

JUDGMENT OF THE COURT

10 March 1992 *

In Case C-214/89,

REFERENCE to the Court 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 by the Oberlandesgericht Koblenz for a preliminary ruling in the proceedings pending before that court between

Powell Duffryn plc

and

Wolfgang Petereit

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,

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F. A. Schockweiler, F. Grévisse, and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Diez de Velasco, M. Zuleeg and J. L. Murray, Judges,

Advocate General: G. Tesauero,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

- Powell Duffryn plc, by Eckart Wilcke, Rechtsanwalt of Frankfurt am Main;
- Wolfgang Petereit, by Karl Otto Armbrüster, Rechtsanwalt of Mainz;
- the German Government, by Professor Christof Böhmer, acting as Agent;
- the Commission of the European Communities, by Friedrich-Wilhelm Albrecht, Legal Adviser, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt of Düsseldorf;

having regard to the Report for the Hearing,

after hearing the oral observations of Powell Duffryn plc, Wolfgang Petereit and the Commission, represented by Henri Étienne, Principal Legal Adviser, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, at the hearing on 15 October 1991,

after hearing the Opinion of the Advocate General at the sitting on 20 November 1991,

gives the following

Judgment

- 1 By order of 1 June 1989, which was received at the Court on 10 July 1989, the Oberlandesgericht (Higher Regional Court) Koblenz referred to the Court for a preliminary ruling 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 a number of questions on the interpretation of Article 17 of that convention, as amended by the 1978 Accession Convention (Official Journal 1978 L 304, p. 1, hereinafter referred to as the 'Brussels Convention').

2 The questions arose in proceedings between W. Petereit, acting as liquidator of the company IBH-Holding AG, in liquidation, and Powell Duffryn plc (hereinafter referred to as 'Powell Duffryn'). It appears from the papers in the case that Powell Duffryn, a company under English law, had subscribed for registered shares in IBH-Holding AG (hereinafter referred to as 'IBH-Holding'), a company limited by shares under German law, when the latter's capital was increased in September 1979. On 28 July 1980 Powell Duffryn participated in the proceedings of a general meeting of IBH-Holding during which, by a show of hands, the shareholders adopted resolutions amending the statutes of IBH, in particular by inserting into them the following clause:

'By subscribing for or acquiring shares or interim certificates the shareholder submits, with regard to all disputes between himself and the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company.'

3 In 1981 and 1982 Powell Duffryn subscribed for further shares on successive increases in the capital of IBH-Holding and also received dividends. In 1983 IBH-Holding was put into liquidation and Mr Petereit, acting as liquidator, brought an action before the Landgericht Mainz claiming that Powell Duffryn had not fulfilled its obligations to IBH-Holding to make the cash payments due in respect of the increases in capital. He also sought to recover dividends which he maintained had been wrongly paid to Powell Duffryn.

4 The Landgericht dismissed the plea of lack of jurisdiction raised by Powell Duffryn whereupon the latter appealed to the Oberlandesgericht Koblenz. That court considered that the dispute raised a question of interpretation of Article 17 of the Brussels Convention, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Does the rule contained in the statutes of a company limited by shares on the basis of which the shareholder by subscribing for or acquiring shares 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 constitute an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention which is concluded between the shareholder and the company?

(Must this question be answered differently depending on whether the shareholder himself subscribes for shares on the occasion of an increase in the company's capital or acquires existing shares?)

2. If Question (1) is answered in the affirmative:

- (a) Does subscription for and acceptance of shares, by means of a written declaration of subscription, on the occasion of an increase in the capital of a company limited by shares comply with the requirement for writing laid down in the first paragraph of Article 17 of the Brussels Convention as regards a jurisdiction clause contained in the statutes of the company?
- (b) Does the jurisdiction clause satisfy the requirement that the dispute must arise in connection with a particular legal relationship within the meaning of Article 17 of the Brussels Convention?
- (c) Does the jurisdiction clause in the statutes also cover claims for payment arising out of a contract relating to the subscription of shares and claims for repayment of wrongly paid dividends?

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

6 Article 17 of the Brussels Convention provides that if the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court of a Contracting State is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court is to have exclusive jurisdiction.

- 7 It is necessary to examine whether a clause conferring jurisdiction inserted in the statutes of a company limited by shares constitutes an agreement within the meaning of Article 17 between the company and its shareholders.
- 8 Powell Duffryn maintains that a clause conferring jurisdiction contained in the statutes of a company limited by shares cannot constitute an agreement because the statutes are normative by nature and thus the contents are not open to discussion by shareholders; shareholders even face the risk of clauses being introduced against their express wishes if such a possibility is provided for in the statutes or the applicable national law.
- 9 In contrast, Mr Petereit and the Commission argue, on the basis of German law and in particular the provisions of the German Aktiengesetz (Law on share companies), that the statutes are contractual by nature and therefore a clause conferring jurisdiction contained therein constitutes an agreement within the meaning of Article 17 of the Brussels Convention.
- 10 In that regard, it appears from a comparative examination of the different legal systems of the Contracting States that the characterization of the nature of the relationship between a company limited by shares and its shareholders is not always the same. In some legal systems the relationship is characterized as contractual and in others it is regarded as institutional, normative or *sui generis*.
- 11 The question therefore arises whether the concept of 'agreement conferring jurisdiction' in Article 17 of the Brussels Convention must be given an independent interpretation or be construed as referring to the national law of one or other of the States concerned.
- 12 It must be emphasized that, as the Court held in its judgment in Case 12/76 *Tessili v Dunlop* [1976] ECR 1473, neither of those two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the

Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty.

- 13 The concept of 'agreement conferring jurisdiction' is decisive for the assignment, in derogation from the general rules on jurisdiction, of exclusive jurisdiction to the court of the Contracting State designated by the parties. Having regard to the objectives and general scheme of the Brussels Convention, and 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 persons concerned, therefore, it is important that the concept of 'agreement conferring jurisdiction' should not be interpreted simply as referring to the national law of one or other of the States concerned.
- 14 Accordingly, as the Court has held for similar reasons as regards, in particular, the concept of 'matters relating to a contract' and other concepts, referred to in Article 5 of the Convention, which serve as criteria for determining special jurisdiction (see the judgment in Case 34/82 *Peters v ZNAV* [1983] ECR 987, paragraphs 9 and 10), the concept of 'agreement conferring jurisdiction' in Article 17 must be regarded as an independent concept.
- 15 In that connection, it must be recalled that, when it was requested to interpret the concept of 'matters relating to a contract', referred to in Article 5 of the Convention, the Court held that the obligations imposed on a person in his capacity as member of an association were to be considered to be contractual obligations, on the ground that membership of an association created between the members close links of the same kind as those which are created between the parties to a contract (see the judgment in Case 34/82 *Peters v ZNAV*, referred to above, paragraph 13).
- 16 Similarly, the links between the shareholders of a company are comparable to those between the parties to a contract. The setting up of a company is the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective. In order to achieve that objective each shareholder is assigned, as regards other shareholders and the organs of the

company, rights and obligations set out in the company's statutes. It follows that, for the purposes of the application of the Brussels Convention, the company's statutes must be regarded as a contract covering both the relations between the shareholders and also the relations between them and the company they set up.

17 It follows that a clause conferring jurisdiction in the statutes of a company limited by shares is an agreement, within the meaning of Article 17 of the Brussels Convention, which is binding on all the shareholders.

18 It is immaterial that the shareholder against whom the clause conferring jurisdiction is invoked opposed the adoption of the clause or that he became a shareholder after the clause was adopted.

19 By becoming and by remaining a shareholder in a company, the shareholder agrees to be subject to all the provisions appearing in the statutes of the company and to the decisions adopted by the organs of the company, in accordance with the provisions of the applicable national law and the statutes, even if he does not agree with some of those provisions or decisions.

20 Any other interpretation of Article 17 of the Brussels Convention would lead to a multiplication of the heads of jurisdiction for disputes arising from the same legal and factual relationship between the company and its shareholders and would run counter to the principle of legal certainty.

21 Consequently, the reply to the national court's first question must be that a clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

The first part of the second question

- 22 In the first part of the second question the national court seeks essentially to ascertain the circumstances in which a clause conferring jurisdiction contained in a company's statutes satisfies the formal requirements laid down in Article 17 of the Brussels Convention.
- 23 Pursuant to Article 17 of the Brussels Convention an agreement conferring jurisdiction must be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with usage in that area and of which the parties are or ought to be aware.
- 24 As the Court held in Case 24/76 *Estasis Salotti v Rivwa* [1976] ECR 1831, paragraph 7, the purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.
- 25 It must nevertheless be emphasized that the situation of shareholders as regards the statutes of a company — which are the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective — is different from that, referred to in the abovementioned judgment, of a party to a contract of sale as regards general conditions of sale.
- 26 First of all, in the legal systems of all the Contracting States the statutes of a company are in writing. Moreover, in the company law of all the Contracting States it is acknowledged that the statutes of companies play a particular role in so far as they constitute the basic instrument governing the relations between a shareholder and the company.
- 27 Furthermore, irrespective of how shares are acquired, every person who becomes a shareholder of a company knows, or ought to know, that he is bound by the

company's statutes and by the amendments made to them by the company's organs in accordance with the provisions of the applicable national law and the statutes.

28 Consequently, when the company's statutes contain a clause conferring jurisdiction, every shareholder is deemed to be aware of that clause and actually to consent to the assignment of jurisdiction for which it provides if the statutes are lodged in a place to which the shareholder may have access, such as the seat of the company, or are contained in a public register.

29 Having regard to the foregoing, the reply to the first part of the national court's second question must be that, irrespective of how shares are acquired, the formal requirements laid down in Article 17 must be considered to be complied with in regard to any shareholder if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register.

The second part of the second question

30 Pursuant to Article 17 of the Brussels Convention, jurisdiction is conferred for the purpose of settling disputes which have arisen or which may arise 'in connection with a particular legal relationship'.

31 That requirement is intended to limit the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given *forum* as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made.

32 In that regard, a clause conferring jurisdiction contained in a company's statutes satisfies that requirement if it relates to disputes which have arisen or which may arise in connection with the relationship between the company and its shareholders as such.

33 The question whether in the present case the clause conferring jurisdiction is to be regarded as having such an effect is a question of interpretation which is a matter for the national court to resolve.

34 Consequently, the reply to the second part of the national court's second question must be that the requirement that a dispute arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if the clause conferring jurisdiction contained in the statutes of a company may be interpreted as referring to the disputes between the company and its shareholders as such.

The third part of the second question

35 In the third part of the second question the national court is essentially seeking to ascertain whether the clause conferring jurisdiction raised before it applies to the disputes brought before it.

36 In that regard, it should be observed that it is for the national court to interpret the clause conferring jurisdiction invoked before it.

37 Consequently, the reply to the third part of the national court's second question must be that it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope.

Costs

38 The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings 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 Oberlandesgericht Koblenz, by order of 1 June 1989, hereby rules:

1. A clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention;
2. Irrespective of how shares are acquired, the formal requirements laid down in Article 17 must be considered to be complied with in regard to any shareholder if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register;
3. The requirement that a dispute arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if the clause conferring

jurisdiction contained in the statutes of a company may be interpreted as referring to the disputes between the company and its shareholders as such;

- 4 It is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope.

Due	Slynn	Joliet	Schockweiler	Grévisse
Kapteyn	Mancini	Kakouris	Moitinho de Almeida	
Rodríguez Iglesias	Diez de Velasco	Zuleeg	Murray	

Delivered in open court in Luxembourg on 10 March 1992.

J.-G. Giraud
Registrar

O. Due
President