OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 11 June 1985

My Lords,

In the present proceedings, the Bundesgerichtshof has referred two questions on the interpretation of Article 17 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

The plaintiffs are a company whose head office is in Mönchengladbach in the Federal Republic of Germany. From 1964 they acted as commercial agents for the defendants, who are based in Villeurbanne in France. Initially the parties agreed to confer jurisdiction on the commercial court at Roanne in France. However, the plaintiffs allege that on 8 October 1975 at the Milan trade fair they agreed orally with the defendants that the courts of Mönchengladbach should have jurisdiction instead. In return for this, according to the plaintiff's version of events, the plaintiffs agreed to bear the costs of translation in lieu of the defendants. The plaintiffs claim to have sent the defendants written confirmation of this oral agreement on 27 October 1975. The defendants are said to have received that letter and never to have disputed its contents.

When the agency agreement was terminated, the plaintiffs brought an action for compensation before the court at Mönchengladbach. The defendants contested the jurisdiction of that court. They denied having entered into the agreement of 8 October 1975 or having received the plaintiffs' letter of 27 October 1975.

When the case came by way of appeal to the Oberlandesgericht at Düsseldorf, that court held that the courts at Mönchengladbach had no jurisdiction because the conditions of Article 17 of the Convention were not satisfied. In its view, Article 17 required an oral agreement of the type in question to be confirmed in writing by the party who stood to lose from it.

The case subsequently reached the Bundesgerichtshof which made the present reference on the basis that the plaintiffs' allegations of fact were well-founded.

The first question asks:

'Are the requirements of the first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters relating to the formal validity of an oral jurisdiction agreement satisfied where the agreement has been confirmed in writing by the party for whose benefit it was concluded?'

Written observations have been put in by the United Kingdom, the Commission and the plaintiffs in the main case. The content of the three sets of written pleadings is to similar effect.

The first paragraph of Article 17 reads as follows:

'If the Parties, one or more of whom is domiciled in a Contracting State have, by agreement in writing or by an oral agreement evidenced in writing, agreed that a court, or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in

connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.'

The first question referred presupposes that an agreement as to jurisdiction has been concluded. Accordingly, the judgments in Cases 24/76 *Estasis Salotti* v. *RÜWA* (1976) ECR 1831 and 25/76 *Galeries Segoura* v. *Bonakdarian* (1976) ECR 1851, in which the existence of mutual consent as required by Article 17 was in issue, are not in point in relation to this question.

All those who have put in observations have referred to the Report on the Convention by Mr Jenard (Official Journal 1979, C 59). The passage devoted to Article 17 makes it clear that that provision aimed to strike a balance between excessive formality on the one hand and the legal uncertainty resulting from the absence of sufficient formal requirements on the other. The Report then states:

'In this respect, the version adopted is similar to that of the Convention between Germany and Belgium, which was itself based on the rules of the Hague Convention of 15 April 1958, in that a clause conferring jurisdiction is valid only if it is in writing, or if at least one of the parties has confirmed in writing an oral agreement'.

Consequently, according to the Jenard Report, the requirement in Article 17 that an oral agreement be evidenced in writing is fulfilled when either of the parties has confirmed that agreement in writing.

Confirmation for this view is said to be found in Article 1 (2) of the 1968 Protocol to the Convention which provides that:

'An agreement conferring jurisdiction, within the meaning of Article 17, shall be valid with respect to a person domiciled in Luxembourg only if that person has expressly and specifically so agreed.'

It is argued that this necessarily implies that, with respect to persons domiciled in other Member States, the evidence in writing required by Article 17 may fall short of 'express and specific' agreement. There may be some force in this but in view of the judgment of the Court in Case 784/79 *Porta-Leasing* v *Prestige International* (1980) ECR 1517 which emphasises the stringent requirements of this Article I doubt whether much weight should be attached to the distinction.

The interpretation advanced in the Jenard Report has, however, been endorsed by the Court in Case 71/83 *Partenreederei Tilly Russ* v *Goeminne Hout* (Judgment of 19 June 1984). Paragraph 17 of that judgment reads as follows:

'Secondly, if it was established that the jurisdiction clause contained in the conditions printed on the bill of lading was the subject of a prior oral agreement between the parties expressly relating to the jurisdiction clause and that the bill of lading, signed by the carrier, was to be regarded as the written confirmation of that oral agreement, such a clause would satisfy the conditions laid down in Article 17 of the Convention, even if it was not signed by the shipper and therefore bore only the signature of the carrier. In fact, not only is the letter of Article 17, which expressly provides for the possibility of an oral agreement evidenced in writing, thereby observed, but in addition its function, which

is to ensure that the agreement of the parties is clearly established, is also fulfilled.'

There is however one matter which is raised by the first question in this case but which did not arise expressly in *Tilly Russ*. That is the question as to whether it suffices for an agreement to be evidenced in writing only by the party for whose benefit it was concluded. To my mind it is so sufficient. If it were otherwise, considerable legal uncertainty would ensue: in any given case it is not always clear which party benefits from such an agreement, especially at the time when it is concluded. As a general rule, it is in a party's interest to litigate in his own State. Yet that is not necessarily so, since it may be that the law of another State is more favourable to him. There may also be other circumstances making it unclear which of the two parties derives the greater benefit from the agreement. This is true of the present case since the plaintiffs have undertaken to bear the costs of translation in return for the defendants' agreeing to confer jurisdiction on the courts of Mönchengladbach.

On the other hand although the point has not been contested in this case, it seems to me that the fact of recording in writing is not in itself enough. The document must be communicated to the other party by or on behalf of the party who signs. It is not enough for the party who records the agreement in writing to file it away in a drawer. While this does not emerge clearly from the words 'evidenced in writing' in the English version of Article 17, it seems to me to be an essential element. The French and German texts ('confirmée par écrit' and 'schriftlich bestätigt' respectively) seem to support that view.

I therefore conclude that a contract is evidenced in writing within the meaning of Article 17 where either of the parties has recorded it in writing and communicated the ensuing document to the other party. It is of no consequence whether or not the agreement was concluded for the benefit of the party who has recorded the agreement in writing.

By its second question the Bundesgerichtshof asks:

'If Question 1 is answered in the negative:

Is the party against whom the jurisdiction is raised estopped from pleading its formal invalidity where that party did not contradict written confirmation of the agreement and has enjoyed the consideration given for it, and where moreover the parties, both commercial firms, had been doing business with each other continuously for a prolonged period?'

This question is asked only in the event that the first question is answered in the negative. Since I take the view that the answer to the initial question is in the affirmative, there is strictly speaking no need to answer the second question. Nevertheless, it seems appropriate to consider that question.

It seems to me from the existing case law that the recipient of a document purporting to confirm an oral agreement is estopped from contesting its contents unless he does so within a reasonable time. The Court has held that, where there is a continuous course of dealing between the parties and a jurisdiction agreement forms part of the general conditions of trading of one of them, then it would be contrary to good faith for the other party to deny the existence of the jurisdiction agreement:

paragraph 11 of the judgment in *Segoura*, paragraph 18 of the judgment in *Tilly Russ*. *A fortiori* the same principle must apply to an oral agreement relating solely to a choice of jurisdiction.

This is all the more so where a party has enjoyed the consideration given for an agreement, e.g. as here the translation of the relevant papers at the expense of the other party.

In the light of these considerations, the questions referred by the Bundesgerichtshof should in my opinion be answered as follows:

(1) An oral agreement is evidenced in writing for the purposes of the first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters where either of the parties has recorded it in writing and communicated the ensuing document to the other party. It is of no consequence whether or not the agreement was concluded for the benefit of the party who has recorded the agreement in writing.

(2) The party against whom the jurisdiction agreement is raised is estopped from contesting its existence or its formal validity where he did not contradict the document constituting written confirmation of the agreement within a reasonable time and has enjoyed the consideration given for it, and where there is a continuous course of dealing betwen the parties, both of which are commercial firms.

The costs of the plaintiffs in the main case fall to be decided by the national court. The Commission and the United Kingdom should bear their own costs.