection of the weaker party to be taken into account, and solely as a *complementary* consideration to its considerations as to the court which is the most appropriate to try the case by virtue of its physical proximity. [12]

21. Neither do I share the view that the justification for Article 5(1) is that the debtor should be answerable in the court for the place where he had to perform his obligation under the rules of the substantive law. [13] That view seems to be based on the idea that that potential defendant undertook, by contract, to perform an obligation at a particular place and should therefore also accept that he should be sued there. Against that argument I would point out that, in so far as it is prescribed by statute, the place of performance under the substantive law does not warrant that conclusion. Such a conclusion is, moreover, all the more questionable in cases such as the one now before the Court. The place of performance of obligations to make payment under the substantive law generally [14] determines merely the allocation of the risks and burdens connected with the transfer of money, the availability of which does not depend on the place of performance of the obligation in question. I cannot understand what that purely economic allocation of risks has to do with the question whether the debtor has to accept the creditor's suing him at a particular place.

22. *(2)* I would now turn to the concept of the place of performance, which, for the authors of the Convention, should, where Article 5(1) applies, yield a court physically proximate to the relationship at issue.

9 — See that which is stated in the Jenard Report (in the penultimate paragraph on p. 23; the report is cited in footnote 2) with regard to the question of the courts for the place where the obligation arose.

10 — See the judgment in Case C-26/91 *Handte* [1992] ECR I-3967, paragraphs 11, 12 and 13.

11 — See Schack, loc. cit., sections 146 and 353.

12 — Cf. the following judgments relating to facts which took place before the Convention was amended by the San Sebastian Convention (OJ 1989 L 285): Case 133/81 *Ivenel* v *Schwab* [1982] ECR 1891, paragraph 16, Case 32/88 *Six Constructions* v *Humbert* [1989] ECR 341, paragraph 14 in conjunction with paragraph 13, and Case C-125/92 *Mulox* v *Geels* [1993] ECR I-4075, paragraph 18.

13 — Geimer/Schütze, *Internationale Urteilsanerkennung*, Vol. I, Part I, Munich, 1983, p. 553.

14 — German law, which distinguishes between questions relating to the place of performance and questions relating to which party is to bear the risk, is an exception in this respect: see Article 270 of the *Bürgerliches Gesetzbuch* (Civil Code), especially Paragraph 4.

23. The concept of the place of performance originates in the *substantive law*.

24. In this sphere, *performance* constitutes an act by which the obligation due is fulfilled vis-à-vis the creditor, thus extinguishing his claim. If that claim is based on a contract — and it is only then that it can be covered by Article 5(1) —, the word 'performance' also means that one of the contractual objectives defined by the parties has been achieved, at any event in the case of a claim relating to one of the two principal obligations (exchanged).

25. It might therefore be inferred from this that the *place of performance*, which is the spatial dimension of performance, is the place where the creditor's claim is extinguished by the debtor's having performed the obligation required of him and, as regards the principal obligations, the place where the aim of the contract is wholly or partly achieved.

26. However, a two-fold reservation must be entered with regard to that conclusion. First, it does not accurately mirror the aim of the substantive provisions relating to the place of performance. Not only do those provisions have, in the absence of agreement, to crystallize the parties' obligations, they must also demarcate the areas for which each of the parties are responsible, in case irregularities should arise in carrying out the contract. [15] Depending on the contractual obligation concerned, the accent falls sometimes on the one objective, sometimes on the other. As regards the obligation to pay the contract price, determination of the place of performance serves, as I have already explained, principally to allocate risks. This is also true of the rule applicable in this case, set out in Article 59(1) of the Uniform Law, which provides that the purchaser's obligation to make payment is to be performed at the creditor's place of business. That rule is based on the view that the person from whom a sum of money is due has to bear the risk attaching to the payment operation. [16]

27. Secondly, it should be pointed out that, in demarcating the parties' responsibilities in this way, the place of the *act* of performance and the place at which performance *achieves its outcome* may differ. Article 19(2) of the Uniform Law will serve as an example. According to that provision, where the contract involves carriage of the goods and no other place for delivery has been agreed upon, delivery is to be effected by handing over the goods to the carrier for transmission to the buyer. The aim of the contract, which is to give the purchaser possession of the goods, is not achieved until he takes delivery of them. In contrast, the seller's responsibility comes to an end once he has duly handed the goods over to the carrier (see also Articles 97(1) and 96 of the Uniform Law).

15 — Schack, loc. cit. (footnote 7), section 10.

16 — Dölle, *Kommentar zum Einheitlichen Kaufrecht*, Munich, 1976, Article 59, section 7.

28. It should be added that, under the substantive law, each contractual obligation may have its own place of performance. It is therefore not precluded that, even if they are closely related economically, two obligations arising under a single contract may have different places of performance.

29. *(3)* The conclusion to be reached from what has been considered so far is that a forum based on a concept derived from the *substantive law* is justified on *procedural grounds*, namely a ground such as physical proximity to the relationship at issue.

30. In this case, that tension is particularly striking. It is sufficient to observe that Article 59(1) of the Uniform Law serves primarily to allocate the risk, in any event in the present circumstances relating to payment.

31. Before going into the case-law of the Court of Justice, I would profit by that observation in order to avoid a misunderstanding which might arise from a superficial reading of the national court's order.

32. More specifically, I consider that the combination of Article 5(1) of the Convention and Article 59(1) of the Uniform Law should not be regarded as giving rise to difficulty merely because it causes jurisdiction to be based on the plaintiff's place of business or residence. Such a reservation could be justified only if a species of general 'antipathy' to conferring jurisdiction on the plaintiff's courts were to be read into the Convention and became a criterion for correcting, where necessary, the outcome of an interpretation. Admittedly, it must be allowed that Article 2 of the Convention adopted the general rule that the courts of the defendant's domicile should have jurisdiction, whilst Article 3 ruled out the application of various national provisions conferring jurisdiction on the plaintiff's courts. [17] Neither can it be contested that, in view of the aforementioned articles, 'apart from the cases expressly provided for, the Convention appears clearly hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile'. [18] Yet such 'exceptions' to the conditions laid down by Article 5 et seq. are by no means rare. Articles 13 and 14 on jurisdiction over consumer contracts show this clearly. The court having jurisdiction under Article 5(3) (place where the harmful event occurred) may turn out, in the event, to be the court of the plaintiff's domicile. There is therefore no justification for inferring conclusions favouring a particular interpretation from the Convention's more or less marked 'antipathy' to the plaintiff's court.

33. The only cogent conclusion resulting from the system laid down by Articles 2, 3

17 — See the judgment in Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraph 16.

18 — Judgment in Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, paragraph 17.

and 5 et seq. seems to me to be that which the Court used as its starting point in the judgments in *Shearson Lehman Hutton* [19] and *Dumez France*, [20] namely that where an interpretation of Article 5 et seq. has the result that the court having jurisdiction is that of the plaintiff's domicile, particular care should be taken to see whether that interpretation accords with the aim of the provision in question. [21] Consequently, the Bundesgerichtshof is at the heart of the matter in so far as it bases its doubts on the fact that the combination of Article 5(1) of the Convention and Article 59(1) of the Uniform Law means that ' *as a general rule* the court's for the place where ... the plaintiff ... is established have jurisdiction'. [22]

34. *(4)* How has the Court reacted in decided cases to the structure of Article 5(1) as I have defined it?

35. *(a)* Already in its first two judgments on the Convention, which it delivered on 6 October 1976, the Court had to lay down the rules for determining the place of performance, on the one hand, as regards the choice of the obligation(s) to be taken into account [23] and, on the other, as regards the choice of applicable provisions or principles from which the place of performance for that obligation (those obligations) arises. [24]

19 — See footnote 18.

20 — See footnote 17.

21 — Cf. also the judgments in Case 189/87 *Kalfelis* v *Schröder* [1988] ECR 5565, paragraphs 8 and 9, and in *Six Constructions*, cited in footnote 12, paragraph 18.

22 — National court's order, p. 14, my emphasis.

23 — Judgment in Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497.

24 — Judgment in *Tessili* v *Dunlop*, cited in footnote 4.

36. As far as those two aspects are concerned, the Court came down in favour of an substantive interpretation of Article 5(1).

37. In accordance with the considerations which I have set out above, that is to say that, under the substantive law, obligations arising under a contract are not all bound to be performed at the same place, the Court held in *De Bloos* v *Bouyer*, which was concerned with claims of the grantee of an exclusive distribution contract towards its suppliers, that:

'... for the purposes of determining the place of performance within the meaning of Article 5 ... the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based'. [25]

38. According to the wording used by the Court of Justice, that solution strives to avoid, as far as possible, a situation in which a number of courts have jurisdiction in respect of one and the same contract: for that reason, the Court refused to interpret Article 5(1) as 'referring to any obligation whatsoever arising under the contract in question'. [26] In addition, it is based on the German and Italian wording of that article, which was applicable at the material time in the 1968 version.

25 — Judgment in *De Bloos* v *Bouyer*, paragraph 13.

26 — Judgment in *De Bloos* v *Bouyer*, paragraph 10.

39. However, the Court has attenuated that principle where the obligations at issue have taken the place of contractual obligations which have not been performed. In such case, the obligation for the purposes of Article 5(1) continues to be the contractual obligation whose non-performance is relied upon in order to support such claims. [27] As a comparison of the judgment and the Opinion in that case shows, [28] that principle also aims at avoiding a number of courts having jurisdiction and, more specifically, at encouraging related questions to be dealt with by the same court.

40. It was also on the basis of an approach guided by the substantive law that, in the judgment in *Tessili* v *Dunlop*, the Court laid down the criterion for choosing the principles and provisions for determining the actual place of performance.

41. According to that judgment, 'the place of performance of the obligation in question' within the meaning of Article 5(1) of the Convention

'is to be determined in accordance with the law which governs the obligations in question according to the rules of conflict of laws of the court before which the matter is brought'. [29]

42. Three points from the grounds of that judgment should be stressed.

43. The first relates to the criterion according to which it has to be assessed whether a concept in the Convention is to be interpreted independently — and hence in a manner common to all the Member States — or as a reference to the substantive rules which are applicable in accordance with the conflicts rules of the first court seised. In that connection, the Court of Justice held as follows:

'Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the Treaty.' [30]

44. The Court added a reservation concerning the restricted scope of the Convention:

'In any event, it should be stressed that the interpretation of the said words and concepts for the purpose of the Convention does not prejudge the question of the substantive rule applicable to the particular case.' [31]

27 — Paragraphs 14 and 15.

28 — Opinion of Advocate General Reischl in *De Bloos* v *Bouyer* [1976] ECR 1512, at 1518.

29 — Operative part of the judgment in *Tessili* v *Dunlop*.

30 — Judgment in *Tessili* v *Dunlop*, paragraph 11.

31 — See the preceding footnote.

45. With regard to the choice between an independent interpretation and a reference to the conflicts rules of the forum, the Court initially opted for a pragmatic criterion: the aim should be an 'appropriate choice'. Account should be taken to that end of the fact that the Convention as such pursues very different aims: [32] strengthening the legal protection of persons established in the Community with a view to the elimination of obstacles to legal relations and the resolution of disputes; [33] equality of rights and obligations for the Contracting States and the persons concerned; [34] the need to avoid a number of courts having jurisdiction; [35] predictability as regards the application of the jurisdiction rules. [36] In addition, each provision and indeed each concept appearing in the Convention has its own function, which may be more or less closely connected with the aforementioned aims. Accordingly, even though in its more recent decisions it has shown a general preference for an independent interpretation, [37] the Court has held that it was appropriate in the final analysis to reserve the possibility in each case of choosing an appropriate interpretation. [38]

46. The second important point in the grounds of the judgment in *Tessili* v *Dunlop* is, as I have already pointed out, the reference made to the aims of the special jurisdictions provided for in the Convention. [39] The Court apparently did not consider it questionable to satisfy the aims of the Convention by referring to the *lex causae*. That is not surprising, since none of parties which submitted observations in that case questioned that solution. Admittedly, the desirability of an independent interpretation was discussed, but from quite different points of view. The discussion essentially came down to weighing the advantages of such an interpretation from the point of view of the uniform application of the Convention against certain disadvantages, namely the ensuing difficulties in the field of comparative law and the (undesired) effects on the substantive law of the Member States.

47. For his part, Advocate General Mayras [40] concentrated on which contractual obligations ought to be taken into account for the purposes of Article 5(1) where the subject-matter of the proceedings is not the seller's principal obligation to deliver the

32 — See the summary in the judgment in *Mulox*, cited in footnote 12, at paragraph 11.

33 — See the preamble to the Convention and *Tessili* v *Dunlop*, cited in footnote 4, paragraph 9.

34 — Judgments in Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541, paragraph 3, in Case 34/82 *Peters* v *ZNAV* [1983] ECR 987, paragraph 9, in Case 9/87 *Arcado* v *Haviland* [1988] ECR 1539, paragraph 10, and in *Kalfelis* v *Schröder*, cited above, paragraph 15; see *similarly*: Case 150/77 *Bertrand* v *Ott* [1978] ECR 1431, paragraphs 14, 15 and 16, *Handte*, cited in footnote 10, paragraph 10, and *Shearson Lehman Hutton*, cited in footnote 18, paragraph 13.

35 — As regards Article 5(1), see section 38, *supra*, and footnote 24 and the judgments in *Ivanel* v *Schwab*, cited above, paragraphs 18 and 19, in Case 38/81 *Effer* v *Kantner* [1982] ECR 825, paragraph 6, and in Case 266/85 *Shenavai* v *Kreischer* [1987] ECR 239, paragraph 8. See, in addition, the judgments in Case 23/78 *Meeth* v *Glacetal* [1978] ECR 2133, paragraph 8, and in Case 48/84 *Spitzley* v *Sommer Exploitation* [1985] ECR 787, paragraphs 16 to 21.

36 — See the judgment in *Handte*, cited in footnote 10, paragraph 18. Cf. also the judgment of 20 January 1994 in Case C-129/92 *Owens Bank* v *Bracco* [1994] ECR I-117, paragraph 32, which mentions the principle of *legal certainty* in this connection.

37 — A very marked preference was expressed for example in paragraph 13 of the judgment in *Shearson Lehman Hutton*, cited in footnote 18.

38 — See paragraph 10 of the judgment in *Mulox*, cited in footnote 12, where it is stated that, *so far as is possible*, the Court comes down in favour of an independent interpretation of the concepts used in the Convention.

39 — See section 15, *supra*.

40 — Opinion in Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1487.

goods, but a claim by the purchaser based on defective performance. [41] After stating that in such case it was appropriate to take account of the said principal obligation, he discussed the application of the *lex causae* relatively briefly. As in the case of the observations submitted to the Court, he discussed only the question of the harmonization (or lack of harmonization) of the conflict rules and of the substantive law. [42]

48. We are now touching on the third relevant point of the grounds of the judgment in *Tessili* v *Dunlop* for present purposes. In that point, the Court discussed whether in the interests of harmonization of the concept of the place of performance it might go further than merely referring to the *lex causae*. According to the Court, that was impossible 'at this stage of legal development' regard being had to 'the differences obtaining between national laws of contract and to the absence ... of any unification in the substantive law applicable ..., [especially since] the determination of the place of performance of obligations depends on the contractual context to which these obligations belong'. [43]

49. If a balance-sheet is drawn up, on the basis of all these considerations, of the judgments in *De Bloos* v *Bouyer* and *Tessili* v *Dunlop* it will be seen that in neither of those judgments did the Court take physical proximity as a reason for examining whether it was necessary to deviate from the substantive law (of the contract) in interpreting Article 5(1). The Court's considerations on the basis of which it examined such a step were of another kind: in so far as in the judgment in *De Bloos* v *Bouyer* it decided that the same court that had jurisdiction in respect of the principal obligations should have jurisdiction in respect of obligations derived from principal obligations, it sought to avoid more than one court having jurisdiction over related issues. [44] The question considered in the judgment in *Tessili* v *Dunlop* as to whether it was necessary to go beyond a reference to the *lex causae* was raised in view of the possible aim of unifying the concept of the place of performance. [45]

50. *(b)* In its subsequent case-law, the Court gradually introduced special rules for disputes relating to employment law, but, in general, remained consistent with that which I have just described. I shall now consider those matters in detail.

51. In *Ivenel* v *Schwab*, cited above, [46] which was delivered in response to a request for a preliminary ruling from the French Cour de Cassation (Court of Cassation), what was at issue was various claims of a commercial traveller following the alleged termination of his contract, which the national appeal court described as a contract

41 — See in particular section IV at 1489 and the second paragraph at 1491, in which the Advocate General sets out his view of the problem arising in the case.

42 — See the Opinion, at 1495.

43 — Judgment in *Tessili* v *Dunlop*, paragraph 14.

44 — See section 39, *supra*.

45 — See section 48, *supra*.

46 — See footnote 12.

of employment. The national court asked what was the obligation to be taken into account for the purposes of the criterion defined in *Tessili* v *Dunlop*. [47] Consequently, the Court had to consider whether it should in that case adhere to the principles set out in *De Bloos* v *Bouyer* or diverge from them. It decided to do the latter, declaring that:

'The obligation to be taken into account for the purposes of the application of Article 5(1) of the Convention ... in the case of claims based on different obligations arising under a contract of employment as a representative binding a worker to an undertaking is the obligation which characterizes the contract.'

52. The Court gave three different reasons for that decision. *First*, it took account of the *aim* of Article 5(1) of conferring jurisdiction on a court which has a *close connection with the case*. In the case of a contract of employment, the Court saw that connection as lying 'particularly in the law applicable to the contract', [48] which 'as a general rule, ... contains provisions protecting the worker'. [49] According to the trend in the conflict rules in regard to that matter, [50] that law is determined by the obligation characterizing the contract in question, which is normally the obligation to carry out work. It will usually be the law of the place where the work is carried out.

53. *Secondly*, the Court took account of the idea of protecting the party who is the weaker from the social point of view. [51]

54. Lastly, basing itself on the considerations set out in the judgment in *De Bloos* v *Bouyer*, [52] the Court came down in favour of interpreting the Convention in such a way that 'the national court is not compelled to find that it has jurisdiction to adjudicate upon certain claims but not on others'. [53]

55. In the judgment in *Shenavai* v *Kreischer*, [54] the Court felt itself constrained — albeit the question raised did not arise in the sphere of employment law, but related to an action brought by an architect with a view to recovering his fees — to supplement the arguments set out in *Ivenel* v *Schwab* relating to physical proximity to the effect that, in employment disputes, proceedings should, where possible, be brought before a court for the place where the work in question was performed, since it is, generally speaking, the substantive provisions of that place which will be applicable. [55] In the Court's view, the fact that employment contracts and other similar contracts 'create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer' [56] also militates

47 — See section 41, *supra*.

48 — Paragraph 15.

49 — Paragraph 19.

50 — The Court refers in this connection to the Convention on the law applicable to contractual obligations, OJ 1980 L 266, p. 1.

51 — Paragraph 16. See also section 20, *supra*.

52 — Cf. sections 38 and 39, *supra*.

53 — Paragraph 18 of the judgment in *Ivenel* v *Schwab*.

54 — Cited in footnote 35.

55 — See the critical comments of Advocate General Mancini in *Shenavai* v *Kreischer* [1987] ECR 246, at 249, and of Advocate General Jacobs in *Mulox*, cited in footnote 12, sections 26 to 29.

56 — Paragraph 16 of the judgment in *Shenavai* v *Kreischer*.

in favour of the solution adopted in *Ivenel* v *Schwab*.

56. After the Court confirmed the *Ivenel* v *Schwab* case-law, as refined by the judgment in *Six Constructions*, [57] it had to consider the case of *Mulox*, which was also concerned with a dispute relating to a contract of employment. However, unlike the cases with which it had hitherto had to deal, *Mulox* was not concerned with the choice of the obligation to be taken into account, but with determining the place of performance of the obligation in question.

57. The Court came to the conclusion that in the field of employment law the place of performance should not be determined in accordance with the *lex causae*, but — independently — on the basis of uniform criteria which, in its view, should be defined on the basis of the system and aims of the Convention. The difficulties arising from the different views as to the place of performance of the obligation in question which the Court had used in *Tessili* v *Dunlop* as justification for deciding that the place of performance should be determined in accordance with the *lex causae* did not exist in the sphere of employment law. In that sphere, the employee's obligation to carry out the agreed work as the characteristic obligation of the contract of employment is the obligation in question within the meaning of Article 5(1). The Court referred in this connection to the particularities of contracts of employment which it had already described in its earlier case-law: they create a lasting bond bringing the worker within the framework of the employer's business and are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements.

58. As to where it was appropriate in this case actually to localize the place of performance (which was to be determined independently), the Court held that it was the place where the employee actually carried out the activity agreed with his employer. The Court referred in this regard to the criteria which it had evolved in its previous case-law, namely a close connection with the dispute and protection of the weaker party.

59. If you would bear with me, I would now take stock of the case-law from *Ivenel* v *Schwab* to *Mulox*.

60. It is clear at first glance that the criteria set out in *Mulox* with a view to determining the *place of performance* were already determined in advance by the *choice* which the Court had made since *Ivenel* v *Schwab* as regards the *obligation in question*. In order to justify that solution, the Court based itself in *Mulox* solely on arguments on which it had already relied in *Ivenel* v *Schwab* (as refined in subsequent judgments). [58] The decision in favour of an independent interpretation of the place of performance had

57 — See footnote 13.

58 — Cf. also the Opinion of Advocate General Jacobs in *Mulox*, section 21 *in fine*.

therefore been taken ever since the judgment in *Ivenel* v *Schwab*. [59]

61. Having regard to the grounds of the judgment in *Ivenel* v *Schwab*, it can be seen that, as early as this, the Court already took the view that to determine the place of performance on the basis of the substantive law of the contract did not square with the aim of Article 5(1) — at any event, not in the sphere of contracts of employment.

62. Accordingly, a twofold conclusion can be reached.

63. First, the case-law discussed above shows that although the Court intended that the place of performance should continue to be determined as a general rule on the basis of the substantive law of the contract, it will depart from that principle where its application, *in a given case, manifestly does not square with the aim of Article 5(1)*. To my mind, this correctly constitutes a *via media* between two extremes (which should be rejected): (a) a rigid application of Article 5(1) which sticks strictly to its wording, but departs from its aim [60] and (b) an interpretation which takes account solely of the court's proximity to the dispute, but which might undermine the concept of place of performance and turn Article 5(1) into a vague *forum conveniens* rule. [61] On closer inspection, the Court had already left the door open in *Tessili* v *Dunlop* to making such an exceptional distinction between the substantive and procedural places of performance (cf. section 44, *supra*).

64. Secondly, it turns out that the problem of the choice of the obligation to take into consideration and that of the test to be used in order to determine the place of performance are closely linked. Any interpretation which, by diverging from the substantive law of the contract (and also from the wording of some language versions of Article 5(1), takes account of an obligation other than the obligation at issue constitutes a step towards an independent interpretation (in relation to the substantive law governing the contract). Such an interpretation affects, intentionally or unintentionally, the relationship between the aim of Article 5(1) and the outcome of applying it. Conversely, such a correction may — as one conceivable means — be deliberately employed in order to take account of the aim of Article 5(1) when it is applied. Such a manner of proceeding may, as the case-law discussed above shows, constitute a better potential solution than determining the place of performance by using comparative law, especially since the use of comparative law does not necessarily guarantee that criteria unsuited to determine a court physically proximate to the relationship at issue will be replaced by more appropriate

59 — In this connection, it is significant that the *1982* judgment delivered by the Cour d'Appel (Court of Appeal), Metz, following the judgment in *Ivenel* v *Schwab* (*Bull. Civ.* 1982, V, p. 304) coincides precisely with the criteria set out by the Court of Justice in *1993* in the judgment in *Mulox*.

60 — See section 22 et seq., *supra*.

61 — Against the latter alternative, see Gothot-Holleaux, *La convention de Bruxelles du 27 septembre 1968*, Paris, 1985, p. 41. See also Droz, *Compétence judiciaire et effets des jugements dans le Marché commun*, Paris, 1972, p. 128 et seq. (section 206).

criteria. Determining the place of performance by means of comparative law may instead reinforce the harmonizing effect of Article 5(1): the criterion of the *lex causae* is a uniform one. [62] However, in view of its very nature, it is relatively remote from the actual determination of the place of performance.

65. In this context, I would further point out that the concept of 'independent interpretation' should not lead one to suppose that there are only two possibilities available in any given case: that is to say, to determine the place of performance *absolutely consistently* with the substantive law or *completely independently* of it. On the contrary — and still in the interest of having an interpretation consistent with the aims of the provision in question — many intermediate solutions are conceivable. I would mention in this context as an example only the judgment in *De Bloos* v *Bouyer*, which I have already discussed. In that judgment, the Court held, as regards claims for damages or claims seeking the dissolution of the contract in question, that the contractual obligation to be taken into account was the obligation the non-performance of which was relied upon in support of such claims. That step towards an independent interpretation of Article 5(1) was again accompanied, however, by a reference to the *lex causae*: 'In the case of actions for the payment of compensation by way of damages, it is for the national court to ascertain whether, *under the law applicable to the contract*, an independent contractual obligation or an obligation replacing the unperformed contractual obligation is involved'. [63]

66. Let us now turn to the case-law not dealing with contracts of employment.

67. In *Shenavai* v *Kreischer*, [64] the Court held that, in proceedings relating to an action for the recovery of fees brought by an architect for the preparation of building plans, the obligation to be taken into account was the contractual obligation on which the legal action was actually based. In order to justify that solution, as against the different one which it reached in *Ivenel* v *Schwab*, the Court first rehearsed the arguments to the effect that an employee was brought within the framework of the employer's business and that the contracts were localized at the place where the activities were pursued, which determined the application of mandatory rules and collective agreements. [65] The Court added that:

'When no such particularities exist, it is neither necessary nor appropriate to identify the obligation which characterizes the contract and to centralize at the place of performance thereof jurisdiction, based on place of performance, over disputes concerning all the obligations under the contract. The variety and multiplicity of contracts as a whole

62 — See the Opinion of Advocate General Mayras in *Tessili* v *Dunlop* (cited in footnote 40) [1976] ECR 1495.

63 — Judgment in *De Bloos* v *Bouyer* (cited in footnote 23), paragraph 17 *in fine*, my emphasis.

64 — Footnote 54.

65 — *Shenavai* v *Kreischer*, paragraph 16.

are such that the above criterion might in those cases create uncertainty as to jurisdiction, whereas it is precisely such uncertainty which the Convention is designed to reduce.

On the other hand, no such uncertainty exists for most contracts if regard is had solely to the contractual obligation whose performance is sought in the judicial proceedings. The place in which that obligation is to be performed usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it, and it is this connecting factor which explains why, in contractual matters, it is the court of the place of performance of the obligation which has jurisdiction.'

68. Those considerations show, in the first place, that the Court clearly recognized the imperfect nature [66] of Article 5(1), since it allows that the place of performance of the obligation at issue (only) 'usually' constitutes the closest connecting factor between the dispute and the court having jurisdiction over it. Secondly, the Court's considerations only cover a limited number of the problems arising. On the one hand, the question as to whether the rules relating to the place of performance of the obligation to make payment are such as to confer jurisdiction on a court physically proximate to the relationship at issue was not discussed. Although the German Government drew attention to the fact that taking account of the characteristic obligation of the contract corresponded more nearly to the aim of Article 5(1) than taking account of the obligation to make payment (which was at issue in *Shenavai* v *Kreischer*), neither it or any of the other parties concerned, nor the Court raised the idea that Article 5(1) had manifestly not achieved its objective. On the other hand, as clearly emerges from paragraph 17 of the judgment, the only alternative to the chosen situation which was discussed was that of '*centralizing*' at the place of performance of the '*obligation which characterizes the contract* ... jurisdiction ... over disputes concerning *all* the obligations under the contract'. [67] The Court rejected that approach on account of the 'uncertainty' which it would, in its view, create. Consequently, it can be considered that the question as to whether it is possible to effect limited corrections having predictable effects still remains open.

69. Outside the sphere of contracts of employment, mention should also be made of the judgment in *Zelger* v *Salinitri* [68] in addition to *Shenavai* v *Kreischer*. That judgment was concerned with a clause relating to the place of performance with regard to the repayment of a loan. In it, the Court confirmed the *Tessili* v *Dunlop* case-law, since it held that the place of performance within the meaning of Article 5(1) was the place which had been 'specified by the parties in a clause which is valid according to the national law applicable to the contract'. The question as to whether that solution was warranted in practice by the 'existence of a direct link between the dispute and the court called upon to take cognizance of it' [69] was not raised. The main theme of the judgment was the relationship between Article 5(1) and Article 17.

66 — It should be observed in passing that a number of writers even ask that Article 5(1) of the Convention should be eliminated: See for example Lasok/Stone, *Conflicts of Laws in the European Community*, 1987, p. 220 et seq.

67 — My emphasis.

68 — Judgment in Case 56/79 *Zelger* v *Salinitri* [1980] ECR 89.

69 — See paragraph 3, *in fine*, of the judgment.

70. *III* — The reply to be given to the national court's first question should take account of all those considerations.

71. *(1)* The question raised by question 1(a), namely *whether* it is appropriate to diverge from the application of the *lex causae* has to be assessed in the light of the test formulated from the case-law: [70] it must be ascertained whether its application in the instant case is manifestly inconsistent with the aim of Article 5(1).

72. In this connection, it should be observed that, in disputes relating to the payment of the purchase price — where the actual conclusion of the contract is not in issue [71] —, it is a question in most cases as to whether the performance provided by the seller was duly effected. [72] Of the courts which are geographically close to the events in connection with the performance of the contract, the one which is to be taken into consideration for the purposes of the aim contemplated by Article 5(1) is that which is in the best position to assess the due nature of that performance.

73. The first part of Article 59(1) of the Uniform Law results in contrast in the courts for the creditor's domicile systematically having jurisdiction, since the creditor should be placed at an advantage as far as the allocation of risks of international payment transactions is concerned. In my view, this in itself supports an independent definition of the place of performance. In that connection, account should be taken of the fact that, for the first part of Article 59(1) of the Uniform Law, the place of performance of the obligation to pay the purchase price is, by definition, independent of the place of performance of the obligation in kind (consideration), the alleged defective performance of which is generally the cause of the dispute about the payment of the purchase price. It is only in the case mentioned in the second part of the provision that the places of performance coincide.

74. It is therefore clear that the criterion set out in the first part of Article 59(1) is manifestly not able to confer jurisdiction on a court which is physically proximate to the relationship at issue. Consequently, question 1(a) should be answered in the negative.

75. *(2)* In order to answer question 1(b), that is to say, *how* the place of performance is to be determined if question 1(a) is answered in the negative, a direct link can be made with that which I have already stated.

76. To my mind, it is not appropriate here to take into consideration the obligation to

70 — See section 63, *supra*.

71 — Spellenberg, *Zeitschrift für Zivilprozeß 91* [1978], p. 38 and bottom of p. 56, rightly points out that, in such a case, the court for the place where the contract was concluded would be the most appropriate court, but that the Convention does not provide for that solution.

72 — Cf. the observations of the German Government in *Shenavai* v *Kreischer* (see section 69, *supra*) ; Spellenberg, loc. cit. (preceding footnote).

make payment, but the seller's obligation to provide the consideration. [73] As is clear from the discussions above, in the case of contractual relations between the parties, it is a question of the 'place of performance' which most readily enables a court to be determined which is physically proximate to the relationship at issue. This is particularly true in this case, since, according to the judgment given on appeal by the Oberlandesgericht Hamm, [74] to which the Bundesgerichtshof expressly refers, the windows delivered had to be to British technical and quality standards.

77. Before setting out this solution in somewhat more detail, I would describe very briefly its relationship with the judgments in *De Bloos* v *Bouyer* and *Tessili* v *Dunlop*, from which it in fact diverges only very slightly. As far as the judgment in *De Bloos* v *Bouyer* is concerned, it should be observed that the proposed solution does not refer to just 'any' contractual obligation, but to the one which is far more likely to result in the determination of a court physically proximate to the relationship than the obligation at issue. In addition, that solution is consistent with the principle set out in *De Bloos* v *Bouyer* and confirmed in *Shenavai* v *Kreischer*, to which some writers refer as the 'isolation principle', that as a general rule a place of performance is to be determined separately for each obligation. Only the method of determining the place of performance differs from that laid down in *De Bloos* v *Bouyer*.

78. As far as the judgment in *Tessili* v *Dunlop* is concerned, it should be observed that the *lex causae* continues to apply, albeit not for the purposes of determining the place of performance of the obligation at issue, but the place of performance of the counter-obligation of the other party.

79. However, that statement should be qualified somewhat with a view to the more detailed specification of the solution proposed. In this connection, I should like to set out the following considerations before setting forth my proposal.

80. The rules of the *lex causae* relating to the place of performance of the seller's obligation to supply the goods may, like the rules on the place of performance with regard to the payment of the purchase price, embody elements which serve solely to apportion the risk — more specifically in this case the carriage risk — and do not provide reliable indications about the economic *objective* of the seller's obligations. [75] As I used such elements when I examined the rules on the place of performance of the obligation to make payment as a reason for diverging from the substantive law of the contract on the ground that those rules could not serve to determine a court which was physically proximate to the relationship at issue, it would seem illogical to use another method when considering the rules on the place of performance of the seller's obligation to deliver the goods. It should be held in that

73 — See section 64 supra.

74 — Published in *Monatsschrift für Deutsches Recht*, 1992, p. 78.

75 — See section 27, *supra*.

regard that, in the case of disputes about the payment of the price arising on account of the alleged defective performance of the counter-obligation — which I considered was the typical case — the court for the place at which the goods were intended to be supplied is, as a general rule, nearer to the facts than the courts for the place from which they were sent. This is true irrespective as to which of those two places is the 'place of performance' under the substantive law and hence irrespective as to which of the contracting parties is to bear the carriage risk.

81. It therefore seems that the Bundesgerichtshof's question should be qualified in this way. It follows from the judgment given on appeal by the Oberlandesgericht Hamm that that court interpreted the clause delivery 'free site in London' simply as an agreement on the circumstances in which delivery was to be made. It seems that it therefore did not consider that London was the place of performance of the (plaintiff's) obligation in kind and this is precisely why it was *not* the *second part* of Article 59(1) of the Uniform Law but the *first part* which was applied.

82. *IV* — For all those reasons, I propose that the reply to questions 1(a) and (b) of the Bundesgerichtshof should be as follows:

Where a supplier makes a claim against a customer for the payment of the price due under a contract for manufacture and supply to which the Uniform Law is applicable and the first part of Article 59(1) of the Uniform Law is applicable to that payment under the substantive law, the place of performance within the meaning of Article 5(1) of the Brussels Convention is the place agreed in the contract at which the goods are intended to be supplied, irrespective as to which of the parties have to bear the risk of conveying the goods to that place.

The national court's second question

— *General observations*

83. The Bundesgerichtshof's second question is to be answered in the event that in view of the answer to the first question 'the German courts cannot derive jurisdiction from Article 5(1) of the Convention'. Since the place of performance within the meaning of that article, as I have just interpreted it, cannot be in Germany in this case, it is necessary to answer the second question.

84. In that question, the Bundesgerichtshof seeks to establish whether, in the circumstances described in the question, 'a jurisdiction agreement [can] validly be made' within the meaning of Article 17 of the Convention. As the Bundesgerichtshof considers that

such agreement was not made 'in writing' (second sentence of the first paragraph of Article 17; the first hypothesis mentioned in that article) and was not 'evidenced in writing' (*loc. cit.*; second hypothesis), it opts for the *third hypothesis* mentioned in Article 17. That provision, which was added on the accession of new Member States in 1978, enables a jurisdiction agreement to 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'.

85. It appears from the Schlosser Report [76] that, in the case of the other two hypotheses contemplated by Article 17, the Court's interpretation 'does not cater adequately for the customs and requirements of international trade'. The authors of the addition to Article 17 sought in particular to attenuate the consequences of the judgment in *Segoura*. [77] In that case, faced with an orally concluded contract of sale embodying no oral jurisdiction agreement within the meaning of Article 17, the Court refused to give any effect to a letter of confirmation from the seller to which the latter had appended its general conditions of sale which did embody a jurisdiction clause. The Court held that such a clause did not form part of the contract unless the purchaser agreed to it in writing. [78] The fact that the purchaser did not raise any objections against a confirmation issued unilaterally by the other party did not amount to acceptance on his part of the clause conferring jurisdiction unless 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, and those conditions contained a clause conferring jurisdiction. [79] The Schlosser Report states in this regard that 'the requirement that the other party to a contract with anyone employing general conditions of trade has to give written confirmation of their inclusion in the contract before any jurisdiction clause in those conditions can be effective is unacceptable in international trade'.

86. In the following appraisal of the questions raised by the Bundesgerichtshof I shall consider the meaning of the provision in question in more detail.

— *Question 2(a)*

87. *I* — In this part of the question, the Bundesgerichtshof starts by describing the *conduct of the parties* which might possibly form the basis of a valid jurisdiction clause

76 — OJ 1979 C 59, p. 124 (section 179).

77 — Judgment in Case 25/76 *Segoura* v *Bonakdarian* [1976] ECR 1851.

78 — Judgment in *Segoura*, cited above, paragraphs 8 and 10.

79 — Second paragraph of the operative part.

(under the third hypothesis):

— after the oral conclusion of a contract, the supplier confirms the conclusion of the contract in writing;

— the written confirmation is accompanied for the first time by general business conditions containing a jurisdiction clause; and

— the customer does not dispute the jurisdiction clause.

88. The Bundesgerichtshof goes on to set out certain accompanying *factual and legal circumstances* which might be relevant:

— there is 'no trade practice' at the place where the customer is established to the effect that the absence of response to such a document is to be regarded as assent to the jurisdiction clause;

— the customer is not aware of any such trade practice; and

— it is the first time that the parties have done business with each other.

89. Since the Court has not yet had to consider the third hypothesis provided for in Article 17 (in its 1978 version), the Bundesgerichtshof has not related its question to the various conditions for the application of that provision, but to the provision as a whole. According to the Bundesgerichtshof, the question arises whether Article 17, despite its narrow wording, concerns not merely the form but also the substantive preconditions for a jurisdiction agreement. The question further arises, in its view, as to how the concepts of international trade or commerce and international trade practices, which must be defined more specifically, and the subjective factors which give rise to the application of that provision are to be interpreted. [80]

90. It seems appropriate in these circumstances to discuss the conditions imposed by the provision at issue individually while taking account of the circumstances mentioned by the Bundesgerichtshof.

91. *II — (1)* First, it should be ascertained whether this case is concerned with '*international trade or commerce*' within the meaning of Article 17. That question, which has not been specifically argued before the Court, should, in my view, be answered in

80 — Order for reference, p. 17.

the affirmative. There is no doubt that the transaction covered by the jurisdiction clause, as a contract of sale relating to the supply of goods from one Contracting State to another the parties to which are established as commercial companies in those States, is *international* in character. Admittedly, that condition could be construed as limiting the application of the provision in question to specific commercial sectors capable of being clearly defined. It was this situation that the Select Committee on the European Communities of the House of Lords seems to have had in mind when it proposed adding a third case to Article 17. [81] However, the aim of Article 17 — which is to prevent jurisdiction clauses in contracts going unnoticed [82] — does not support such an interpretation. Without limiting the scope of the article in question *from the outset* in this way, it seems appropriate to take into consideration, when interpreting the concept of a commercial or trade practice and the subjective conditions for the application of the third hypothesis, any differences between institutionalized trade and commerce (in the commodities sector, for example) and other international transactions. [83]

92. Since the parties to the contract at issue are commercial companies and both were acting in their own sector of business, there is no doubt to my mind that the transactions at issue relate to (international) *commerce or trade*.

93. *(2)* It should next be considered what guidance can be provided to the Bundesgerichtshof for the purposes of interpretation having regard to the obligation for a jurisdiction clause to be concluded in a '*form which accords with practices in that trade or commerce*'.

94. *(a)* As has been seen, the third hypothesis contemplated by Article 17 was introduced so as authorize modes of concluding valid jurisdiction clauses other than clauses in writing or evidenced in writing. In view of the structure of Article 17, it is clear that jurisdiction agreements according with the relevant 'practices in the trade or commerce' should be authorized as valid types of jurisdiction agreement.

95. In contrast, the scope of that criterion is not absolutely clear. As the Bundesgerichtshof has correctly observed, according to the wording of Article 17, it refers solely to the 'form' of the jurisdiction agreement at issue,

81 — Session 1976-77, 45th Report, section 20.

82 — See the Jenard Report (cited in footnote 2), p. 37.

83 — The Lugano Convention (OJ 1988 L 319, p. 1), which is not applicable to these proceedings, and the San Sebastian version of the Brussels Convention (OJ 1989 L 285, p. 4) seem to support this. In those two conventions, the criterion 'in international trade and commerce' has been retained, but a new condition has been laid down, namely that the usage must have been one 'of which the parties are or ought to have been aware and which in such trade or commerce is widely known ... and regularly observed'.

and it may be asked whether it is not also supposed to relate to the agreement itself — namely to *consensus*.

96. In my view, the latter view is correct. Admittedly, the Commission rightly points out that the Schlosser Report regards the third hypothesis in Article 17 'merely' as a 'relaxation of the formal provisions' and raises the question as to whether 'questions of consensus other than the matter of form should be decided according to the national laws applicable or to unified EEC principles'. [84] However, the aim of the 1978 amendment would not be achieved if merely a formal provision were involved. In the judgment in *Segoura*, the Court held that there was no valid jurisdiction clause, precisely because there was no proof of actual consensus between the parties as required by Article 17: [85] the fact that the purchaser does not respond to written confirmation does not 'amount to acceptance'. [86] If the new version referred only to the form, the need for actual consensus would still have be examined *in accordance with that case-law*, without any relaxation being achieved having regard to the needs of international commerce or trade. More generally, it should be observed that, in accordance with a consistent line of cases of the Court, including *Segoura*, the formal requirements set out in Article 17 do not have an aim in themselves [87] but perform the function of '[ensuring] that the consensus between the parties is in fact established'. [88]

97. The Court of Justice confirmed this approach again very recently in the judgment in *Powell Duffryn*, [89] which was concerned with a clause conferring jurisdiction contained in a company's statutes. After observing that in the legal systems of the Contracting States the statutes of a company are in writing and constitute the basic instrument governing the relations between a shareholder and the company, the Court held that

'*irrespective of how shares are acquired*, every person who becomes a shareholder of a company *knows, or ought to know,* that he is bound by the company's statutes ...'. [90]

98. As far as the instant case is concerned, it should be added that commercial practices concerning *purely formal* requirements in the field in question can arise only with great difficulty, if at all. Such requirements come under *procedural law*, the mandatory rules of

84 — Loc. cit. (footnote 76), p. 125 (section 179).

85 — See the judgment in *Segoura*, paragraph 6.

86 — See the second paragraph of the operative part of the judgment in *Segoura*.

87 — See footnote 82 and the passage cited therein.

88 — Judgments in Case 24/76 *Estatis Salotti* v *RÜWA* [1976] ECR 1831, paragraph 7, in *Segoura*, paragraph 6, in Case 784/79 *Porta-Leasing* v *Prestige International* [1980] ECR 1517, paragraph 5, in Case 201/82 *Gerling* v *Amministrazione del Tesoro dello Stato* [1983] ECR 2503, paragraph 13, in Case 71/83 *Tilly Russ* v *Nova* [1984] ECR 2417, paragraph 14, in Case 221/84 *Berghoefer* v *ASA* [1985] ECR 2699, paragraph 13, and in Case 73/85 *Iveco Fiat* v *Van Hool* [1986] ECR 3337, paragraph 5.

89 — Judgment of 10 March 1992 In Case 214/89 *Powell Duffryn* [1992] ECR 1745.

90 — Paragraph 27, my emphasis.

which can be formulated differently and amended at any time by the Member States. [91] As the Schlosser Report shows, it may, in contrast, very well be that, for the purposes of determining the court having jurisdiction, there exist commercial practices relating to the way in which *consensus is formed*, since that question is a matter of *substantive* law. Such practices, like that relating to absence of response to a commercial letter of confirmation, may be a mixture of elements relating to form and elements relating to substantive consensus. In other words, they may relate to a certain *form*, in the sense of the *manner* in which consensus is formed. The third hypothesis contemplated by Article 17 therefore refers to a situation in which the conformity of the parties' conduct with commercial practices, combined with certain subjective conditions, guarantees that which, outside its sphere of application, is guaranteed only by writing or 'evidence in writing': jurisdiction clauses must not pass unnoticed in a contract. [92]

99. *(b)* It is no accident that the Bundesgerichtshof provides details of the parties' conduct and of the legal situation in the United Kingdom with a view to the interpretation of Article 17. The relevance of those factors is to be assessed depending on how the concept of 'commercial or trade practices' is understood, in particular where there is no response to a commercial letter of confirmation. This point is disputed in academic writing, where the following *three different approaches* are to be found:

— With regard to a particular method of reaching consensus, a commercial or trade practice means a *de facto* usage which is generally and continuously followed and regularly observed by the circles concerned in commercial transactions corresponding, objectively and from the point of view of their localization, to the commercial transaction at issue, and which warrants the conclusion that the conduct concerned embodies an agreement (or consent on the part of the party concerned). Article 17 confers legal effect on such a usage. [93] From that point of view, the existence of a relevant commercial practices has to be *proved*. [94]

— Under Article 17, in international trade the absence of a response to a commercial letter of confirmation may, by virtue of a commercial or trade practice, signify agreement to a jurisdiction clause added by that confirmation (in any event, where the parties are or ought to be aware of that practice). Such a practice does not have to be specifically proved. [95]

91 — See Kohler's pertinent observations in *Diritto del Commercio Internazionale*, 1990, p. 611, at p. 622.

92 — See footnote 82 and the passage cited therein.

93 — See, in particular, Stöve, *Gerichtsstandsvereinbarungen nach Handelsbrauch, Art. 17 EuGVü und § 38 ZPO*, Heidelberg 1993, pp. 20 to 23, 56 et seq., who provides detailed reasoning; and, to the same effect, Geimer/Schütze, loc. cit. (footnote 13), p. 478; Schütze, *Deutsches Internationales Zivilprozeßrecht*, Berlin, 1985, p. 56; Gothot-Holleaux (footnote 60), section 175; and Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments*, Abingdon, 1987, p. 1062 et seq.

94 — Huet, *Journal du droit international*, 1990, p. 153, at p. 159.

95 — See, in particular, Schmidt, *Recht der Internationalen Wirtschaft*, 1992, p. 173, at p. 177.

— There is a commercial or trade practice with regard to a manner of reaching consensus where it is recognized by (a) legal system(s) to be determined that the parties' conduct constitutes agreement (or consent) by virtue of a commercial or trade practice. The criterion for determining that legal system or those legal systems has to be established by interpreting Article 17. [96]

100. I would propose that the Court should adopt the *first* approach set out above, for the following reasons.

101. The conclusion following from the second approach set out above, namely that the Convention itself recognizes the practice of the commercial letter of confirmation as a commercial practice is certainly not justified. It can, admittedly, be inferred from the Schlosser Report that the judgment in *Segoura*, cited above, which related to that practice, was the *reason* for the revamping of Article 17. However, it is not possible to determine the exact content of the commercial practice allegedly recognized. It is sufficient to observe in that regard that, in the States signatory to the Convention, there are completely different conceptions of the legal significance of the practice in question [97] and that it cannot be ruled out that there are differences depending on the commercial sector in question.

102. The third approach which I described, which confers on Article 17 the character of a conflicts rule, or of a reference to a national conflicts rule, is linked directly to that consideration. As far as that approach is concerned, it must be objected that it may be difficult to determine in practice commercial practices in the field of international trade (except in those fields which are intrinsically international). However, that fact does not gave rise to any argument according to which Article 17 can be interpreted in the sense sought by that view.

103. In the first place, it appears from the system of the provision in question, in particular the English and French versions, that the relevant commercial practices must relate to 'international trade'. The German version refers, albeit in a somewhat ambiguous manner, to 'internationale Handelsgebräuche' (international commercial usages). The introduction into Article 17, through the intermediary of conflicts rules, of local usages which are not proven to be imposed in the sphere of the relevant international trade would have the result of facilitating the incorporation of jurisdiction clauses to an extent exceeding that required by the reform. In that regard, attention should be drawn to the

96 — Jung, *Vereinbarungen über die Internationale Zuständigkeit nach dem EWG-Gerichtsstands- und Vollstreckungsübereinkommen und nach § 38 Abs. 2 ZPO*, Bochum, 1980, p. 172 et seq.; Lindacher, in Wolf/Horn/Lindacher, *AGB-Gesetz, Kommentar*, 2nd ed., Munich, 1989, annex to Article 2, sections 90 and 92; Rauscher, *Zeitschrift für Zivilprozeß 104 (1991)*, pp. 272, 292 et seq.; *ibid.*, *Praxis des Internationalen Privat- und Verfahrensrechts*, 1992, pp. 143, 145; Ulmer, in Ulmer/Brandner/Hensen, *AGB-Gesetz, Kommentar*, 5th ed., Cologne, 1987, annex to Article 2, section 33; see also Hausmann, in Reithmann/Martiny, *Internationales Vertragsrecht*, 4th ed., Cologne, 1988, section 1203.

97 — For a detailed discussion of the question, see Stöve (footnote 93), p. 129 et seq.

wording of the Lugano and San Sebastian Conventions, [98] which, in addition to the conditions laid down in the 1978 version, require that the usage should 'in such trade or commerce [be] widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned'. According to the Jenard/Müller Report on the Lugano Convention, [99] 'having regard to the words "internationale Handelsbräuche" and "usages" which are used in the French and German versions of Article 17 of the Brussels Convention, it seems that there are at least no major differences in substance between the provisions concerned in the two Conventions'. To my mind, that commentary is hard to square with the new version if Article 17 of the 1978 version was a mere conflicts rule or a reference to national conflict rules.

104. Secondly, as I have already mentioned, the Court has viewed the formal requirements laid down in the first two hypotheses in Article 17 as guaranteeing actual consensus and has accordingly laid down certain *independent requirements with regard to consensus itself*. In that regard, it has avoided bringing into that provision complex, very controversial problems relating to conflicts of laws. [100] Moreover, regret has been expressed since the outset that Article 17 was not coupled with an express conflict rule on account of certain preconditions for consensus (namely legal capacity and agency). [101] In my view, the interpretation of the third hypothesis in Article 17 should remain consistent with this and therefore, as in the case of the other two hypotheses, should give rise to an independent interpretation. [102]

105. *(c)* The application of that solution to the present case calls for the following observations.

106. *(aa)* It should first be observed that the legal situation in the United Kingdom, as described by the Bundesgerichtshof, is not decisive in itself, no more than the legal situation in Germany: Article 17 is not a conflicts rule. I shall be returning shortly to the question of the — limited — importance of national law for the purposes of proving the existence of a commercial practice and as regards the subjective conditions for the application of Article 17.

107. *(bb)* I would next explain the importance, from two points of view, of the criterion which I have just put forward with a view to giving a useful answer to the questions raised by the Bundesgerichtshof. The first relates to the need for the practice in

98 — See footnote 83.

99 — OJ 1990 C 189, p. 57, last paragraph of section 59, at p. 77.

100 — See Roth, *Zeitschrift für Zivilprozeß 93*, 1980, p. 156 et seq.

101 — See Droz (footnote 61), section 215, at p. 134.

102 — See also O'Malley/Layton, *European civil practice*, London, 1989, sections 21.37 and 21.70.

question to be sufficiently widespread, having regard to the characteristics of the transaction at issue. In order to achieve the aim of Article 17 when applying that criterion, only trade or commercial practices which are geographically and objectively related to transactions of the type at issue may be taken into account. [103] The protection against jurisdiction clauses being incorporated unnoticed which Article 17 aims to afford would, for instance, not be achieved if in a case such as this reliance could be placed on practices in force in the automobile sector or in Franco-German trade.

108. The second point of view relates to the authority which the trade or commercial practice must have acquired in the sector concerned. For the purposes of Article 17, it must be established that the practice is regularly observed in circles involved in the particular trade or commerce. It is only on that condition, which is also prescribed by the Lugano and San Sebastian Conventions following the example of Article 9(2) of the Vienna Convention on contracts for the international sale of goods, [104] that the practice acquires the practical effectiveness which will enable it also to be legally recognized through Article 17. As regards the practice of the subsequent incorporation of general business conditions into a contract by means of a commercial letter of confirmation, the conditions for the third hypothesis to apply are fulfilled only where participants in the trade or commerce concerned regard conditions incorporated in this way as binding.

109. I would observe in passing that it is my impression that those conditions are not met by all transactions falling within the scope of the Convention. In fields characterized by frequent repetition of identical transactions in an essentially closed circle of traders, such practices find more fertile soil than elsewhere.

110. *(cc)* However that may be, it is for the tribunal of fact to carry out the necessary investigations into the circumstances which are relevant in regard to that criterion with the assistance of the International Chamber of Commerce or of a bilateral chamber of commerce. [105]

111. When assessing the circumstances pleading for or against the existence of a commercial or trade practice, it is possible, in

103 — A different view is apparently taken by Kropholler in *Europäisches Zivilprozeßrecht*, 4th ed., Heidelberg, 1993, section 42 on Article 17 of the Convention: it is sufficient that a trade or commercial practice should exist in international trade or commerce and it is unnecessary to show precisely in what States that practice applies. A similar idea is to be found in Kropholler/Pfeifer, *Festschrift für Heinrich Nagel*, Münster, 1988, p. 157, at p. 163.

104 — United Nations Convention of 11 April 1980 on contracts for the international sale of goods.

105 — In any event, it is pointed out that the question put by the Bundesgerichtshof does not raise any issues concerning the habitual nature of incorporating a jurisdiction clause into general conditions incorporated by a letter of confirmation or concerning the habitual nature of the content of such a clause. This may turn on the type of the transaction at issue and perhaps also on the fact that the necessary findings have not yet been made by the tribunal of fact. In that regard, it may perhaps be necessary to specify the criterion which I have proposed in subsequent proceedings.

an individual case, also to take into account — with all the requisite circumspection — the national legal systems concerned. The *emergence* and *continuance* of usages in international trade or commerce depend, *inter alia*, on the extent to which judicial notice is taken of such practices by the courts in the Member States. Thus, in trade between two Member States whose courts attach no importance to the practice of the commercial letter of confirmation in signifying possible consensus, a usage to that effect can scarcely ever come about. The contrary will apply where the courts in the two Member States are prepared to take judicial notice of such a usage. At the present stage of the proceedings, those indications — which are, of necessity, very general — should suffice.

112. *(dd)* This brings me to the last issue to be discussed in this context. As has been seen, according to the 1968 version of the Convention, jurisdiction clauses could be incorporated only in the ways covered by the first and second hypotheses set out in Article 17. Consequently, within the scope of that article, differing practices relating to the inclusion of clauses into contracts could not extend to jurisdiction clauses, even if such practices existed under other rules relating to incorporation. The old version of Article 17 necessarily precluded this.[106] On that ground, when the trade or commercial practices are examined, it is necessary to ignore the effects of the old version of Article 17 on the incorporation of jurisdiction clauses. If the 1978 reform is to have practical effect, practices relating to other contractual provisions must decide the matter. In other words, it is necessary to interpret the third hypothesis in Article 17 as conferring on general practices the legal effects in the sphere of jurisdiction clauses which they were denied by the old version of Article 17.

113. *(3)* I would now turn to the subjective conditions of Article 17, where it provides that '*the parties are or ought to have been aware*' of the practices in trade or commerce.

114. Those conditions are intended to prevent jurisdiction clauses — whatever the practices in a given trade or commerce — from having effects vis-à-vis persons who were unaware or should not have been aware of those practices and therefore were unaware or should not have been aware of the manners of incorporating clauses into a contract to which those usages relate.

115. If the criterion of 'practices in trade or commerce' is essentially a matter of fact, the same must also be true of the abovemen-

106 — See also section 98 and footnote 91.

tioned subjective conditions. Accordingly, account can be taken of all relevant circumstances.

116. As far as the present case is concerned, it appears from the order for reference that the customer was unaware of the commercial practice relied on, to the effect that absence of response to a letter of confirmation of the type described by the Bundesgerichtshof has to regarded as assent to a jurisdiction clause. That fact is relevant in any event where the party concerned was not aware in a general way — irrespective of the question of jurisdiction clauses [107] — of the commercial usage alleged by the other party.

117. In answering the question as to whether that party *ought to have been aware* of that practice, it is possible to take account of two of the circumstances which the Bundesgerichtshof has brought to the Court's notice: the fact that the alleged practice does not apply at the place where the customer has its head office and that this was the first time that the parties had done business. As far as the first point is concerned, the academic writings cited by the Bundesgerichtshof suggest that in English law generally — that is to say, not only in the sphere of jurisdiction clauses — absence of response to a commercial letter of confirmation to which general business conditions are appended for the first time is not regarded as signifying assent to the content of those conditions. [108] In such a case, the practice in question cannot be regarded as being known to the customer, unless other circumstances (for instance, commercial contracts with other economic operators in the trade or commerce) sufficiently supporting the opposite view are relied upon and proved. This is also a matter for the tribunal of fact.

118. *III* — For all the above reasons, I consider that the reply to question 2(a) should be as follows:

In the circumstances adverted to by the Bundesgerichtshof, a jurisdiction agreement can be validly made under the third hypothesis in the second sentence of Article 17, first paragraph, of the Convention only where a practice exists which is followed generally, continuously and regularly by the circles concerned in transactions which correspond, both objectively and in point of their localization, to the transaction at issue and warrants the conclusion that the parties' conduct implies assent to the content of the letter of

107 — See section 112, supra.

108 — See, for example, Ebenroth, *Zeitschrift für vergleichende Rechtswissenschaft*, 77 (1978), p. 161 at p. 164 et seq.

confirmation and the general business conditions appended thereto.

If, in view of the fact that one of the parties was unaware of such a practice — if any —, the resolution of the dispute turns on whether that party ought to have been aware of that usage, the question should be answered in the negative if no such practice existed at the place at which that party has its head office and it was the first time that that party did business with a party adopting such a usage. Matters will be different where other circumstances are relied on and proved which bear out to a sufficient degree the fact that the party concerned ought to have been aware of the commercial practice in question.

— *Question 2(b)*

119. The Bundesgerichtshof raised this part of the question in case a jurisdiction clause may be validly concluded in the circumstances set out in question 2(a). If, as regards the subjective conditions set out in Article 17, there should be no circumstances other than those set out in the order for reference, question 2(a) should be answered in the negative and there would be no need to answer question 2(b). I consider that if the Court should follow my view it should merely answer question 2(a).

120. Be that as it may, the question of the 'language risk' [109] raised in the part of the question which I am now to consider does not seem to me to be particularly complex.

121. Reference should be made *in limine* to the judgment in *Elefanten Schuh*, [110] according to which legislation of a Contracting State requiring a particular language to be used in private relations does not have to be taken into consideration in the field of application of Article 17. This should also hold good, however, of rules relating to the 'language risk' developed by case-law in a Member State, since such rules, like the legislation referred to in *Elefanten Schuh*, have an effect on the requirements relating to the manner in which the agreement is reached (form and substantive conditions). [111]

109 — See section 3 of the order for reference at p. 20.

110 — Judgment in Case 150/80 *Elefanten Schuh* v *Pierre Jacqmain* [1981] ECR 1671.

111 — Kohler, *Praxis des internationalen Privat- und Verfahrensrechts*, 1991, p. 299, at p. 300 (footnote 7).

122. In those circumstances, the Bundesgerichtshof asks whether a jurisdiction clause can be validly concluded regard being had to the following facts:

— the general business conditions appended to the letter of confirmation were in a language other than the language in which the contract was drawn up and the negotiations were conducted;

— the customer did not know that language; and

— the letter of confirmation written in the language in which the contract was negotiated and concluded, referred generally to the general business conditions but not specifically to the jurisdiction clause.

123. It is further known that this was the first time that the parties did business with each other.

124. In those circumstances — and in particular in the absence of any specific reference to the jurisdiction clause in the language in which the contract was drawn up and the negotiations were conducted — it cannot be claimed as a general rule that the party concerned was given adequate notice of the jurisdiction clause. Consequently, a basic precondition for actual consensus would be absent. In such a case, if the third hypothesis in Article 17 is applied, a jurisdiction agreement could be concluded only if the practice in force itself authorized a language to be used other than the language in which the contract was drawn up and the negotiations were conducted. Question 2(b) should be answered to this effect.

The national court's third question

125. For completeness' sake, I would briefly rehearse the issues raised by this question, that is to say, whether, in the event that a validly concluded jurisdiction clause under Article 17 is involved, there should be a 'further examination, under the national substantive law which is applicable in accordance with the conflicts rules of the court hearing the case, of the question whether the jurisdiction clause is validly incorporated in the contract'.

126. In the context in which this question is raised, it should be answered in the negative. Article 17 is intended to create, within its field of application, independent and, hence, uniform law. [112] Article 17 provides an exhaustive definition of the requirements with regard to substantive consensus and the necessary forms for guaranteeing those requirements. Accordingly, there is no room for provisions of domestic law carrying out the same function in addition thereto. The third question should be answered to this effect.

C — Conclusion

127. For the reasons set out above, I propose that the Court should answer the questions raised by the Bundesgerichtshof as follows:

Question 1(a) and (b):

1. Where a supplier makes a claim against a customer for the payment of the price due under a contract for manufacture and supply to which the Uniform Law on the International Sale of Goods is applicable and the first part of Article 59(1) of the Uniform Law is applicable to that payment under the substantive law, the place of performance within the meaning of Article 5(1) of the Brussels Convention is the place agreed in the contract at which the goods are intended to be supplied, irrespective as to which of the parties have to bear the risk of conveying the goods to that place.

The reply to the following questions, in so far as they need to be answered, should be as follows:

2. (a) In the circumstances adverted to by the Bundesgerichtshof, a jurisdiction agreement can be validly made under the third hypothesis in the second sentence of Article 17, first paragraph, of the Convention only where a practice exists which is followed generally, continuously and regularly by the circles concerned in transactions which correspond, both objectively and

112 — See the judgments in *Estatis Salotti* (cited in footnote 88) and *Segoura* (cited in footnote 77). See also section 104 *supra*.

in point of their localization, to the transaction at issue and warrants the conclusion that the parties' conduct implies assent to the content of the letter of confirmation and the general business conditions appended thereto.

If, in view of the fact that one of the parties was unaware of such a practice — if any —, the resolution of the dispute turns on whether that party ought to have been aware of that practice, the question should be answered in the negative if no such practice existed at the place at which that party has its head office and it was the first time that that party did business with a party adopting such a usage. Matters will be different where other circumstances are relied on and proved which bear out to a sufficient degree the fact that the party concerned ought to have been aware of the commercial practice in question.

(b) Agreement on a jurisdiction clause cannot be validly concluded for the purposes of Article 17 by silence following receipt of a commercial letter of confirmation where the general business conditions attached to the letter of confirmation and containing the jurisdiction clause are in a language other than that in which the contract was concluded and the negotiations were conducted, the addressee of the letter does not know the language in question, no specific reference to that clause was made in the language in which the negotiations were conducted and the contract was concluded, and it is the first time that the parties did business with each other. The situation would be different only if the commercial practice in force itself authorized a language to be used other than the language in which the contract was concluded and the negotiations were conducted.

3. Rules of national law relating to the effective incorporation of contractual provisions and, in particular, of provisions set out in general business conditions and covering effective consensus and the form to be taken by such consensus are not applicable alongside Article 17 of the Brussels Convention. Accordingly, such rules of the national substantive law which is applicable in accordance with the conflicts rules of the court hearing the case cannot be used in order to determine whether a jurisdiction clause satisfying the conditions laid down by Article 17 has been validly incorporated into a contract.