defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that if the challenge to jurisdiction is not preliminary to any defence as to the substance it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised.

3. Since the aim of Article 17 of the Convention is to lay down the formal requirements which agreements conferring jurisdiction must meet, Contracting States are not free to lay down formal requirements other than those contained in the Convention. When those rules are applied to provisions concerning the language to be used in an agreement conferring jurisdiction they imply that the legislation of a Contracting State may not allow the validity of such an agreement to be called in question solely on the ground that the language used is not that prescribed by that legislation.

In Case 150/80

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 Hof van Cassatie [Court of Cassation], Belgium, for a preliminary ruling in the action pending before that court between

ELEFANTEN SCHUH GMBH, Kleve, Federal Republic of Germany,

and

PIERRE JACQMAIN, Schoten, Belgium,

on the interpretation of Articles 17, 18 and 22 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore and Lord Mackenzie Stuart (Presidents of Chambers), T. Koopmans, A. O'Keeffe, G. Bosco, O. Due, U. Everling and A. Chloros, Judges,

Advocate General: Sir Gordon Slynn
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 Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities may be summarized as follows:

I — Facts and written procedure

1. From February 1970 Mr Jacqmain, a resident of Schoten (near Antwerp), Belgium, was employed as a sales agent by the German undertaking G. Hoffmann GmbH, now Elefanten Schuh GmbH which has its registered office at Kleve in the Federal Republic of Germany. Mr Jacqmain, who was sole agent for the Belgian provinces of Antwerp, Brabant and Limburg, in fact worked for the Belgian subsidiary of Elefanten Schuh, Elefant SA, which has its registered office at Genk-Zwartberg in Belgium.

Difficulties arose concerning *inter alia* the assignment of his contract of employment to Elefant SA which led Elefanten Schuh GmbH to dismiss Mr Jacqmain without notice on urgent grounds in December 1975.

According to the information contained in the file the contract of employment concluded between Mr Jacqmain and Hoffmann, which was drafted in German, contained a jurisdiction clause stipulating that the court at Kleve (Federal Republic of Germany) would have exclusive jurisdiction in the event of any dispute.

Mr Jacqmain brought an action before the Arbeidsrechtbank [Labour Tribunal] Antwerp seeking damages from the two companies payable by them jointly for the breach of the employment contract.

On 26 May 1976 Elefanten Schuh, the first defendant in the action, stated its case as to the substance of the claim. By a further document lodged on 1 March 1977 it invoked the jurisdiction clause contained in the contract in order to challenge the jurisdiction *ratione loci* of the Arbeidsrechtbank Antwerp.

The tribunal decided that under the terms of Article 627 (9) of the Gerechtelijk Wetboek [Belgian Judicial Code] the claim might be made to "the court ... of the place designated ... for the pursuance of the occupation"; that it was not contested that the plaintiff pursued his occupation in the service of the first defendant *inter alia* within the territorial jurisdiction of the Arbeidsrechtbank Antwerp and that, under Article 630 of the Belgian Judicial Code, no agreement to the contrary between the parties could deprive the plaintiff of the right to bring his claim before that tribunal. The tribunal accordingly rejected the plea as to jurisdiction and ordered the two companies to pay most of the damages claimed.

2. Whilst acknowledging that under Article 17 of the Brussels Convention of 27 September 1968 the parties may by written agreement derogate from the rules on jurisdiction contained in the Belgian Judicial Code, on appeal the Arbeidshof [Labour Court] Antwerp upheld the jurisdiction of the Arbeidsrechtbank Antwerp to entertain the case in pursuance of Article 627 (9) of the Belgian Judicial Code.

In the same appeal the Arbeidshof held that, by Article 52 (1) of the Royal Decree of 18 July 1966 consolidating the laws on the use of languages in administrative matters as well as by Article 10 of the Decree of 19 July 1973 governing the use of languages, the contract of employment should have been written in Dutch and that Article 10 aforesaid provides that any act or document not written in Dutch is null and void, including therefore, documents which, under the legislation of 18 July 1966 on the use of languages, were already irregular at the time when the decree governing the use of the languages came into force. Consequently the contract of employment written in German was null and void and the clause conferring jurisdiction contained therein was invalid so that Article 17 of the Brussels Convention could not apply.

The two companies appealed in cassation but the appeal by Elefant SA was declared inadmissible for being out of time.

It appears from the order for reference that as its first submission in cassation Elefanten Schuh GmbH contended that the validity of an agreement conferring exclusive jurisdiction is governed uniformly, as regards all the Member States of the European Economic Community, by Article 17 of the Convention of 27 September 1968 and cannot be affected by rules on labour relations between employers and workers promulgated by a Member State.

The respondent in cassation in turn put forward two grounds for the inadmissibility of that submission.

The first ground for inadmissibility is based on Article 6 (1) of the Brussels Convention according to which where there are several defendants a defendant who is domiciled on the territory of a Contracting State may be sued, in

another Member State, in the courts for the place where any one of them is domiciled. The Hof van Cassatie rejected that ground since it did not appear that at the time of the summons one of the original defendants, Elefant SA or Elefanten Schuh GmbH, was domiciled within the territorial jurisdiction of the Arbeidsrechtbank Antwerp.

The second submission of inadmissibility is based on Article 18 of the Brussels Convention which is worded as follows:

"Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16."

Owing to the fact that the appellant in cassation did not challenge the territorial jurisdiction of the Arbeidsrechtbank Antwerp until it lodged its conclusions at the hearing of the tribunal on 1 March 1977, the respondent in cassation, before the Arbeidshof, relied upon Article 854 of the Belgian Judicial Code by which the lack of jurisdiction of the court seised of the case should be pleaded before all other objections or defences except when it is a matter of public policy. The court which made the reference held that the rules contained in Article 627 (9) of the Judicial Code, concerning the territorial jurisdiction of courts in disputes over contracts of employment, are not a matter of public policy and then raised questions (numbered 1) on the interpretation of the Brussels Convention which are set out below.

The Hof van Cassatie next took the view, of its own motion, that the submission was inadmissible for lack of interest if, as a result of the related nature of the actions, which is not contested, as established by the judgment of the Arbeidshof, the Arbeidsrechtbank Antwerp had jurisdiction to entertain both actions, even if the action by the defendant against the plaintiff, had it been lodged separately, would, pursuant to a valid agreement conferring jurisdiction, have had to be brought before the court of another Contracting State.

In this connexion the court which made the reference refers to Article 22 of the Brussels Convention, which provides:

"Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

With the questions set out below (numbered 2) in mind the national court observes that the third paragraph of Article 22 defines the term "related" in virtually the said terms as Article 30 of the Judicial Code and that the term

therefore clearly has the same meaning in both provisions. The finding by the Arbeidshof that the claims are related is therefore also relevant for the application of Article 22 of the Convention.

As regards the submission in cassation itself, the court which made the reference held that the Decree of 19 July 1973 of the Cultuurraad voor Nederlandse Cultuurgemeenschap [Culture Council for the Netherlands Cultural Community], governing the use of languages in relations between employers and employees, has application to natural and legal persons having a place of business in the Dutch-speaking area or which employs staff in that area; Article 2 of that decree provides that the language to be used in relations between employers and employees shall be Dutch; by Article 10 of the decree documents and acts which are not in accordance with the provisions of the decree are void and they shall be so declared by the court of its own motion; accordingly the court may not take cognizance of the content of a document which has been drawn up in a language other than Dutch.

Thus the submission raises a question on the interpretation of Article 17 of the Brussels Convention which is set out below under 3. That article is worded as follows:

"If the parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connexion with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.

Agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

If the agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention."

3. The Hof van Cassatie stayed the proceedings and put the following questions to the Court of Justice for a preliminary ruling:

"1. (a) Is Article 18 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applicable if parties have agreed to confer jurisdiction on a court within the meaning of Article 17?

(b) Is the rule on jurisdiction contained in Article 18 applicable if the defendant has not only contested jurisdiction but has in addition made submissions on the action itself?

(c) If it is, must jurisdiction then be contested *in limine litis?*

2. (a) In application of Article 22 of the Convention can related actions which, had they been brought separately, would have had to be brought before courts of different Contracting States, be brought simultaneously before one of those courts, provided that the law of that

court permits the consolidation of related actions and that court has jurisdiction over both actions?

(b) Is that also the case if the parties to one of the disputes which have given rise to the actions have agreed, in accordance with Article 17 of the Convention, that a court of another Contracting State is to have jurisdiction to settle that dispute?

3. Does it conflict with Article 17 of the Convention to rule that an agreement conferring jurisdiction on a court is void if the document in which the agreement is contained is not drawn up in the language which is prescribed by the law of a Contracting State upon penalty of nullity and if the court of the State before which the agreement is relied upon is bound by that law to declare the document to be void of its own motion?"

4. The order for reference dated 9 June 1980 was entered on the Court register on 24 June 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the Government of the United Kingdom, represented by R. D. Munrow, of the Treasury Solicitor's Office, acting as Agent, and by the Commission of the European Communities, represented by its Legal Adviser, A. McClellan, acting as Agent, assisted by H. Van Houtte of the Brussels Bar.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations lodged with the Court

The questions relating to Article 18 of the Convention

The *Government of the United Kingdom* suggests that the reply to question 1 (a) should be that if a court is satisfied that by entering an appearance a defendant intends to submit to its jurisdiction and thus to waive an agreement entered into pursuant to Article 17, that court may properly assume jurisdiction in accordance with Article 18. That conclusion follows from generally accepted principles of the law of contract. Furthermore, a valuable indication of the likely intention of the parties to the 1968 Convention is also to be found in the pre-existing bilateral arrangements. For example, by the terms of bilateral conventions entered into between the United Kingdom on the one hand and France, Belgium, the Federal Republic of Germany, Italy and the Netherlands on the other hand, the jurisdiction of the original court is to be recognized where the defendant submitted to the jurisdiction by voluntarily appearing in the proceedings, and the fact that there was an agreement between the plaintiff and the defendant attributing jurisdiction to a different court is no exception to this rule.

In the *Commission's* view, Article 18 of the Brussels Convention is also applicable if the parties have decided by agreement which court shall have jurisdiction, in accordance with Article 17.

That argument may be founded on the very words of Article 18 which provides that the court before whom a defendant enters an appearance shall not have

jurisdiction in the case of the exclusive jurisdiction of another court under Article 16; however, that provision does not mention Article 17. In accordance with the second paragraph of Article 17 *in fine* the exclusive jurisdiction provided for in Article 16 prevails over the exclusive jurisdiction provided for in Article 17; the special position of Article 16 in relation to Article 17 is moreover confirmed by Articles 19, 28 and 34 of the Convention.

Moreover, if the rule on supplementary jurisdiction contained in Article 18 were not to apply in the case of an agreement on jurisdiction in accordance with Article 17, that would jeopardize the very object of Article 18 which is to widen the range of courts having jurisdiction and consequently reduce legal uncertainty as regards the rules on jurisdiction (see *Jenard* Report on the Convention of 27 September 1968, Official Journal 1979, C 59, p. 1 at p. 38).

Such a flexible interpretation of Article 18 would not be in contradiction with the strict formalism required by Article 17 for an express jurisdiction agreement. That difference is explained by the very nature of the two kinds of prorogation of jurisdiction; one is founded on the law and the other requires a contractual basis.

As regards Question 1 (b) the *Government of the United Kingdom* first of all points out that there is a certain discrepancy between the different language versions of the second sentence of Article 18. The French text reads:

"Cette règle n'est pas applicable si la comparution a pour objet de contester la compétence . . ."

but the other three texts which are at present authentic are worded as follows:

"Dies gilt nicht, wenn der Beklagte sich *nur* einläßt, um den Mangel der Zuständigkeit geltend zu machen . . ."

"Tale norma non è applicabile se la comparizione avviene *solo* per eccepire la incompetenza . . ."

"Dit voorschrift is niet van toepassing indien de verschijning *uitsluitend* ten doel heeft de bevoegdheid te betwisten . . ."

The English text, which, like the Danish and Irish texts, will be authentic on the entry into force of the Convention of 9 October 1978 on the accession of the three new Member States, is worded as follows:

"This rule shall not apply where appearance was entered *solely* to contest the jurisdiction . . ."

The Danish text is similarly worded, whilst the Irish text is closer to the French.

It is arguable on the French text that a defendant who enters an appearance to contest the court's jurisdiction may at the same time submit arguments on the substance of the case without thereby conferring jurisdiction on the court. But the English text, like the German, Italian and Dutch texts, requires the defendant to confine his defence to the question of jurisdiction.

Although it does not seem possible to the Government of the United Kingdom to advocate an interpretation of Article 18 based only on the French text it nevertheless believes that the provision should be flexibly applied. Article 18 would be better served if the defendant were allowed to plead on the substance where it is clear that the plea as to the substance is intended to be merely sub-

sidiary (see *Bülow-Böckstiegel*, "Internationaler Rechtsverkehr in Zivil- und Handelssachen", Volume 1, p. 156).

Furthermore, the Jenard Report describes the purpose of Article 18 in neutral language which makes no mention of the need for the plea to the jurisdiction to stand alone:

"Article 18 governs jurisdiction implied from submission. If a defendant domiciled in a Contracting State is sued in a court of another Contracting State which does not have jurisdiction under the Convention, two situations may arise: the defendant may either, as he is entitled to do, plead that the court has no jurisdiction under the Convention, in which case the court must declare that it does not have jurisdiction; or he may elect not to raise this plea, and enter an appearance. In the latter case, the court will have jurisdiction." (Official Journal 1979, C 59, p. 38.)

There is moreover a risk, in the view of the Government of the United Kingdom, that too rigid an interpretation of Article 18 might do injustice to the defendant where proceedings are accompanied by provisional or protective measures which the defendant can only prevent by addressing arguments to the substance of the case. Difficulties might also arise if a time-limit for the lodging of a defence runs out before the jurisdiction issue has been settled, or in the rather exceptional circumstance contemplated by Article 59 of the Convention. Finally it is illogical that a court, which, having heard the defendant, concludes that it lacks jurisdiction, should nevertheless be automatically required to assume jurisdiction under Article 18 simply because the defendant has not confined his argument to the issue of jurisdiction but has included argument on the substance of the case.

It is therefore the United Kingdom's submission that, whilst Article 18 normally requires the challenge of jurisdiction to be made in isolation, it should be interpreted in a flexible manner so as to permit arguments being also addressed to the substance without automatically providing a foundation of that jurisdiction in exceptional cases where such arguments are clearly subsidiary to the main objective of contesting the jurisdiction of the court seised.

In the *Commission's* view it is not possible in law for the defendant to plead first on the substance and thereby implicitly recognize the jurisdiction of the court and then refute that jurisdiction in the course of the proceedings. However it regards as excessively strict the view that a defendant who argues on the substance after challenging the jurisdiction of the court seised has accepted the jurisdiction of that court. It points out that specifically where Article 18 of the Convention is concerned courts of the Contracting States have already confirmed that a defendant who denies jurisdiction may plead on the substance of the case in the alternative (Bundesgerichtshof, 3 March 1976, Recht der internationalen Wirtschaft 1976, 447; Italian Court of Cassation, 23 June and 10 November 1977, Giustizia Civile 1978, No 1, pp. 44 to 47; Arrondissementsrechtbank, Roermond, 31 October 1974, Nederlandse Jurisprudentie 1975, No 405; Tribunale di Bassano del Grappe, 13 February 1976, EEG — Documentatie No 36; Tribunale de Pinerolo, 31 March 1976, Rivista di Diritto Internazionale Privato e Processuale 1977, No 1, p. 78).

The Commission is further of the view that the issue whether the defendant, besides contesting jurisdiction, may put forward submissions in the alternative on the substance without conferring jurisdiction under Article 18 should be governed by the national procedural law of the court seised as the Jenard Report advocates a similar solution as regards the concept of "appearance" (Jenard Report, p. 38).

As regards Question 1 (c) the *Government of the United Kingdom* and the *Commission* are both of the opinion that jurisdiction must be contested *in limine litis.* However they refer to the Jenard Report (p. 38) as confirmation that the precise point in time up to which the defendant may raise a plea to the jurisdiction should be left to the rules of procedure of the court seised of the proceedings.

The questions relating to Article 22 of the Convention

The *Government of the United Kingdom* observes that Questions 2 (a) and (b) are not questions on the interpretation of Article 22 of the Convention as they are both concerned with the circumstances in which a court may assume jurisdiction. Article 22 however deals with the circumstances in which a court may either stay its proceedings or decline jurisdiction. Consequently the government believes that, worded as they are, these two questions cannot be answered.

The *Commission,* too, believes that Article 22 does not constitute a basis for founding jurisdiction which would allow claims, because they are related, to be lodged otherwise than with the courts having jurisdiction to entertain those claims under the normal rules of jurisdiction of the Convention. It adds that, besides the three cases referred to in Article 6 of the Convention in which the fact that cases are related is a basis for founding jurisdiction, lack of jurisdiction may be raised if a claim is made, on grounds that the cases are related, before a court which has no jurisdiction to entertain that claim under Articles 2 to 16.

The question on Article 17 of the Convention

The Government of the United Kingdom first proposes that Question 3 should be re-phrased more generally as follows:

"Where an agreement satisfying the conditions of Article 17 and conferring exclusive jurisdiction in relation to a dispute on the courts of one Contracting State forms part of a contract which is void by the law of another Contracting State, does this allow the courts of that other State to disregard the agreement and to assume jurisdiction over the dispute in accordance with other provisions of the Convention?"

The government stresses that where proceedings relating to the validity of an agreement on attribution of jurisdiction, which is clearly a separate agreement, are brought before a court other than the court having jurisdiction under Article 17, the court seised should examine the validity of the agreement solely in the light of the requirements of Article 17. According to judgments of the Court of 14 December 1976 in Cases 24/76 *(Estasis Salotti* v *RÜWA* [1976] ECR 1831) and 25/76 *(Segoura* v *Bonakdarian* [1976] ECR 1851) those requirements must be strictly construed.

Where, however, the agreement on jurisdiction forms part of a contract from which it is not severable its validity should depend on that of the contract and should therefore be determined pursuant to the rules of the court seised on conflict of laws. If, in the present state of the rules of the Member States on conflict of laws, different courts may arrive at different results, that difficulty will be largely overcome when the Convention on the Law Applicable to Contractual Obligations, opened for signature at Rome on 19 June 1980, comes into operation. Although that Convention does not apply to agreements conferring jurisdiction as such, such agreements stand or fall according to the validity of the contract of which they are an integral part. If those contracts are valid under the legal system of a Member State of the Community, applicable by virtue of the Convention on Contractual Obligations, the test for the validity of jurisdiction clauses will be Article 17 of the Brussels Convention. Moreover the Convention on Contractual Obligations allows a rule of the law of a country specified by that Convention to be refused application only if application of that rule would be manifestly incompatible with the public policy of the forum.

In either case, that is, where the contract in which the jurisdiction clause is embedded is valid or the jurisdiction agreement considered separately is a valid one, it may be disregarded only in exceptional circumstances, where its operation would manifestly be incompatible with the public policy of the forum. The fact that the jurisdiction clause, or the agreement of which it forms part, would be void under a rule of the national law of the court seised of the matter which that court has to apply of its own motion is not a sufficient ground for invalidation.

The *Commission* is of the view that national law is applicable to the validity of the conferment of jurisdiction only after Article 17 has been applied, to the extent to which such application does not affect the exclusive jurisdiction referred to in Article 17 of the Brussels Convention.

It points out here that in theory various national laws may conceivably govern the validity of the agreement conferring jurisdiction. However, the need to have uniform validity of such agreements at Community level, as was suggested by Mr Advocate General Capotorti, (Opinion in Cases 24/76 and 25/76, [1976] ECR 1846 and 1867 to 1868), would act as a guideline for achieving an independent interpretation of Article 17 of the Convention.

Finally the Commission submits that the possibility that Belgium might be able to impose the use of Dutch, on pain of nullity, as an additional requirement for the validity of an agreement conferring jurisdiction when one of the parties is an employer or employee resident in the Dutch-speaking area would pre-suppose the adoption of a Protocol to that effect like the one for Luxembourg.

III — Oral procedure

At the sitting on 31 March 1981 oral argument was presented on behalf of the Commission of the European Communities, represented for the purposes of the oral procedure by its Legal Adviser, A. McClellan, acting as Agent and assisted by H. Van Houtte of the Brussels Bar.

The Advocate General delivered his opinion at the sitting on 20 May 1981.

Decision

1 By judgment dated 9 June 1980 which was received at the Court on 24 June 1980 the Cour de Cassation [Court of Cassation] of Belgium referred to the Court for a preliminary ruling 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 several questions as to the interpretation of Articles 17, 18 and 22 of that Convention.

2 Those questions were put in the context of an appeal in cassation against a judgment of the Arbeidshof Antwerpen [Labour Court, Antwerp] ordering Elefanten Schuh GmbH, a company incorporated under German law, and Elefant NV, a company incorporated under Belgian law, to pay jointly the sum of BFR 3 120 597 together with interest to Mr Pierre Jacqmain for having *inter alia* dismissed Mr Jacqmain without notice.

3 It appears from the papers placed before the Court that in 1970 Mr Jacqmain was employed as a sales agent by the German company Hoffmann GmbH which subsequently adopted the name Elefanten Schuh GmbH; however, he actually worked in Belgium, in particular in the provinces of Antwerp, Brabant and Limburg, on instructions which he received from the Belgian subsidiary of that undertaking, Elefant NV The main action arose as a result of difficulties which occurred in 1975 between Mr Jacqmain and the two companies concerning details of the transfer of the contract of employment from the German company to the Belgian company.

4 Mr Jacqmain brought an action in the Arbeidsrechtbank Antwerpen [Labour Tribunal, Antwerp] against the two companies. The defendant companies appeared before that court and by their first submissions they contested the substance of the applications lodged against them. In further submissions lodged nine months later the German company claimed that the Arbeidsrechtbank did not have jurisdiction on the ground that the contract of employment contained a clause stipulating that the court at Kleve in the Federal Republic of Germany was to have exclusive jurisdiction in the event of any dispute. The Arbeidsrechtbank dismissed that objection. It took the view that such a clause could not derogate from Article 627 of the Belgian Judicial Code which in disputes of this kind provides that the court of the place where the occupation is pursued is to have jurisdiction.

5 The Arbeidshof Antwerpen, to which an appeal from the judgment of the Arbeidsrechtbank was made, considered that pursuant to Article 17 of the Brussels Convention of 27 September 1968 the parties to the contract of employment could confer territorial jurisdiction on the court of Kleve by agreeing in writing to derogate from the rules on territorial jurisdiction contained in the Belgian Judicial Code. However, the Arbeidshof held that the German company could not rely on the jurisdiction clause on the ground that the contract of employment had to be written in Dutch by virtue of Article 10 of the Decree of 19 July 1973 governing the use of languages in relations between employers and employees, adopted by the Cultuurraad voor Nederlandse Cultuurgemeenschap [Culture Council for the Netherlands Cultural Community] (Moniteur Belge, p. 10089). The Arbeidshof took the view that Article 10, which provides that any act or document not written in Dutch is null and void, applies to documents drawn up before the decree entered into force. Consequently the contract of employment, drawn up in German, was null and void and the clause conferring jurisdiction contained therein was invalid.

6 The appeal in cassation lodged against the judgment of the Arbeidshof by the Belgian company was declared inadmissible by the Hof van Cassatie [Court of Cassation]. As the appeal in cassation lodged by the German company concerned the validity of the jurisdiction clause in particular the Hof van Cassatie decided in view of Article 17 of the Brussels Convention to put three questions to the Court of Justice.

Question 1

7 Question 1 is worded as follows:

"1. (a) Is Article 18 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applicable if parties have agreed to confer jurisdiction on a court within the meaning of Article 17?

(b) Is the rule on jurisdiction contained in Article 18 applicable if the defendant has not only contested jurisdiction but has in addition made submissions on the action itself?

(c) If it is, must jurisdiction then be contested *in limine litis?*"

8 Articles 17 and 18 form Section 6 of Title II of the Convention which deals with prorogation of jurisdiction; Article 17 concerns jurisdiction by consent and Article 18 jurisdiction implied from submission as a result of the defendant's appearance. The first part of the question seeks to determine the relationship between those two types of prorogation.

9 In the first sentence, Article 18 of the convention lays down the rule that a court of a Contracting State before whom a defendant enters an appearance is to have jurisdiction and in the second sentence it provides that that rule is not to apply where appearance was entered solely in order to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16 of the Convention.

10 The case envisaged in Article 17 is not therefore one of the exceptions which Article 18 allows to the rule which it lays down. Moreover neither the general scheme nor the objectives of the Convention provide grounds for the view that the parties to an agreement conferring jurisdiction within the meaning of Article 17 are prevented from voluntarily submitting their dispute to a court other than that stipulated in the agreement.

11 It follows that Article 18 of the Convention applies even where the parties have by agreement designated a court which is to have jurisdiction within the meaning of Article 17.

12 The second and third parts of the question envisage the case in which the defendant has appeared before a court within the meaning of Article 18 but contests the jurisdiction of that court.

13 The Hof van Cassatie first asks if Article 18 has application where the defendant makes submissions as to the jurisdiction of the court as well as on the substance of the action.

14 Although differences between the different language versions of Article 18 of the Convention appear when it is sought to determine whether, in order to exclude the jurisdiction of the court seised, a defendant must confine himself to contesting that jurisdiction, or whether he may on the contrary still achieve the same purpose by contesting the jurisdiction of the court as well as the substance of the claim, the second interpretation is more in keeping with the objectives and spirit of the Convention. In fact under the law of civil procedure of certain Contracting States a defendant who raises the issue of jurisdiction and no other might be barred from making his submissions as to the substance if the court rejects his plea that it has no jurisdiction. An interpretation of Article 18 which enabled such a result to be arrived at would be contrary to the right of the defendant to defend himself in the original proceedings, which is one of the aims of the Convention.

15 However, the challenge to jurisdiction may have the result attributed to it by Article 18 only if the plaintiff and the court seised of the matter are able to ascertain from the time of the defendant's first defence that it is intended to contest the jurisdiction of the court.

16 The Hof van Cassatie asks in this regard whether jurisdiction must be contested *in limine litis.* For the purposes of interpreting the Convention that concept is difficult to apply in view of the appreciable differences existing between the legislation of the Contracting States with regard to bringing actions before courts of law, the appearance of defendants and the way in which the parties to an action must formulate their submissions. However, it follows from the aim of Article 18 that if the challenge to jurisdiction is not preliminary to any defence as to the substance it may not in any event occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised.

17 Therefore the answer to the second and third parts of Question 1 should be that Article 18 of the Convention must be interpreted as meaning that the rule on jurisdiction which that provision lays down does not apply where the defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that, if the challenge to jurisdiction is not preliminary to any defence as to the substance, it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised.

Question 2

18 Question 2 is as follows:

"2. (a) In application of Article 22 of the Convention, can related actions which, had they been brought separately, would have had to be brought before courts of different Contracting States, be brought simultaneously before one of those courts, provided that the law of that court permits the consolidation of related actions and that court has jurisdiction over both actions?

(b) Is that also the case if the parties to one of the disputes which have given rise to the actions have agreed, in accordance with Article 17 of the Convention, that a court of another Contracting State is to have jurisdiction to settle that dispute?"

19 Article 22 of the Convention is intended to establish how related actions which have been brought before courts of different Member States are to be dealt with. It does not confer jurisdiction; in particular, it does not accord jurisdiction to a court of a Contracting State to try an action which is related to another action of which that court is seised pursuant to the rules of the Convention.

20 The answer to Question 2 should therefore be that Article 22 of the Convention applies only where related actions are brought before courts of two or more Contracting States.

Question 3

21 The final question is worded as follows:

> "3. Does it conflict with Article 17 of the Convention to rule that an agreement conferring jurisdiction on a court is void if the document in which the agreement is contained is not drawn up in the language which is prescribed by the law of a Contracting State upon penalty of nullity and if the court of the State before which the agreement is relied upon is bound by that law to declare the document to be void of its own motion?"

22 From that wording it appears that the Hof van Cassatie is solely concerned with the validity of an agreement conferring jurisdiction which is rendered void by the national legislation of the court seised as having been written in a language other than that prescribed by that legislation.

23 Article 17 stipulates that the agreement conferring jurisdiction must take the form of an agreement in writing or an oral agreement evidenced in writing.

24 According to the Report on the Convention submitted to the Governments of the Contracting States at the same time as the draft Convention those formal requirements were inserted out of the concern not to impede commercial practice, yet at the same time to cancel out the effects of clauses in contracts which might go unread, such as clauses in printed forms for

business correspondence or in invoices, if they were not agreed to by the party against whom they operate. For those reasons jurisdiction clauses should be taken into consideration only if they are the subject of a written agreement, and that implies the consent of all the parties. Furthermore, the draftsmen of Article 17 were of the opinion that, in order to ensure legal certainty, the formal requirements applicable to agreements conferring jurisdiction should be expressly prescribed.

25 Article 17 is thus intended to lay down itself the formal requirements which agreements conferring jurisdiction must meet; the purpose is to ensure legal certainty and that the parties have given their consent.

26 Consequently Contracting States are not free to lay down formal requirements other than those contained in the Convention. That is confirmed by the fact that the second paragraph of Article 1 of the Protocol annexed to the Convention expressly prescribes special requirements of form with regard to persons domiciled in Luxembourg.

27 When those rules are applied to provisions concerning the language to be used in an agreement conferring jurisdiction they imply that the legislation of a Contracting State may not allow the validity of such an agreement to be called in question solely on the ground that the language used is not that prescribed by that legislation.

28 Moreover, any different interpretation would run counter to Article 17 of the Convention the very purpose of which is to enable a court of a Contracting State to be chosen by agreement where that court, if not so chosen, would not normally have jurisdiction. That choice must therefore be respected by the courts of all the Contracting States.

29 Consequently, the answer to Question 3 must be that Article 17 of the Convention must be interpreted as meaning that the legislation of a Contracting State may not allow the validity of an agreement conferring jurisdiction to be called in question solely on the ground that the language used is not that prescribed by that legislation.

Costs

30 The costs incurred by the Government of the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since the proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hof van Cassatie by judgment of 9 June 1980, hereby rules:

1. **Article 18 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applies even where the parties have by agreement designated a court which is to have jurisdiction within the meaning of Article 17 of that Convention.**

2. **Article 18 of the Convention of 27 September 1968 must be interpreted as meaning that the rule on jurisdiction which that provision lays down does not apply where the defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that, if the challenge to jurisdiction is not preliminary to any defence as to the substance, it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised.**

3. **Article 22 of the Convention of 27 September 1968 applies only where related actions are brought before courts of two or more Contracting States.**

4. Article 17 of the Convention of 27 September 1968 must be interpreted as meaning that the legislation of a Contracting State may not allow the validity of an agreement conferring jurisdiction to be called in question solely on the ground that the language used is not that prescribed by that legislation.

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans O'Keeffe

Bosco Due Everling Chloros

Delivered in open court in Luxembourg on 24 June 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 20 MAY 1981

My Lords,

This case was referred to the Court by the Hof van Cassatie, Brussels by order dated 9 June 1980 in accordance with Article 3 of the Protocol of 3 June 1971 on the Interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgments ("the Convention"). It concerns three articles of the Convention: Articles 17 and 18, on prorogation of jurisdiction; and Article 22, on the consolidation of related actions.

The appellant in the proceedings before the court making the reference, Elefanten Schuh GmbH, is a company incorporated under German law. I refer to the appellant as "the German Company." It maintains its registered office in Kleve and is engaged in the shoe business. The respondent, Pierre Jacqmain, lives in Schoten in Belgium.

On 1 February 1970 the German Company engaged Mr Jacqmain as its commercial representative in Belgium