2. Where there is a clause conferrring jurisdiction such as that described in the reply to the first question the first paragraph of Article 17 of the Convention of 27 September 1968 cannot be interpreted as prohibiting the court before which a dispute has been brought in pursuance of such a clause from taking into account a set-off connected with the legal relationship in dispute.

Kutscher Mertens de Wilmars Mackenzie Stuart

Pescatore Sørensen O'Keeffe Bosco

Delivered in open court in Luxembourg on 9 November 1978

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 12 OCTOBER 1978 [1]

Mr President,
Members of the Court,

1. In exercising its jurisdiction to interpret the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters the Court of Justice has already had occasion to consider Article 17 which, as the Court is aware, governs "prorogation of jurisdiction". In two judgments of 14 December 1976 delivered in Cases 24/76 *Estassis Salotti* v *Rüwa* and 25/76 *Galeries Segoura* v *Bonakdarian* ([1976] ECR 1831 and 1851) the Court gave particular attention to the form of clauses conferring jurisdiction. Two different questions have now been submitted, one of which concerns the conditions for the permissibility of a clause of that nature with regard to its content, whilst by the other it is intended to establish whether that prorogation of jurisdiction must also cover a claim of set-off submitted by the defendant.

It is sufficient with regard to the fact to recall that:

(a) In August 1972 a contract for the supply of glass was concluded between the company Glacetal, having its registered office in France, and the undertaking Meeth, having its registered office in the Federal Republic of Germany. The contract contained in addition to a clause assenting to the jurisdiction of the German courts, a clause prorogating

1 — Translated from the Italian.

jurisdiction whereby proceedings instituted by Meeth were to come under the jurisdiction of the French courts whilst proceedings initiated by Glacetal had to be brought before the German courts;

(b) Subsequently Glacetal, in order to obtain payment of the balance of the price remaining unpaid, instituted proceedings against the defendant in the Landgericht (Regional Court) Trier which, by judgment of 13 January 1975, found in favour of the plaintiff. In the course of an appeal to the Oberlandesgericht (Higher Regional Court) Koblenz the undertaking Meeth claimed a set-off in respect of an alleged credit arising out of its right to compensation for damages caused through delay in delivery of the goods; however, the Oberlandesgericht, in its judgment of 17 September 1976, declared that that defence was inadmissible since, under the clause conferring jurisdiction, the French courts alone were entitled to pronounce judgment on Meeth's claim;

(c) Following a further appeal the proceedings are now before the Bundesgerichtshof (Federal Court of Justice) which, by an order of 1 February 1978, has submitted the following two questions to the Court of Justice:

"1. Does the first paragraph of Article 17 of the Convention permit an agreement under which the two parties to a contract for sale, who are domiciled in different States, can be sued only in the courts of their respective States?

2. Where an agreement permitted by the first paragraph of Article 17 of the Convention contains the clause mentioned in Question 1, does it automatically rule out any set-off which one of the parties to the contract wishes to propose in pursuance of a claim arising under the said agreement in answer to the claim made by the other party in the court having jurisdiction to hear the latter claim?"

2. The doubt which is expressed by the first question concerns the following point: the first paragraph of Article 17 of the Convention relates to a clause whereby "the parties have ... agreed that a court or the courts *of a Contracting State* are to have jurisdiction to settle any disputes which have arisen ... in connexion with a particular legal relationship", whereas a clause such as that in the present case confers jurisdiction on the courts *of two Contracting States* to settle disputes arising from the contract and the disputes are assigned to the courts of one or other State depending on which of the parties to the contract initiates proceedings.

In my view the validity of a clause of this nature can be recognized without misgivings. Indeed, it is probable that no doubt would have arisen if the clause had been worded differently; that is, if it had prescribed that each party could be sued only before the courts of his domicile (or perhaps of the State of which he is a national: in the present case the two links coincide). In those circumstances an identical intention would have been expressed in such a way as to emphasize the concern of the parties to establish a single criterion as being decisive: the domicile (or the nationality) of the defendant. Nevertheless, quite apart from the foregoing, it can be recognized that the parties to a contract may stipulate that the courts of two States shall have jurisdiction to settle disputes arising from that contract, provided that each jurisdiction is restricted to a specified class of dispute. In short, there is nothing to preclude the parties, instead of treating all disputes which could arise from their contract as a whole, from

dividing them into two or more groups in accordance with criteria which they are free to establish and prescribing the courts of a different State for each group. This is not a common step but there are no grounds for considering it unlawful.

The Commission is accordingly correct in observing that the parties to the contract could have concluded two separate agreements (one for proceedings which Meeth might institute and the other for proceedings initiated by Glacetal), thus specifying in each of such agreements a single jurisdiction (the French courts in the former case, the German in the latter). The simpler form, whereby two separate, national agreements are combined in a single clause, clearly cannot affect the problem of the substantive validity of such expression of the joint intention of the parties.

It is scarcely necessary to state that the specific choice made by the parties in the present case is undoubtedly compatible with Article 17 of the Convention. We have seen that the Bundesgerichtshof has referred exclusively to the first paragraph of Article 17, which does not prescribe limits to the right to such choice in that it does not require that there be any material link between the contract and the State to which the court or tribunal specified by the clause pertains. But even if regard be had to the second paragraph of Article 17, the conditions concerning validity which it prescribes — a requirement that Articles 12, 15 and 16 must in all circumstances be observed — it will simply be found that the clause in question does not infringe any of those conditions. Accordingly it is merely superfluous to point out that the choice expressed in the clause is fully in accordance with the general system of the Convention: the courts specified are those of the defendant's country of domicile, as is provided in the first paragraph of Article 2. The only effect of the clause is thus that the jurisdiction based on domicile is rendered exclusive.

It remains finally to point out that the Commission has further doubted whether the generic description in the clause conferring jurisdiction of the courts of a State is sufficient in the absence of further specification of the level or type of court. The Commission has itself affirmed that it is sufficient, and indeed it appears to me that nothing could conform more completely with Article 17 than the literal repetition of the wording adopted by that article ("the *courts* of a Contracting State are to have jurisdiction ..."). It seems to me clear that a clause so worded refers by implication to the system of rules of territorial jurisdiction relating to value and subject-matter in force in the State in question in order to determine precisely the court before which proceedings must be instituted.

3. I shall now turn to consider the second question, which is undoubtedly more complex. It appears to me proper first of all to clarify the wording of the question in order to avoid any confusion which might arise from the question as it has been formulated by the Bundesgerichtshof. That court has in fact asked whether an agreement prorogating jurisdiction such as that at issue in the present case precludes any possibility on the part of the defendant to put forward a defence of set-off in the court before which the plaintiff has brought his action and which has jurisdiction under the agreement to settle the main action. The problem which the Court of Justice is required to decide is not that of the interpretation of the intention of the parties to the contract and the scope which they attributed, whether expressly or by implication, to that jurisdiction clause. That is for the national court to settle. The interpretation of the clause must, however, be preceded by an interpretation of the rules of the Brussels Convention with a view to attaining two ends: to ascertain, on the one hand, whether or not the parties to a contract who draw up a clause prorogating

jurisdiction have the power, if they wish, to exclude the hypothesis of a defence of set-off before the court having jurisdiction under the clause; and to establish, on the other, how to resolve the problem of jurisdiction concerning a set-off where jurisdiction over the main action has been determined by an agreement prorogating jurisdiction of the type described above and where the parties have made no provision whatever for dealing with claims of this nature.

Another essential point appears to me that concerning the nature of the claim in question. In its observations the German Government was rightly concerned to point out that for the purposes of this procedure "set-off" ("Aufrechnung") must be taken to mean only "reliance by one party as a defence, on the substantive effects of a set-off in court proceedings", and that we are not concerned either with a case in which a set-off agreement is invoked or with a case in which the defendant submits a counterclaim based on sums due to him to be offset against his debt. In this matter I have to point out that, whilst the first of those cases is certainly irrelevant to the question submitted by the Bundesgerichtshof, the file does not make it sufficiently clear whether in the present proceedings the German undertaking has put forward a defence of set-off strictly so-called or a counterclaim. Investigation of this matter falls within the jurisdiction of the court dealing with the substance of the case. However, since the distinction between a counterclaim and a defence is very important for the reply to the question in point I think it appropriate to take account of both possibilities.

In substantive law the mechanism of a set-off is clear: a debt owed by one person to another is extinguished because the debtor is also the creditor of the opposite party; naturally, the debt and the credit are cancelled out up to an equal amount. With regard to procedure, however, two situations may arise: the case where the defendant relies on the plaintiff's debt exclusively as a defence and the case where the defendant submits a counterclaim. The difference is that the defence is concerned exclusively to obtain the dismissal of the plaintiff's claim, whilst the counterclaim is intended to establish a claim by the defendant and accordingly to obtain a ruling against the plaintiff. In the case of the set-off the defendant may rely on this defence to justify his non-payment of the debt claimed by the plaintiff; but he must introduce a counterclaim if he wishes his own debt to be recognized in its entirety and to obtain a ruling compelling the plaintiff to make payment (full payment if the court rules that the plaintiff's claim is unfounded; partial payment if it upholds the plaintiff's claim but the amount to which the defendant is entitled exceeds that owing to the plaintiff).

4. The above considerations are, I think, sufficient guidance for an inquiry. Let us suppose that the set-off is claimed purely as a defence. In that case it appears to me that the parties to a contract who draw up a clause prorogating jurisdiction do *not* have power to preclude the court on which jurisdiction is conferred from taking cognizance in addition of any defence, provided that the set-off is claimed in respect of a right arising from the same contract. In fact, in accordance with Article 17 of the Convention, all jurisdiction clauses confer upon the court or courts chosen by the parties jurisdiction "to settle *any disputes* which have arisen or which may arise in connexion with a particular legal relationship". The set-off, the defence relied upon by the defendant, remains within the context of the dispute which the plaintiff has brought before the court; that dispute continues to be classified as arising from the contractual relationship binding the parties where the set-off too expresses a claim originating in that relationship. To consider that the defence should be brought before a

different court from that seized of the main action would entail dissolving the unity of the procedure and would disregard the rights of the defence, since it would in fact oblige the defendant to change his defence into an independent claim. Accordingly I consider that, despite anything which may have been included in the prorogating agreement, jurisdiction to hear a set-off must always be attributed to the court having jurisdiction to hear the main action. Likewise, I think it unnecessary in this context to refer to the principles of the proper administration of justice and economy of procedure, which were no doubt amongst the principles which prompted the Convention of 1968, and to which both the Commission and the German Government have referred in their observations.

If the defence takes the form of a counterclaim quite different considerations apply.

Article 6 (3) of the Convention lays down a special rule on counterclaims arising from the same contract or facts on which the original claim was based, providing that the court in which the original claim is pending has jurisdiction. Likewise in the context of the provisions on jurisdiction in matters relating to insurance and instalment sales and loans, it is expressly stated that they do not affect the right to bring a counterclaim in the court in which, in accordance with Sections 3 and 4 of Title II, the original claim is pending (second paragraph of Article 11 and third paragraph of Article 14). The said Article 6, however, is one of those special jurisdiction provisions which are to be considered as being excluded by the prorogation of jurisdiction: the Court of Justice made this clear in the said judgments in the *Salotti* v *Rüwa* case (paragraph 7 of the decision) and in the *Segoura* v *Bonakdarian* case (paragraph 6 of the decision). The decisive factor here, in other words, is the *exclusive* nature of the jurisdiction conferred; the independent nature of a counterclaim, precisely because it is a positive action and not merely a defence, allows it to be separated from the main procedure, as of necessity happens if a clause of the type in question requires one party to the agreement to bring proceedings before a court other than that before which proceedings must be instituted by the other party. This point is also supported by legal writers: I shall only indicate Weser ("Convention Communautaire sur la Compétence Judiciaire et l'Exécution des Décisions", p. 266). The celebrated Jenard Report also makes clear that any clause based on Article 17 which is inserted in an agreement concerning a guarantee takes precedence over the special provision on jurisdiction contained in Article 6 (2), although it does not deal with the relation between a clause conferring jurisdiction and the rule in Article 6 (3); however, I think it can be taken that the reasoning applied with regard to Article 6 (2) also applies to the next paragraph.

If the foregoing is correct it must follow that the parties to a contract may, if such is their intention, expressly provide that counterclaims cannot be brought before the court on which jurisdiction has been conferred by a clause of the type in question. If the parties make no provision on this point such exclusion of jurisdiction follows from the relationship between Article 17 and Article 6 of the Convention. Finally, in view of the breadth of the discretion attributed to parties to contracts by the said Article 17, it would naturally be possible for them, whilst making provision in general terms for the exclusive jurisdiction of the courts of the domicile of the defendant, at the same time to provide (always subject to observance of the formal requirements prescribed in that article) that counterclaims should be "drawn into" the jurisdiction specified for main actions.

5. In conclusion I suggest that the Court, in reply to the questions referred to it by the Bundesgerichtshof by its order of 1 February 1978, should rule that:

(a) An agreement to the effect that each of the parties to a contract for sale, who are domiciled in different States and have different nationalities, may be sued only before the courts of his domicile or of the State of which he is a national, is valid in accordance with Article 17 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

(b) The fact that it has been agreed in the context of a contract for sale between persons domiciled in different States and having different nationalities that the courts of the domicile of the defendant (or of the State of which he is a national) shall have exclusive jurisdiction does not prevent those courts from having sole jurisdiction to settle a claim of set-off submitted purely as a defence by the defendant in proceedings instituted by the other party to the contract.

(c) An agreement in a contract for sale to the effect that each of the parties, who are domiciled in different States and have different nationalities, may be sued only before the courts of his domicile (or of the State of which he is a national) precludes the submission of a counterclaim before the court having jurisdiction to take cognizance of the main action unless this has been expressly provided for by the parties.