OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 20 November 1991 *

Mr President,
Members of the Court,

1. These proceedings concern certain questions referred to the Court by the Oberlandesgericht (Higher Regional Court), Koblenz, for a preliminary ruling on the interpretation of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978 Accession Convention.

2. I shall briefly recall the facts underlying these proceedings, referring for a more detailed account to the Report for the Hearing.

In 1979, and then in 1980 and 1981, Powell Duffryn Plc, an undertaking governed by English law, participated in the increase of capital in IBH-holding AG (referred to as 'IBH'), an undertaking governed by German law, and subscribed for shares in it.

On 28 July 1980 the statutes of IBH were altered in general meeting and a new clause was inserted into Article 4 of the statutes with the following wording: '*By subscribing for or purchasing shares or interim certificates the shareholder submits with regard to all disputes with the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company.*' It should be emphasized that Powell Duffryn took part in the meeting and was therefore present when the amendment was introduced and approved by a show of hands.

Subsequently to the declaration of insolvency of IBH, Mr Petereit, a lawyer acting as the trustee in bankruptcy, commenced proceedings before the Landgericht (Regional Court), Mainz, maintaining that Powell Duffryn had not fulfilled its obligations under the agreement to subscribe for shares, and seeking reimbursement of dividends wrongly paid. Powell Duffryn contended that the Landgericht Mainz lacked jurisdiction but the latter, by interlocutory decision, declared itself to have jurisdiction, and considered that the jurisdiction clause contained in Article 4 of the statutes was valid under Article 17 of the Convention.

Powell Duffryn appealed against that decision to the Oberlandesgericht, Koblenz, which stayed the proceedings and, in essence, referred the following questions to the Court for a preliminary ruling:

1. Does a jurisdiction clause in the statutes of a company limited by shares constitute an agreement conferring jurisdiction within the meaning of Article 17 of the Convention, and must this question be answered

* Original language: Italian.

differently depending upon whether the shareholder subscribes for shares or purchases existing shares.

2. If the first question is answered in the affirmative:

(a) does a written declaration of subscription for and acceptance of shares, on the occasion of an increase in capital, comply with the requirements for writing laid down in the first paragraph of Article 17;

(b) does the jurisdiction clause satisfy the requirement that the dispute must arise in connexion with a particular legal relationship within the meaning of Article 17;

(c) finally, does the jurisdiction clause also cover claims to payment arising out of a contract for the subscription of shares and claims to the repayment of wrongly paid dividends?

3. The main point to be decided is therefore whether a jurisdiction clause contained in the statutes of a company limited by shares constitutes an agreement conferring jurisdiction within the meaning of Article 17, thus complying with the formal requirements laid down in that article.

Article 17, in the wording formulated in the Accession Agreement in respect of Denmark, Ireland and the United Kingdom of 1978, provides for the situation in which 'the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship', as well as requiring that 'such an agreement conferring jurisdiction shall be either in writing or evidenced in writing, or, in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware.'

In view of the terms of the aforementioned provision, the question to be determined in the first place is whether the provision in question contained in the statutes (the clause conferring jurisdiction) is of a contractual nature within the meaning of Article 17. In order to reply to that question it is essential to clarify as a preliminary point the scope of the concept of an agreement between the parties (literally 'if the parties . . . have agreed . . . ') referred to in Article 17.

On that point it is clear that an autonomous meaning, and thus one common to all the Contracting States, may be attributed to concepts used in the Convention, where they are not defined by it, or regard may be had to national law. And it is well known that the Court has not in principle opted for the 'national' interpretation or for an autonomous interpretation, but has allowed that choice to be determined by an examination of the individual concepts in order to establish on a case-by-case basis which of the two options is likely to contribute most fully to the efficacy of the Convention. [1]

1 — See judgment in Case 12/76 Tessili v Dunlop ECR 1485, paragraph 11.

Nevertheless, in its most recent judgment the Court has shown a clear preference for the autonomous interpretation of the Convention,[2] to the extent to which it may be affirmed that practice in the matter has developed towards a situation in which there exists a general rule (autonomous interpretation) subject to exceptions (renvoi to national law).

I therefore consider that the concept of an agreement between the parties within the meaning of Article 17 must be interpreted in an autonomous manner. In so doing, I am taking account both of the objectives and of the scheme of the Convention, and in particular, therefore, of the objective of avoiding divergences in the application of the Convention itself, and of thus ensuring greater legal certainty by means of a clear and uniform interpretation for all the Contracting States, and also of the general principles common to all the national legal systems.

4. Indeed a comparison of the various legal orders of the Member States demonstrates, on the one hand, that the nature of corporate relationships and in particular — of relevance here — the relationships between a company and its shareholders, are not treated uniformly, although at the same time the differences do not entail substantially different consequences.

In fact, in the legal systems in which the contractual conception prevails, and they are the largest majority, it is clearly established that the obligation stemming from status as a shareholder may subsist irrespective of the will of the individual. Thus, for example, it is not disputed that a resolution adopted by a majority at a meeting of the company, which in principle resists inclusion in any contractual classification, is binding on all the shareholders including those in disagreement, and on persons who subsequently become shareholders. Conversely, in the legal systems where the institutional concept prevails, whereby the statutes (and indeed the deed of incorporation) are *sui generis* acts having the value of objective law for the shareholders, it may be that certain clauses of the statutes are enforceable only against those who expressly consented to them, in the strict contractual sense of the term.

The contractual-institutional dichotomy in the categorization of corporate relationships seems to me in the end rather theoretical and thus of little relevance in the solution of the problem in question. What is important, in my opinion, is rather the fact that, regardless of the view adhered to and of the academic discussion on this subject, there is underlying the corporate phenomenon an expression of an intention to enter into legal relations which manifests itself in the deed of incorporation of the company, of which the statutes form an integral part, which leads to close links being established between the shareholders and between the shareholders and the company, reciprocal obligations which are provided for most fully and completely in the statutes and, for present purposes, are in essence at least analogous to contractual obligations in their effects.

5. That is specifically confirmed in the *Peters* judgment[3] in which the Court held

2 — See amongst other authorities judgments in Case 29/76 Eurocontrol v Lufttransportunternehmen GmbH & Co Kg [1976] ECR 1451; Case 21/76 Mines de Potasse d'Alsace v Fondation Reinwater [1976] ECR 1735; Case 139/80 Trost v Blanckaert & Willems PVBA [1981] ECR 819; Case 34/82 Martin Peters Bauunternehmen GmbH v Zuid Nederlandse Vereniging [1983] ECR 987.

3 — Cited above at footnote 2.

that an action for the recovery of monies brought by an association having legal personality against one of its members was a matter relating to a contract. That judgment has a twofold significance: on the one hand, the Court therein stated that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, the concept of matters relating to a contract (referred to in Article 5 of the Convention), cannot be interpreted 'simply as referring to the national law of one or other of the States concerned';[4] it then went on to state that 'membership of an association creates between the members close links of the same kind as those which are created between the parties to a contract'.[5]

It is hardly necessary to point out that the general and definitive terms of that description by the Court of corporate relationships preclude its scope from being confined to the concept of 'matters relating to a contract' in Article 5(1) of the Convention, which was specifically at issue in the *Peters* judgment. Nor do I see any reason to depart in this case from the abovementioned case-law.

In the final analysis I consider that, in the context of an independent and uniform interpretation of the concepts contained in the Convention and having regard to the essence of the corporate phenomenon (transcending the various formal definitions adopted in the various legal orders), it is legitimate and reasonable for present purposes to recognize the provisions of statutes governing relations between the company and its shareholders as being of a contractual nature, or at least of a nature analogous to contract; and that, obviously, also applies to a clause conferring jurisdiction such as the clause at issue in the present proceedings. A clause of that kind may therefore be regarded as falling within the concept of an agreement between the parties, within the meaning of Article 17.

6. Once it is established on the basis of the foregoing that a clause conferring jurisdiction contained in the statutes of a company falls within the concept of an agreement between the company and its shareholders, it is necessary to ascertain whether that clause complies with the conditions laid down in Article 17 of the Convention.

I nevertheless consider that it is useful, before ascertaining that question, briefly to review the Court's case-law in the matter.

The Court has always held that the provisions of the article in question must be interpreted in accordance with a restrictive and strict criterion, given that they constitute an exception to the general principle of the defendant's forum (Article 2) and the special jurisdiction referred to in Articles 5 and 6.

In particular, the Court has held that, by making the validity of the prorogation of jurisdiction subject to 'the existence of an agreement between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated.'[6] The manner in which that consensus is to be

4 — Ibid, at paragraph 9.

5 — Ibid, at paragraph 13.

6 — Judgments in Case 24/76 Estasis Salotti v Rüwa [1976] ECR 1831, at paragraph 7, and Case 25/76 Segoura v Bonakdarian [1976] ECR 1851, at paragraph 6.

demonstrated is therefore, according to the interpretation given by the Court, closely linked to proof of the existence of the agreement between the parties. In fact 'the purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.'[7]

Moreover, the practical solutions adopted demonstrate that the Court has to some extent mitigated the strictness of the formal requirements laid down in the provisions in question.

In fact it is clear from the relevant case-law that the consensus between the parties may be ascertained on the basis of presumptions of logic (for example, where a party receives an advantage under a clause, he must be presumed to have accepted that clause),[8] or on the basis of conclusive conduct (for example where a written confirmation was not contested by the other party, or the acceptance of a benefit provided for in return for a clause conferring jurisdiction favouring the other party),[9] or again on the basis of the application of reasonable care, as in the case of clauses which the party concerned could or should have been aware of by exercising reasonable care, or of usages which he should or could have been aware of, etc.[10]

7 — Ibid, at paragraphs 7 and 6 respectively.

8 — Judgment in Case 201/82 Gerling Konzern Speziale Kreditversicherungs AG v Amministrazione del Tesoro dello Stato [1983] ECR 2503.

9 — Judgment in Case 313/85 Iveco Fiat SpA v Van Hool NV [1986] ECR 3337 and the judgment in Case 221/84 Berghoefer Gmbh and Co KG v ASA [1985] ECR 2699.

10 — Judgment in Case 24/76, cited above; judgment in Case 71/83 Tilly Russ [1984] ECR 2417, and the judgment in Case 313/85, cited above.

The mitigation by the Court of the strict application of the formal requirements was confirmed and amplified by the new wording of Article 17, as amended by the Accession Convention of 1978 which, I recall, refers to the usages of international trade or commerce and provides that a clause conferring jurisdiction may also be accepted in a form permitted by usages which the parties were or ought to have been aware of.

All that shows a very considerable (and necessary) attention and sensitivity to the demands of international trade and, more generally, to the actual functioning of the business world. For it is clear that an excessively strict application of the principles laid down in Article 17 would render it practically impossible to apply clauses conferring jurisdiction contained in contractual documents or documents arising out of contractual relationships (for example credit documents) which owing to their specific characteristics are not, and only with difficulty could be, signed by one of the Contracting Parties.

7. Having said that, it is also true that the Court has always stressed that the reality of the consensus between the parties with regard to the clause in question must be proved, as must the fact that they agreed to it knowingly. The purpose is always to avoid a jurisdiction clause being inserted surreptitiously, that is to say in a situation in which one of the parties is not in fact aware of it, whether under the reasonable care doctrine or under the presumption of awareness of usages, as referred to in the *Salotti* and *Tilly Russ* judgments cited above.

With regard to the case before the Court, it is necessary to establish whether there was conscious acceptance, or at least awareness, of a clause contained in the statutes of the company which, by way of derogation from the general principle of the defendant's forum and the special jurisdictions laid down in Articles 2, 5 and 6 of the Convention respectively, provides that the competent courts for disputes involving the company are to be those of the company's principal office, irrespective of the nature of the dispute.

Situations raising the problem of the validity and therefore the applicability of the derogating provision may occur at various times in the life of the company.

The first situation relates, shall I say, to the 'original' validity of the clause, that is to say its insertion in the statutes at the time when the company was incorporated. I do not consider that this situation poses particular problems where the corporate obligations are essentially given a contractual designation, as I have already suggested. As to the formal requirements laid down in Article 17 it is inconceivable that those requirements, as elucidated by the Court, are not complied with in the case of a deed of incorporation of a company.

Nor are any greater or different problems posed by the situation in which the clause assigning jurisdiction is introduced subsequently by an alteration of the statues by a resolution of the general meeting, in particular as regards those members expressing by a vote in favour their agreement to the introduction of the clause. In that case as well, it is undeniable that both the substantive conditions (consensus), and the formal conditions (reduction to writing) required by Article 17 of the Convention are met.

It is hardly necessary to point out that, as is evident from the file, the clause in the present case is valid and fully enforceable against Powell Duffryn which voted in favour of it when it was resolved to insert the clause into the statutes of IBH.

8. Perplexity and disagreement have arisen on the question whether the clause assigning jurisdiction is to be deemed valid and enforceable also as against members who (a) voted against the insertion of the clause into the statutes; (b) have subsequently become members of the company, perhaps by acquiring shares by telephonic means or, according to the very infelicitous example given at the hearing, by finding the security by chance or even by stealing it, or by subscribing for new shares on the occasion of an increase of capital. Essentially, in both situations mentioned the conditions laid down in Article 17 are not satisfied: in the former situation there is no consensus since there was in fact disagreement; in the latter there is no proof of actual consent to the clause.

I do not share this perplexity and consider instead that a clause assigning jurisdiction contained in the statutes of a company is binding on all its members, including future members and members who were against the introduction of the clause and who have remained as shareholders. I consider

therefore that the argument to the contrary must be rejected since it does not foresee or resolve either immediate problems or remote and general ones. [11]

As regards the situation of the shareholder who has expressed his disagreement to the insertion of a clause conferring jurisdiction, it may be stated straight away that, whilst the purpose of Article 17 is to prevent such a clause from being introduced into a contract surreptitiously, its purpose is not to render it inapplicable as against those persons who, though being perfectly aware of its existence but disagreeing with it, continue to be shareholders. Indeed, whereas normally the non-acceptance of a clause assigning jurisdiction precludes the relevant contract from coming into existence, or causes that clause to be excluded from the contract, it would be very curious if, in the case of a company, such disagreement were to bring about an extremely advantageous situation, namely continued membership of the company and at the same time inapplicability of the clause in question as against the dissenting shareholder.

As regards, then, the situation in which a person becomes a shareholder on the acquisition of or the subscription for a share, it has been authoritatively argued, and rightly so, that such an event is usually marked by some written formality, which is either contemporaneous or subsequent and confirmatory and specifically refers to the statutes of the company and to all the rights and obligations flowing therefrom, in such a way as to observe the strict conditions laid down in Article 17 of the Convention, as interpreted by the Court. [12]

However, it is apparent from a research note drawn up by the Court's departments that, although it is true that the subscription for and the acquisition of shares are carried out in such a way as to require written form, the form of subscription for and/or the acquisition of a share do not normally contain any reference to the statutes. On the other hand, contrary to arguments put forward during the hearing, I do not think that an express reference to the statutes is necessary in order for the clause assigning jurisdiction contained in them to be valid, since the Court's case-law on such clauses inserted in general conditions or standard contracts is not relevant here.

It is perhaps superfluous to emphasize that, whilst a reference to general conditions of sale is doubtless necessary since those conditions might even be missing, reference to statutes contained in a document attesting the acquisition of or subscription for shares would constitute excessive and unnecessary formalism. Even the most heedless and casual acquirer of shares is in fact well aware of the fact that he is always

11 — In addition to this part of the present proceedings, the argument refuted here was put forward by Thode, actually in a note on the order for reference before the Court (in Wirtschafts- und Bankrecht VII B.1., 1989, p. 1425). Taking the opposite view, that is to say tending essentially in the direction I have suggested, and again commenting on this same order for reference, are Geimer in Entscheidung zum Wirtschaftsrecht, 1989, p. 855), who expressed the same opinion before the case before the Court arose (Geimer-Schütze, Internationale Urteilsanerkennung, Vol. I, Munich 1983, p. 696), and others (Kropholler, Europäisches Zivilprozeßrecht, Heidelberg 1987, p. 152). In favour of the validity of an arbitration clause in statutes, in the light of a provision on formal requirements for oppressive clauses analogous to Article 17, see Italian Court of Cassation, Judgment of 3 February 1968, No 353 in Giustizia Civile, 1968, p. 179.

12 — See to that effect Geimer-Schütze, Internationale Urteilsanerkennung, loc. cit., p. 940.

subject to the rules contained in the statutes, regardless of any reference to their applicability.

9. I am, moreover, persuaded that the solution of the problem calls for a wider perspective which does justice both to the specific nature of the jurisdiction clause contained in the statutes of a company and to the relevance in the 'legal' as opposed to the economic life of the company of the collective will as against the consent of an individual. Were one to fail to appreciate that the problem raised by the national court does not call for a solution dependent on the sole consent of the individual and on traditional contractual aspects, one would not go very far; perhaps one would manage to resolve the present case, somehow: it would, however, be on a narrow ground and unsatisfactory.

In particular, to seek the consent of the individual shareholder in the traditional manner, applying to the jurisdiction clause the criteria used for the contract of a sale of a consignment of beetroot, would lead inexorably and primarily to an intolerable duality of regimes as between shareholders. That would be in this way: although falling within the sphere of Article 17, such a clause would be enforceable only against those persons taking part in the adoption of the statutes contemporaneously with the deed of incorporation, or in the case of a clause introduced subsequently, only against those expressing a vote in favour of such a clause. But not only in that way: in the case of subsequent shareholders acquiring existing shares it may be possible to come to the conclusion that such a clause is enforceable against them or not depending on whether they acquired the shares of members in respect of whom that clause was applicable; clearly that unacceptable result would be achieved, for example, if the solution adopted by the Court in the *Tilly Russ* judgment [13] were to be followed literally.

It is certainly not a coincidence that all the parties to the proceedings are opposed to a solution involving a duality of regimes as between shareholders. In fact, a duality of regimes would lead to a very paradoxical situation, especially in a company with many shareholders in many different countries. The company would be compelled, in the absence of a clause such as the one now before the Court, to proceed against its members before courts throughout the whole of Europe, America, Asia in order to recover contributions.

On the other hand, it is precisely the principle of equality between shareholders together with the requirements of transparency emphasized at the outset, which have inspired the most enlightened legislatures to affirm the criterion of *forum societatis*. Indeed it is well known that the exclusive or concurrent jurisdiction of the court of the place in which the company has its principal office is consistently applied in disputes between members and as between the company and its members, irrespective, evidently, of the nature of the dispute and of whether the company is the plaintiff or the defendant. [14]

13 — Ibid. at paragraphs 24 and 25.

14 — In Belgium (exclusive) jurisdiction is conferred on the court competent for the principal office or the main establishment (Article 628 of the Judicial Code); in Denmark Article 238 of the Code of Civil Procedure provides for the concurrent jurisdiction of the court of the place in which the registered office is situated, as does Germany in Article 22 of the Zivilprozessordnung; and the same may be said of Luxembourg (Article 36 of the Code of Civil Procedure) and of the Netherlands (Article 126 of the Code of Civil Procedure); in Italy the general jurisdiction rule applies to companies (Article 19 of the Code of Civil Procedure) and to cases between shareholders (Article 23).

It is symbolic that in the jurisdiction clause now before the Court the term used, which is a habitual one, is the courts ordinarily competent to entertain suits concerning the company.

Nor obviously would it be reasonable to suggest that each shareholder, in the process of acquiring that status, should have to subscribe to an express and specific acceptance of the derogation of jurisdiction in favour of the *forum societatis.* Such a solution, which has already been by-passed by the Court's case-law, would in any event be unfeasible having regard to the methods and techniques applicable to the movement of securities, and would not eliminate the two-fold regime as between shareholders: in essence it would amount to affirming the radical impossibility for a company limited by shares to enjoy the benefit of a clause of the type now before the Court.

As may be seen, it is necessary to adopt a different and broader perspective which, whilst fully doing justice to the ratio of Article 17 of the Convention and eschewing excessive and damaging formalism, takes account of the reality of the corporate phenomenon and its specific features in relation to contracts for valuable consideration, and of the requirements relating to the circulation of shares.

10. In the case of companies, there is undeniably underpinning the constitution of the company (whatever may be the legal description given to the corporate 'contract') a convergence of economic interests directed at the pursuit of common purposes. There is in the deed incorporating the company a community of interests whereby all the Contracting Parties seek through the pursuit of a common (economic) activity, profits and advantages. That is so, regardless of the individual reasons prompting each member to pursue the common interests, reasons which obviously may vary, but not in any significant way.

Thus, the original convergence of interests and the identical legal position of the members (equality of status subsists not merely as between the founder members at the time of incorporation but also as between them and persons joining the company subsequently since the same community of interests in pursuit of common ends extends to them as well) include an inherent possibility of sacrificing the interest of the individual seen in the light of the objectives pursued by the company which are in any event common to all the participants.

In fact, acceptance of all the provisions of the statutes, even if by definition there is not unanimity on one of them, flows from observance of the rules as to the formation of the corporate will, part of the rules governing the company's functioning. Those rules, which may be defined as the 'rules of the game', imply by definition that the shareholder agrees to be bound by the decisions of the general meeting, even if he is in disagreement with regard to a specific clause, in the same way as the shareholder who subsequently joins the company agrees to be bound by the matters hitherto occurring in the company's life.

In the final analysis, the acceptance of all the rights and obligations flowing from the statutes is inherent in the acquisition of the status of member and, moreover, entails acquiescence in all past and future decisions

of the organs of the company adopted in accordance with the provisions of the statutes and of the law concerning the formation of the corporate will.

11. Corporate logic and its underlying principles, as I have described them, clearly demonstrate that the consent of the parties to the statutes, thus to the rules governing the functioning of the company, constitute the expression of the collective will of the shareholders namely the corporate will. Similarly, it is the corporate will, and the acts giving expression to it, which regulate the obligations as between members and company, and, again, it is the corporate will in which the contractual origins of the company are subsumed. So much is that so that it is inconceivable to seek an agreement between the parties in the strict sense of the term, as an exclusive source of the obligations in question.

It is therefore in the light of the corporate will, and not in relation to the consent of the individual shareholder, that the conformity of the clause in question with the conditions laid down in Article 17 falls to be assessed.

Any other conclusion would entirely misapprehend the reality of the corporate phenomenon and lead to consequences which are certainly undesirable and which, in any event, do not correspond to the logic of the article in question: in particular, the risk of a *duality of regimes averted to as between the shareholders with regard to the competent court, a situation which would surely be at variance with the objective of Article 17.*

In the light of the foregoing considerations I therefore consider that the formal requirements laid down in Article 17 of the Convention are fulfilled if the corporate will, that is to say the expression of the overall will of the shareholders, has been arrived at in conformity with the rules of national law applicable in that respect.

That reference to the applicable national law, in the terms stated, seems to me essential in order to establish the valid formation of the corporate will (the provisions governing its formation and, specifically the majorities required, being different in the various Member States) and, at the same time, specifically to mark the limits thereof. It is in fact hardly necessary to stress that any such reference may in no way enable the Contracting States to impose different formal requirements going beyond those provided for in Article 17 as interpreted in these proceedings.

In the present case, those conditions are fully satisfied since written form, often satisfied by a notarial deed, is required in all the legal systems of the Contracting States for the adoption of the deed incorporating the company, and containing the statutes or, in any event, making express reference to them. Similarly, alteration of the statutes is required to be in written form or, at the very least, confirmed in writing, in order generally to comply with the same formal conditions as those prescribed for the deed of incorporation.

From the foregoing observations it may evidently be inferred that the same conclusion is arrived at whether the clause in question was originally contained in the statutes or whether it was inserted subsequently as a result of an alteration thereto.

As regards, then, those shareholders who did not take part in the adoption of the clause in question, the same conclusion must be arrived at, regard being had to the specific characteristics of companies and the requirements inherent in the circulation of shares. Thus, the acquisition of the status of shareholder (regardless of whether already existing shares are acquired or whether new shares are subscribed for on an increase in capital) entails acceptance of all the obligations flowing from the statutes including any clause conferring jurisdiction.

12. I do not think it appropriate to go into the preoccupations concerning any perverse effects which may arise from the solution which I have suggested, such as the risk of frivolous choices of courts or the choice of a *forum non conveniens* (the courts of Heidelberg for a company with its principal office and main establishment in Naples).

Above all else, the Court is called upon to interpret the Convention with regard to a concrete case in which the jurisdiction clause provides for 'the jurisdiction of the courts ordinarily competent to entertain suits concerning the company', that is to say the courts of the place in which the company has its principal office. Having said that, I consider that the problem deserves to be examined in a manner which goes beyond the present case, both in view of the importance of the question raised, and the fact that the question raised by the national court is formulated in general terms.

On a first reading, indeed, the choice made by the parties as to the competent court might appear irrelevant from the point of view of the Convention and the Court's case-law. But on a closer and more thorough examination it is certainly not to be excluded that the Court's case-law (the *Tilly Russ* and the *Salotti* judgments) and specifically Article 17 itself, as amended by the 1978 Convention, (the reference to international trade, and in particular the usages which the parties were or ought to have been aware of) very opportunely provide hints for that choice, in fact, hints as to the coherence and rationality of the choice of the competent courts in relation to practice. [15]

In any event, I consider that the sole manner in which one may be certain of not depriving the new wording of Article 17 of all significance, and of paying heed to the specific requirements of the actual functioning of the business world (without, moreover, distorting the original purpose of that provision which continues to be that of ensuring certainty and awareness of such clauses), consists precisely in laying down specific conditions relating to consent, which do justice to the particular sector in question. [16]

15 — See to this effect the interesting remarks made by Carbone, la disciplina communitaria della proroga della giurisdizione in materia civile e commerciale, in Diritto del Commercio Internazionale, 1989, p. 351 et seq., particularly at pp. 356 et seq.; and also, by the same author, Area dell'economic communitaria e clausole di deroga alla giurisdizione contenute in polizze di carico, in Diritto marittimo, 1977, p. 169 et seq., in particular p. 181.

16 — On this point see Kohler, Rigueur et souplesse en droit international privé: Les formes possibles pour une convention de juridiction dans le commerce international par l'article 17 de la Convention de Bruxelles dans sa nouvelle redaction, in Diritto del Commercio Internazionale, 1990, pp. 611 et seq. The author rightly emphasizes that the relaxation of the formal requirements effected by the new wording of Article 17 entailing a necessary relaxation of the same conditions with regard to the establishment of consensus, can be justified only by the possibility of substantive review of clauses conferring jurisdiction. Whilst stating that national law, particularly the common law systems, have always permitted their courts to perform such a review, not only in order to protect parties in a weak bargaining position, but also in areas in which professionals carry on their business on the basis of established conditions', the author is nevertheless of the opinion that such review is not possible on the basis of the current wording of Article 17, and therefore stands in need of amendment.

In that context, in examining the validity of clauses assigning jurisdiction in the light of usages in force in international commerce, as well as ensuring observance of the formal requirements which guarantee that attention is drawn to the clauses themselves, it is appropriate also to review their contents, thus ensuring the consistency and the reasonableness of the rules in the light of current usages in the specific commercial sector under consideration.

Returning to the case under examination and in order to seek further clarity, I would observe that, having regard to the choice of the *forum societatis* made by the large majority of legal systems, the same choice made by the shareholders and enshrined in the statutes of the company not only complies with the formal requirements laid down, but is also the only coherent and reasonable choice out of the actual or legally permissible choices available in the sector before the court.

I therefore suggest that the Court should limit the validity of a clause conferring jurisdiction to the situation in which, as in the present case, it is provided that the courts ordinarily competent to entertain suits concerning the company are to have jurisdiction, and should affirm that a provision contained in the statutes conferring such jurisdiction constitutes a valid agreement within the meaning of Article 17, where it comes into existence in accordance with the applicable national rules governing the formation of the corporate will. That conclusion also replies to question 2(a).

13. As regards, then, the question whether the clause conferring jurisdiction satisfies the requirement that the dispute must arise in connexion with a particular legal relationship within the meaning of Article 17 (question 2(b], I would first of all recall that the purpose of that provision is to prevent the party in a stronger bargaining position from imposing on the other party the jurisdiction of any other court. In view of that fact, the provision in question is observed if Article 4 of the statutes, whose interpretation is in the end a matter for the national court, is interpreted as referring to all disputes between the shareholder and the company arising out of the reciprocal corporate obligations.

Finally, as regards question 2(c), in which the national court asks whether the clause referred to in Article 4 of the statutes also covers claims to payment arising out of a contract relating to the subscription for shares and claims to the repayment of wrongly paid dividends, the interpretation of the article in question is a matter for the court hearing the main dispute. It is that court which is required to give a decision on the jurisdiction clause in order to determine to what extent and subject to what limits it is applicable to money owing to the company and to claims for the recovery of wrongly paid dividends.

14. In the light of the foregoing observations, I conclude that the Court should reply as follows to the questions raised by the Oberlandesgericht, Koblenz:

1. A clause conferring jurisdiction contained in the statutes of a company limited by shares, pursuant to which the shareholder is bound to accept the jurisdiction of the courts ordinarily competent to entertain suits concerning the company in respect of disputes with it or its organs, constitutes for all shareholders a valid agreement conferring jurisdiction within the meaning of Article 17 of the Convention, if it is concluded in compliance with the applicable rules of national law concerning the formation of the corporate will.

2. The requirement that a dispute must arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if Article 4 of the statutes is interpreted as referring to all disputes between the shareholders and the company arising out of the reciprocal corporate obligations.

3. It is for the national court to interpret the clause conferring jurisdiction in order to determine which disputes fall within its scope.