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

Mr President,
Members of the Court,

1. This case, like Case 24/76, is concerned with the interpretation of Article 17 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters; here too, therefore, we have to consider the requirements which need to be satisfied by an agreement assigning jurisdiction (which, in the present case, is invoked by the vendor against the purchaser). But, in contrast to Case 24/76, the questions referred by the German Bundesgerichtshof for a preliminary ruling on this occasion are concerned with the case of an oral contract. The issues raised thereby are concerned both with the conditions necessary for an oral agreement assigning jurisdiction to be deemed to exist and with the way in which the assignment agreement is, as required by Article 17, to be confirmed in writing for it to be recognized as valid.

A contract of sale was orally entered into on 14 September 1971 between Bonakdarian, whose registered office is in Hamburg, the vendor, and Segoura, whose registered office is in Brussels, the purchaser. At the same time the purchaser made a payment on account. On the same day, it received the goods which were the subject of the contract together with a document serving as a 'confirmation letter and invoice' which made an express reference to the general conditions of sale, delivery and payment printed on the back. Those conditions included a clause conferring on the Hamburg court exclusive jurisdiction to decide any dispute which might arise. This evoked no comment from the purchaser.

A dispute subsequently arose concerning payment of the outstanding amount and the German court of first instance at first ordered Segoura in its absence to pay a sum equivalent to the outstanding amount, together with interest but later, following an objection, cancelled its judgment and ruled that it had no jurisdiction because there had been no agreement for jurisdiction by consent within the meaning of the first paragraph of Article 17 of the Brussels Convention of 27 September 1968. The court declared that, in the absence of any evidence proving that the assignment clause had been the subject of an oral agreement, there was no such agreement. With regard to the contention of the vendor that the consent of the purchaser to the assignment of jurisdiction was evidenced by the absence of any comment after it had received the invoice letter referring to the general conditions of sale, the court observed that, in those circumstances, the invoice letter, which referred for the first time to the clause assigning jurisdiction, amounted at most to a contractual offer amending the original contract, and that, in any case, there was a total absence of the written acceptance required by Article 17.

A different view was, however, taken by the appeal court, which held that the reference to the general conditions of sale contained in the invoices sent to the purchaser constituted confirmation of an oral agreement which also covered the general conditions of sale, including the clause assigning jurisdiction. According to the appeal court such confirmation, which was not disputed, was sufficient to satisfy the relevant requirements as to form laid down in Article 17.

1 — Translated from the Italian.

The difference between the two courts dealing with the substance in their appraisal of the facts and concerning the existence in the present case of an oral agreement assigning jurisdiction may perhaps explain why the Bundesgerichtshof, to which the purchaser appealed against the judgment of the appeal court, has submitted two separate questions on the interpretation of Article 17 relating to two separate sets of circumstances, the first concerning the interpretation placed on the facts by the appeal court, the second appearing to be framed in accordance with the different view of the facts taken by the court of first instance. The questions are as follows:

(1) Are the requirements of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters satisfied if, at the oral conclusion of a contract of sale, a vendor has stated that he wishes to rely on his general conditions of sale and if he subsequently confirms the contract in writing to the purchaser and annexes to this confirmation his general conditions of sale which contain a clause assigning jurisdiction?

(2) Are the requirements of the said article satisfied if, in dealings between merchants, a vendor, after the oral conclusion of a contract of sale, confirms in writing to the purchaser the conclusion of the contract subject to his general conditions of sale and annexes to this document his conditions of sale which include a clause assigning jurisdiction and if the purchaser does not challenge this confirmatory letter?

2. Under Article 17 an oral agreement for jurisdiction by consent is, with a view to expediting trade, a valid means of conferring exclusive jurisdiction on the selected court but, out of consideration for the certainty of legal relationships and the protection of the weaker party, such an agreement has effect only if it is followed by confirmation in writing (the article cited requires in terms an 'oral agreement confirmed in writing'). Such confirmation must obviously be such as to fulfil the purpose for which it was required. Furthermore, especially when the clause assigning jurisdiction is one of a set of general conditions pre-determined by one of the parties, particular care must be taken to ensure that confirmation is effected in such a way as to leave no doubt concerning the agreement of the other party to the assignment of jurisdiction.

At this juncture there arises the issue of confirmation forthcoming from one only of the parties. The Jenard report, which was presented with the Brussels Convention, stated that the wording of Article 17 is 'very similar' to that of the Germano-Belgian Convention, which is in turn based on the Hague Convention of 15 April 1958 on selected jurisdiction in connexion with international sales of goods. As regards the effectiveness of oral agreements assigning jurisdiction the Germano-Belgian Convention requires 'confirmation in writing which has not been disputed' (Article 3 (2)) and the Hague Convention confirmation 'by declaration in writing by one of the parties or by a broker without having been contested' (Article 2), both of them, of course, with specific reference to the designation of the court which is to have jurisdiction. The Jenard report adds that 'since the clause conferring jurisdiction presupposes a genuine agreement between the parties, the court may not necessarily regard a writing made by the party invoking it as proof of an oral agreement'.

In the light of these considerations, it is, in my opinion, clearly impossible to justify so strict a view with regard to the requirements for confirmation as that suggested by Segoura, the effect of which would be wholly and absolutely to rule out any possibility of valid confirmation being supplied by the party which has pre-determined the clause assigning

jurisdiction. The wording of Article 17 does not appear to require this, nor would it be necessary for the protection of the party against whom the assignment of jurisdiction is being invoked because the latter still retains the right, after receiving the letter of confirmation, to challenge anything stated therein which relates to the oral agreement on assignment.

The essential purpose of confirmation in writing of an oral agreement assigning jurisdiction is to express the oral clause in words which are objectively certain, and to define its precise terms as they affect the parties and the selected court which, under the clause, is assigned jurisdiction in disputes arising in connexion with a specific legal relationship. The same purpose can be achieved even when the written document containing the confirmation is supplied by the party which pre-determined the assignment clause provided that, having regard to the previous and subsequent conduct of the two parties to the agreement, this is done in such a way as to amount to objective verification of the agreement reached on the clause reduced to writing in the 'confirmation'.

Apart, therefore, from the case of a bilateral confirmation which obviously presents no difficulty, it is possible to distinguish two separate examples of written confirmation given by one party only in the context of general conditions, including assignment of jurisdiction, pre-determined in its own interests by one of the contracting parties. In the first example, confirmation is given by the party which did not pre-determine the general conditions and to whom the clause is disadvantageous. Even if such confirmation refers to the general conditions as a whole it can be regarded as sufficient to give effect to the assignment clause. The second example occurs when confirmation is forthcoming from the party which has pre-determined the general conditions. It is clear that, in this case, there must be a stricter approach: that is to say, confirmation in writing must record not only the oral agreement concerning the general conditions but, in particular, the agreement regarding the clause assigning jurisdiction. What must be avoided is the possibility that the clause has gone unnoticed or has simply not been mentioned in a comprehensive reference to the general conditions of contract. It must, of course, be borne in mind that the abovementioned rules of the Conventions all provide for written confirmation of an oral agreement assigning jurisdiction; it is therefore the conclusion of that agreement which must be proved. And, as is usual, the weaker party must have played its part in the conclusion of such agreement not only by being aware of the assignment clause but also by being willing to accept it.

3. In the light of the foregoing considerations, I come now to consider the case, set out in the first question, where, at the time of the oral conclusion of a contract of sale, the vendor did no more than make a unilateral and very general declaration of his intention to contract on the basis of the general conditions which he himself had laid down. In a case of this kind can the jurisdiction clause be regarded as having been incorporated in the agreement although there has never been any direct mention of it?

It will be noted that the case in question is very different from that in which a comprehensive reference to conditions of sale laid down in advance by the vendor is included in the text of a written contract on the back of which those conditions, including the clause on jurisdiction, are printed. In that case the purchaser has ample opportunity to acquaint himself with the clause before concluding the contract.

On the other hand, when an oral contract is entered into it is, as the vendor itself agrees in its observations in

the present case, reasonable to assume that the parties concentrate their attention on the essential points of the agreement without specifically considering the general conditions, of which, therefore, the purchaser really becomes aware only when it receives the letter from the vendor confirming the oral agreement relating to the essential points and to which the text of the general conditions is annexed. If the purchaser has not been aware of the assignment clause he cannot conceivably have agreed to it; the purchaser's presumed agreement to an indefinite number of general conditions would be tantamount to leaving the vendor free to determine the court which is to have jurisdiction, and this is not the same as an agreement specifically designating the court which is to have jurisdiction, as provided for by Article 17.

The situation might well be different in the case, on which we need not however express a view here, where there is a continuous business relationship between two undertakings by virtue of which it is customary to apply the assignment clause in accordance with the general conditions laid down in advance by one of the parties. In such circumstances it is not inconceivable that a straightforward general reference by word of mouth to such conditions by the vendor and agreed to by the purchaser may amount to consent by the latter to the assignment clause.

When, therefore, in the conclusion of a sales agreement the facts are as described in the first question, the attachment of the written text of the conditions of sale to the subsequent letter of confirmation referring to them cannot constitute confirmation within the meaning of Article 17 because its essential premise is lacking, namely prior agreement on the assignment of jurisdiction. Such a letter may constitute a draft amendment of the oral contract but, as such, it is capable of having effect only if the other party has agreed to it in writing.

4. Nor is the view which I have developed up to this point invalidated by the objection that it goes beyond consideration of the formal requirements provided for by Article 17 of the Convention since it broaches the question of the conditions required for the existence of an agreement selecting jurisdiction to be valid. In fact, the questions submitted by the national court are concerned with the extent to which particular circumstances meet the requirements (all the requirements) laid down by Article 17, and the 'sufficiency' of particular conduct for the purposes of that article. Article 17 must accordingly be viewed as a whole and it is clear that, even before laying down specific requirements as to form, its purpose is to ensure that the parties have concluded an agreement (or agreed on a clause) the purpose of which is to select a forum which is to be seised of disputes which have arisen or are liable to arise out of a given legal relationship. That is to say, the rule in question also includes conditions of substance, the first of which is the existence of an agreement of a certain type and which has a particular purpose.

In this connexion, the question legitimately arises whether the substantive aspects of the agreement assigning jurisdiction are to be deduced from Article 17, interpreted by itself, or whether these aspects ought not rather to be left for determination under the law of the different States. The issue is similar to that described in my opinion in Case 24/76 regarding the form of the agreement in question and, in particular, the possibility that the meaning of the words 'in writing' should be interpreted in accordance with the law applicable in the various States. And the answer in this case must follow the same lines: in so far as such requirements, whether relating to substance or to form, have been laid down by the Convention as conditions precedent for the formalities required by the Convention to be fulfilled, an independent interpretation must be

found on the basis of the logic and wording of the Convention. All this is, of course, without prejudice to national requirements in other respects, whether of form or of substance, which do not come within the ambit of the Convention rules subject to Community interpretation.

The close connexion between the question of confirmation in writing of an oral agreement assigning jurisdiction and that of the existence of such an agreement is abundantly clear. To distinguish between the existence of an oral agreement and its confirmation by regarding the first as exclusively subject to national law and, accordingly, to different legal rules and case-law, while the other was governed by a single legal system would be liable to create serious discrepancies in the application of Article 17 within the contracting states. I may add that, if the definition of the requirements for the creation of an agreement were beyond the scope of the Convention, the appraisal by this Court of the formal requirement of confirmation in writing might prove too restrictive or too liberal, according to the standpoint of the particular national legal system which is regarded as having jurisdiction to verify the existence of the assignment clause. This would produce a situation contrary to the principle of uniformity which the Convention seeks to establish.

5. Consideration of the second question submitted by the national court does not, at this juncture, call for much comment. As this Court is aware, the difference between the case stated in the first question and that in the second question is the following: in the first, the vendor's statement that he intends to apply his own general conditions to the contract is assumed to have been made at the time when the contract was orally concluded; in the second, the declaration is assumed to have been made in writing only *after* the oral conclusion of the contract and without protest on the part of the purchaser. In these circumstances, it seems clear that when, during the negotiations which lead to the oral contract of sale, there is not even any reference to the general conditions including the assignment clause, that consensus of wills on the assignment of jurisdiction without which there cannot be any 'confirmation' within the meaning of Article 17 is absolutely lacking.

6. It is accordingly my opinion that the Court should reply to the questions of the Bundesgerichtshof by ruling that the requirements of Article 17 of the Brussels Convention of 27 September 1968 are not satisfied if, during the oral conclusion of a contract of sale, the vendor indicates that he wishes to rely on the general conditions of sale laid down by himself and does no more than make a general reference to those conditions without specifically mentioning the assignment of jurisdiction and subsequently sends to the purchaser a written confirmation of the contract to which are annexed his general conditions, including a clause assigning juridiction.

The reply must be the same even if, after the conclusion between merchants of an oral contract of sale, the vendor confirms the contract in writing and, simultaneously, for the first time states that the contract is to be regarded as subject to the general conditions of sale — which include a clause assigning jurisdiction — laid down by the vendor himself and attached to the writing, and the purchaser does not indicate his dissent.