In Case 23/78

REFERENCE to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the action pending before that court between

NIKOLAUS MEETH, trader, owner of the undertaking Nikolaus Meeth, window manufacturers and wood processors, established in Piesport/Mosel, Federal Republic of Germany,

and

GLACETAL, SOCIÉTÉ À RESPONSABILITÉ LIMITÉE (limited liability company), having its registered office in Vienne-Estressin, France,

on the interpretation of the first paragraph of Article 17 of the Convention of 27 September 1968,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), P. Pescatore, M. Sørensen, A. O'Keeffe and G. Bosco, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the

Enforcement of Judgments in Civil and Commercial Matters may be summarized as follows:

I — Facts and written procedure

By a written contract concluded in August 1972 Glacetal, a limited liability company, whose registered office is in Vienne-Estressin, France, undertook to deliver in its own lorries to the undertaking Nikolaus Meeth (hereinafter referred to as "Meeth"), window manufacturers and wood processors, established in Piesport/Mosel, Federal Republic of Germany, certain quantities of insulating glass.

The contract concluded between the two parties contained the following clauses on the law which would apply and the courts which would have jurisdiction if a dispute arose:

"Unless provision is made to the contrary the sole law applicable shall be the relevant German law governing transaction between traders.

...

The place of performance for both parties shall be Piesport.

...

If Meeth sues Glacetal the French courts alone shall have jurisdiction. If Glacetal sues Meeth the German courts alone shall have jurisdiction."

Glacetal made 16 deliveries in the period from September to December 1972 for which Meeth made four payments in October and December 1972. Since Glacetal was unable to obtain the balance it instituted proceedings before the Landgericht (Regional Court) Trier to recover the sum due, namely DM 126 501.22.

The Landgericht, by a judgment of 13 January 1975, ordered Meeth to pay Glacetal the sum of DM 123 774.90, together with interest at 10% to run from 1 February 1975.

Meeth lodged an appeal with the Oberlandesgericht (Higher Regional Court) Koblenz, which, by a judgment of 17 September 1976, reduced the sum payable by Meeth to Glacetal to DM 49 509.96, together with interest, since in the meantime proceedings for the winding-up of Meeth's affairs had terminated in an agreement approved by the courts under which the undertaking's debts were to be paid at the rate of 40%.

The Oberlandesgericht ruled that a claim by Meeth that the sum of DM 157 494.03 be set off by way of damages for delayed delivery and refusal to deliver was inadmissible; it ruled that the agreement conferring jurisdiction drawn up between the parties prohibited Meeth from bringing such a claim before any courts except those of France.

When Meeth lodged an appeal on a point of law against that ruling with the Bundesgerichtshof, requesting a ruling that its claim for a set-off was admissible, that court, by an order of its 8th Civil Senate of 1 February 1978, decided to stay the proceedings, pursuant to Article 3 (1) of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, until the Court of Justice has given a preliminary ruling on the following questions:

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?

The order of the Bundesgerichtshof was received at the Court Registry on 27 February 1978.

Pursuant to Article 5 (1) of the Protocol of 3 June 1971 and Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 3 May 1978 by the Commission of the European Communities and on 16 May by the Government of the Federal Republic of Germany.

The Court, having heard the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry.

II — Written observation submitted to the Court

The *Government of the Federal Republic of Germany* considers that the disputed agreement conferring jurisdiction is lawful and that it does not automatically rule out the setting-off of claims connected with the same contract which, in pursuance of the jurisdiction clause, would have to be enforced before another court.

(a) Article 17 of the Convention confers upon the parties to a contract power to specify the courts which are to have jurisdiction; saving questions of form and of the limits laid down by the second paragraph of Article 17 with regard to the lawfulness of such agreements, the parties may freely choose the jurisdiction of the courts of the States which are parties to the Convention. The disputed clause in the agreement is clear enough; it has been judiciously drafted in that it observes the principal rule for the conferring of jurisdiction laid down in Article 2 of the Convention of 1968 and avoids favouring one of the parties. An affirmative reply should therefore be given to the first question of the Bundesgerichtshof.

(b) In the second question it is asked whether it necessarily follows from Article 17 of the Convention of 1968 that it is inadmissible to put forward a defence of set-off before a court which, according to the agreement conferring jurisdiction, would have no jurisdiction to take cognizance of proceedings on a counterclaim.

According to generally-accepted principles, such a set-off is not subject to the criteria for jurisdiction *ratione materiae* and *ratione loci* which apply in the case of independent proceedings to off-set claims (Aufrechnungsforderung). The second paragraph of Article 11 and the third paragraph of Article 14 of the Convention of 1968 expressly authorize a counterclaim despite the fact that exclusive jurisdiction is recognized *ratione materiae;* accordingly there must in principle be even stronger grounds for permitting a set-off without regard to criteria of jurisdiction.

However, questions of jurisdiction arise from the fact in the case of a set-off against a claim the court is required in large measure to consider the same matters as it would in independent proceedings to off-set claims. According to the Bundesgerichtshof, since the German courts do not have jurisdiction and there is no appropriate procedure before the civil courts with regard to the claim for a set-off, it is impossible for procedural reasons to pursue such a claim; because of the fundamental lack of jurisdiction in such matters the requirements of German procedural law militate against a decision on the set-off having the force of *res judicata.*

The Bundesgerichtshof furthermore deduced from the fact that the parties have concluded an arbitration agreement in respect of a specific claim that such claim cannot be relied upon as a set-off

before the ordinary courts; if this were not so the existence of the claim would be decided by an agency quite different from that agreed on by the parties themselves. An arbitration clause thus has the same effect as an express clause between the parties excluding a set-off; it is accepted that such a clause is permissible. On the other hand, the Bundesgerichtshof did not consider that an agreement conferring jurisdiction on a purely national basis, whether *ratione loci* or *ratione materiae*, entails a prohibition against instituting proceedings for the subject-matter of the set-off before a court other than that agreed on by the parties. The Bundesgerichtshof has treated an international agreement conferring jurisdiction as having effects, with regard to the admissibility of a set-off, equivalent to an arbitration clause.

The parties may make express provision for claiming a set-off before a court which does not have jurisdiction to take cognizance of an application or they may prohibit it in any proceedings, in the same way as they should be entitled to exclude a counterclaim even where there is a connexion in law with the original claim, since the second paragraph of Article 17 of the Convention of 1968 does not refer to Article 6 (3).

The present case relates solely to the point whether an agreement conferring jurisdiction which is lawful under Article 17 of the Convention of 1968 and which states expressly that it covers only the exercise of a right by means of legal action, also prohibits a claim for a set-off before a court which lacks jurisdiction. Such a prohibition can be inferred from the agreement between the parties because of the nature of the interests which are assumed in Article 17. It would appear to be possible to give a general ruling on this point only if it were clearly called for on the basis of a comparative study of the legal systems in question or if in Article 17 of the Convention a connexion had been established between such claims and jurisdiction clauses.

It is for the courts to interpret agreements between parties and to decide whether or not the latter intended to restrict their right to claim a set-off. Within the scope of the Convention of 1968 the presumption that there are close links between each of the parties and his own State does not lead directly to the conclusion that the parties intended to prohibit set-offs; this is particularly true of agreements conferring jurisdiction concluded after the entry into force of the Convention of 1968. Furthermore, the courts must consider whether the conditions as to form prescribed in Article 17 do not run counter to the presumption of a prohibition of set-offs and whether there are not certain restrictions on such a prohibition in cases of liquidation or bankruptcy or applying, more generally, by the logic of procedural requirements where there are connexions in law between the claims, where the claim for a set-off is not disputed or where there is a decision having the force of *res judicata*.

It is unnecessary to settle each of these points in the present proceedings: Article 17 of the Convention of 1968 does not necessarily entail a prohibition of set-offs and the jurisdiction of the Court of Justice covers only the interpretation of that Convention, not of agreements between parties.

(c) The reply to the questions submitted by the Bundesgerichtshof should therefore be as follows:

1. Article 17 of the Convention on jurisdiction and the enforcement of judgments permits an agreement under which the two parties to a contract of sale, who are domiciled in different States, can be sued only in the courts of their respective States.
2. The clause mentioned in Question 1 does not 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 only to hear the latter claim.

The essential points of the observations put forward by the *Commission* are as follows:

(a) An agreement conferring jurisdiction, such as that concluded by the parties to the main action, is not at variance with the principle set out in the second paragraph of Article 2 of the Convention of 1968 concerning the jurisdiction of the courts of the State where the person concerned is domiciled. The sole effect of such an agreement is that, where appropriate, the courts which may be chosen pursuant to Articles 5 and 6 are excluded. It is intended to render exclusive the jurisdiction already conferred upon the courts of the State of domicile.

It may be wondered whether an agreement of this kind can be considered as an agreement conferring jurisdiction within the meaning of Article 17 of the Convention: if such an agreement does not identify the court which is to have jurisdiction it must at least make it possible to identify it. This condition may not be fulfilled in the present case, since the agreement in dispute merely refers to "the French courts" or the "German courts" and leaves open the questions of the courts having territorial jurisdiction, the type of court having jurisdiction (ordinary courts, labour courts . . .) and of the level of the court in question. On the first point, the wording of Article 17 makes clear that it is sufficient if it has been indicated that "a court or the courts of a Contracting State" shall have jurisdiction; as to the two remaining points, the interpretation of the clause conferring jurisdiction shows that it refers to the ordinary courts of first instance. From this point of view it thus appears that there is no doubt that the agreement in dispute is compatible with Article 17.

Furthermore, the agreement in dispute does not state that the courts of one Contracting State shall have jurisdiction, but rather that it shall belong to the courts of one or other Contracting State depending on the nationality of the defendant. Since Article 17 makes express provision for an agreement designating "a court or the courts of a Contracting State" it does not appear that, on a literal interpretation, any other outcome is possible.

Doubtless, according to the case-law of the Court of Justice, Article 17 must be interpreted narrowly; nevertheless it is doubtful whether a strictly literal interpretation would be in accordance with the objective of that provision. The agreement freely concluded between the parties could equally well have been expressed in the form of two agreements, separated on a territorial basis; agreements whereby each of the parties could be sued only before the courts of his own State could also be sufficient. This avoids the charge which is frequently levelled against agreements conferring jurisdiction, namely that in cases of dispute they assist the economically stronger party.

(b) A reply to the second question is necessary only if the reply to the first question is in the affirmative.

In general, a defence of set-off must be considered inadmissible in certain circumstances, in particular where binding procedural rules prevent the ordinary courts from delivering a judgment capable of acquiring the authority of *res judicata* in respect of that claim. Likewise, a defence of set-off is inadmissible if the parties to a contract have concluded an express agreement that in a dispute brought before a specific court they will not claim a set-off which, according to the agreement, falls within the jurisdiction of another court. It is also recognized in domestic law that an agreement containing a provision that the courts of

the State of a particular party shall have exclusive international jurisdiction involves in addition a contractual prohibition against reliance, before a court other than that agreed upon, on a claim for a set-off covered by the agreement conferring jurisdiction. The question whether this also applies where it has been agreed that the courts of the defendant's State shall have jurisdiction can only be settled by way of the interpretation and consideration of all the circumstances of the case. If this interpretation were to lead to the conclusion that, with regard to a set- off, the parties have also agreed as to the exclusive jurisdiction of the courts which have jurisdiction over counterclaims, such regard for the intentions of the parties does not appear to be compatible with the Convention of 1968.

In the present case the parties agreed to apply German law; it must therefore be decided in accordance with German substantive law whether the claim for a set-off is valid in relation to that law. On the other hand, the question whether the claim for a set-off is procedurally admissible must be decided in accordance with procedural law. For this purpose it is necessary to take into consideration not only the wording of the Convention but also its objectives.

It was intended that the Convention should establish in the Community a uniform legal practice with regard to jurisdiction and the enforcement of judgments in civil and commercial matters; it establishes a system of direct rules conferring jurisdiction whereby, in proceedings of an international nature, the courts derive their jurisdiction directly from the Convention; it is intended to facilitate the proper administration of justice and to avoid conflicting judgments.

If the claims of the plaintiff and of the defendant arise from the same legal relationship the court best suited to settle claims by the defendant against the plaintiff is the court whose substantive law is to be applied to the subject-matter of the main action. In the present case the German court before which the main claim has been brought must be considered as having jurisdiction.

Furthermore, it is important to avoid any dislocation of proceedings, in order to save time and expense and to avoid superfluous procedure. This is also indicated by Article 6 (3) of the Convention. Finally, the remark should be made that the Convention of 1968 makes no provision for a stay of proceedings in order to take account of the judgment of a court before which the defendant subsequently institutes proceedings against the plaintiff; likewise, no provision is made for "judgment to be delivered conditionally" pending disposal of the counterclaim where that claim is heard separately from the main action.

These considerations as a whole lead to the conclusion that agreements conferring jurisdiction which restrict the setting-off of connected claims are incompatible with the Convention of 1968.

III — Oral Procedure

The Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, submitted its oral observations at the hearing on 20 September 1978.

The Advocate General delivered his opinion at the hearing on 12 October 1978.

Decision

1 By an order of 1 February 1978, which was received at the Court Registry on 27 February 1978, the Bundesgerichtshof submitted pursuant to the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Convention") certain questions concerning the interpretation of Article 17 of the Convention.

2 The file shows that the undertaking Nikolaus Meeth, window manufacturers and wood processors, established in Piesport/Mosel, Federal Republic of Germany, the defendant in the main action and appellant on a point of law, entered into a contract with Glacetal S. à R. L., the plaintiff in the main action and respondent to the appeal, for the supply of glass by the French company to the German undertaking.

The parties agreed that the contract should be governed by German law, that the place of performance of the contract was Piesport and that "if Meeth sues Glacetal the French courts alone shall have jurisdiction. If Glacetal sues Meeth the German courts alone shall have jurisdiction".

When Meeth failed to pay for certain deliveries effected by Glacetal the latter commenced proceedings to obtain payment of the sums due before the Landgericht Trier — the court having jurisdiction on the basis of the defendant's domicile — which ordered the German undertaking to make payment.

3 In the course of that procedure Meeth raised against Glacetal's claim a defence of set-off relating to the damage which it claimed to have suffered owing to delay or default on the part of the French company in performing its obligations under the contract.

The court of first instance, however, refused to allow that sum to be set off against the sale-price claimed by the French company since it considered that Meeth had failed to adduce sufficient proof in support of its claim for damages.

Meeth appealed against that judgment to the Oberlandesgericht Koblenz, which in turn found that the French undertaking was entitled to the payments it claimed, subject, however, to the effects of a composition in bankruptcy which had in the meantime been arranged.

With regard to the set-off between the selling price and the claim submitted by Meeth, the Oberlandesgericht did not allow this defence on the ground that the clause conferring jurisdiction contained in the agreement between the parties did not permit a set-off to be claimed before the German courts.

An appeal was made against this judgment on a point of law to the Bundesgerichtshof which considers that the answer to this question depends on the interpretation of Article 17 of the Convention and has referred two preliminary questions on this point to the Court of Justice.

The first question

4 The first question asks:

"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?"

5 According to the first paragraph of Article 17 "if 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 or which may arise in connexion with a particular legal relationship, that court or those courts shall have exclusive jurisdiction".

With regard to an agreement conferring reciprocal jurisdiction in the form in which it appears in the contract whose implementation forms the subject-matter of the dispute, the interpretation of that provision gives rise to difficulty because of the fact that Article 17, as it is worded, refers to the choice by the parties to the contract of a single court or the courts of a single State.

That wording, which is based on the most widespread business practice, cannot, however, be interpreted as intending to exclude the right of the parties to agree on two or more courts for the purpose of settling any disputes which may arise.

This interpretation is justified on the ground that Article 17 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the Convention, other than those which are expressly excluded pursuant to the second paragraph of Article 17.

This applies particularly where the parties have by such an agreement reciprocally conferred jurisdiction on the courts specified in the general rule laid down by Article 2 of the Convention.

Although such an agreement coincides with the scope of Article 2 it is nevertheless effective in that it excludes, in relations between the parties, other optional attributions of jurisdiction, such as those detailed in Articles 5 and 6 of the Convention.

6 The reply to the first question must accordingly be that the first paragraph of Article 17 of the Convention cannot be interpreted as prohibiting 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.

The second question

7 The second questions asks:

"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 off-set 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?"

8 According to the first paragraph of Article 17, jurisdiction is conferred on a given court or courts in order to settle any disputes which have arisen or which may arise "in connexion with a particular legal relationship".

The question of the extent to which a court before which a case is brought pursuant to a reciprocal jurisdiction clause, such as that appearing in the contract between the parties, has jurisdiction to decide on a set-off claimed by one of the parties on the basis of the disputed contractual obligation must be determined with regard both to the need to respect individuals' right of independence, upon which Article 17, as has been noted above, is based, and the need to avoid superfluous procedure, which forms the basis of the Convention as a whole of which Article 17 is part.

In the light of both of these objectives Article 17 cannot be interpreted as preventing a court before which proceedings have been instituted pursuant to a clause conferring jurisdiction of the type described above from taking into account a claim for a set-off connected with the legal relationship in dispute if such court considers that course to be compatible with the letter and spirit of the clause conferring jurisdiction.

9 Accordingly the reply to the second question must be that where there is a clause conferring jurisdiction such as that described in the reply to the first question the first paragraph of Article 17 of the Convention 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.

Costs

10 The costs incurred by the Government of the Federal Republic of Germany and by the Commission, which have submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Bundesgerichtshof, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

In answer to the questions referred to it by the Bundesgerichtshof by an order of 1 February 1978, hereby rules:

1. **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 cannot be interpreted as prohibiting 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 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.