JUDGMENT OF THE COURT (Sixth Chamber)
20 February 1997 *

In Case C-106/95,

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

Mainschiffahrts-Genossenschaft eG (MSG)

and

Les Gravières Rhénanes SARL

on the interpretation of Article 5(1) and the third hypothesis mentioned in the second sentence of 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 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1; amended version of the Convention at p. 77),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J. L. Murray, President of the Fourth Chamber, acting for the President of the Sixth Chamber, C. N. Kakouris (Rapporteur), P. J. G. Kapteyn, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mainschiffahrts-Genossenschaft eG (MSG), by Thor von Waldstein, Rechtsanwalt, Mannheim,

— Les Gravières Rhénanes SARL, by Fink von Waldstein, Rechtsanwalt, Mannheim,

— the German Government, by Jörg Pirrung, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

— the Commission of the European Communities, by Pieter van Nuffel, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Mainschiffahrts-Genossenschaft eG (MSG), represented by Thor von Waldstein; Les Gravières Rhénanes SARL, represented

by Fink von Waldstein; the Greek Government, represented by Vasileios Kontolaimos, Assistant Legal Adviser in the State Legal Department, acting as Agent, and the Commission, represented by Hans-Jürgen Rabe, at the hearing on 4 July 1996,

after hearing the Opinion of the Advocate General at the sitting on 26 September 1996,

gives the following

Judgment

1 By order of 6 March 1995, received at the Court on 31 March 1995, the Bundesgerichtshof (Federal Court of Justice) 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 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1; amended version of the Convention at p. 77; hereinafter 'the Convention'), two questions on the interpretation of Article 5(1) and the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the Convention.

2 The questions arose in proceedings between Mainschiffahrts-Genossenschaft eG (MSG) ('MSG'), an inland-waterway transport cooperative based at Würzburg (Germany), and Les Gravières Rhénanes SARL ('Gravières Rhénanes'), whose registered office is in France, concerning compensation for damage caused to an inland-waterway vessel which MSG owned and had chartered to Gravières Rhénanes by a time charter concluded orally between the parties.

3 According to the case-file, that vessel operated a shuttle service on the Rhine between 1 June 1989 and 10 February 1991, chiefly carrying shipments of gravel. With some exceptions, the places of loading were all located in France, whilst the cargo was invariably unloaded in France. According to MSG, the handling equipment used by Gravières Rhénanes to unload the cargo damaged its vessel. The main proceedings are for the sum of DM 197 284, namely the difference between the amount paid by Gravières Rhénanes' insurers and the amount claimed by MSG.

4 MSG brought an action before the Schiffahrtsgericht (Maritime Court) Würzburg, taking the view that the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the Convention entitled it to do so on the ground that the parties had validly designated Würzburg, MSG's principal place of business, as the place of performance and the Würzburg courts as having jurisdiction.

5 The first and second sentences of the first paragraph of Article 17 of the Convention provide as follows:

'If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.'

6 It appears from the order for reference that, when the contractual negotiations had been completed, MSG sent Gravières Rhénanes a commercial letter of confirmation containing the following pre-printed statement:

'The place of performance is Würzburg and the courts for that place have exclusive jurisdiction.'

Moreover, MSG's invoices also mentioned that forum directly and by reference to the conditions of the bill of lading. Gravières Rhénanes did not challenge the commercial letter of confirmation and paid all invoices without objection. The Schiffahrtsgericht Würzburg declared the action admissible.

7 On an appeal brought by Gravières Rhénanes, the Oberlandesgericht (Higher Regional Court) Nürnberg rejected the application as inadmissible on the ground that there was no international jurisdiction. MSG appealed on a point of law to the Bundesgerichtshof.

8 The Bundesgerichtshof found, in the first place, that the jurisdiction of the French courts was borne out by the general rule set forth in the first paragraph of Article 2 of the Convention (place of the defendant's domicile), by Article 5(3) (place where the harmful event occurred) and likewise by Article 5(1) (place of performance of the obligation in question). The contractual obligations arising under the contract of carriage had to be performed in France and MSG was under an obligation to present the vessel at Gravières Rhénanes' principal place of business, which was in France. In the Bundesgerichtshof's view, this case affords two possible approaches by which the jurisdiction of the French courts might be ousted in favour of the international jurisdiction of the German courts.

9 In the first place, Würzburg might be regarded as the place of performance within the meaning of Article 5(1) of the Convention, on the ground that it was identified as such by the parties' oral agreement. The Bundesgerichtshof observes that in this case the agreement was 'abstract'. It characterizes an agreement on the place of performance as abstract where it does not set out to designate the place where the person liable has to perform his obligations, but only to determine the courts having jurisdiction, without complying with the requirements as to form set out in Article 17 of the Convention. The only aim of such an agreement, therefore, is to disguise an agreement conferring jurisdiction. In this case, the contractual obligations had to be performed in any event in France, where in all cases the place of unloading was located.

10 Whilst stressing that, under the applicable German law, the agreement at issue on the place of performance was validly concluded, the Bundesgerichtshof has doubts about whether such 'abstract' agreements are valid under the Convention in so far as they involve a risk of abuse, that is to say, circumvention of the rules as to form set out in Article 17 of the Convention.

11 Secondly, in the event that an 'abstract' agreement on the place of performance is regarded as invalid, the Bundesgerichtshof considers that the German courts might have jurisdiction in this case by virtue of the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the Convention.

12 In those circumstances, the Bundesgerichtshof stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1) Is an oral agreement on the place of performance (Brussels Convention, Article 5) to be recognized even if it is not intended to fix the place at which the person liable has to perform the obligations incumbent on him, but is intended solely to establish — informally — that the courts for a particular place are to have jurisdiction (a so-called "abstract" agreement on the place of performance)?

2) In the event that the Court of Justice should answer Question 1 in the negative:

(a) Can an agreement conferring jurisdiction in international trade or commerce in accordance with the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the 1978 version of the Brussels Convention also be concluded by one party's not contradicting a commercial letter of confirmation containing a pre-printed reference to the courts of the consignors' place of business having sole jurisdiction or must there have been in every case prior consensus with regard to the content of the letter of confirmation?

(b) Is it sufficient in order for there to be an agreement conferring jurisdiction within the meaning of the aforesaid provision if the invoices sent by one party all contain a reference to the courts of the carrier's place of business having sole jurisdiction and to the conditions of the bill of lading used by the carrier which also stipulate the courts of the same place as having jurisdiction, and the other party invariably paid the invoices without objecting, or is prior consensus also required in this respect?'

The second question

13 By its second question, which, being concerned with exclusive jurisdiction, may conveniently be considered first, the national court essentially asks whether, under a contract concluded orally, an agreement conferring jurisdiction may be deemed to have been concluded in international trade or commerce in the form required by the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the Convention simply by virtue of the fact that one party to the contract did not react to a commercial letter of confirmation sent to him by the

other party to the contract or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction, or whether there should in any event be prior consensus on the part of the persons concerned, only written confirmation of the agreement being unnecessary.

14 It should be observed in this regard that, according to the Court's case-law, the requirements laid down by Article 17 of the Convention must be strictly interpreted in so far as that article excludes both jurisdiction as determined by the general principle of the defendant's courts laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 (see, to this effect, Case 24/76 *Estasis Salotti* [1976] ECR 1831, paragraph 7, and Case 25/76 *Segoura* [1976] ECR 1851, paragraph 6).

15 The Court has further held with regard to the initial version of Article 17 that, by making the validity of a jurisdiction clause subject to the existence of an 'agreement' between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the purpose of the requirements as to form imposed by Article 17 is to ensure that consensus between the parties is in fact established (*Estasis Salotti*, paragraph 7, and *Segoura*, paragraph 6).

16 However, in order to take account of the specific practices and requirements of international trade, the aforementioned Accession Convention of 9 October 1978 added to the second sentence of the first paragraph of Article 17 of the Convention a third hypothesis providing that, in international trade or commerce, a jurisdiction clause may be validly concluded in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.

17 Yet that relaxation incorporated in Article 17 by the 1978 Accession Convention does not mean that there is not necessarily any need for consensus between the parties on a jurisdiction clause, since it is still one of the aims of that provision to ensure that there is real consent on the part of the persons concerned. The weaker party to the contract should be protected by avoiding jurisdiction clauses incorporated in a contract by one party alone going unnoticed.

18 To take the view, however, that the relaxation thus introduced relates solely to the requirements as to form laid down by Article 17 by merely eliminating the need for a written form of consent would be tantamount to disregarding the requirements of non-formalism, simplicity and speed in international trade or commerce and to depriving that provision of a major part of its effectiveness.

19 Thus, in the light of the amendment made to Article 17 by the 1978 Accession Convention, consensus on the part of the contracting parties as to a jurisdiction clause is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in this regard of which the parties are or ought to have been aware.

20 It must therefore be considered that the fact that one of the parties to the contract did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice.

21 Whilst it is for the national court to determine whether the contract in question comes under the head of international trade or commerce and to find whether there was a practice in the branch of international trade or commere in which the parties are operating and whether they were aware or are presumed to have been aware of that practice, the Court should nevertheless indicate the objective evidence which is needed in order to make such a determination.

22 It should first be considered that a contract concluded between two companies established in different Contracting States in a field such as navigation on the Rhine comes under the head of international trade or commerce.

23 Next, whether a practice exists must not be determined by reference to the law of one of the Contracting Parties. Furthermore, whether such a practice exists should not be determined in relation to international trade or commerce in general, but to the branch of trade or commerce in which the parties to the contract are operating. There is a practice in the branch of trade or commerce in question in particular where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

24 Lastly, actual or presumptive awareness of such practice on the part of the parties to a contract is made out where, in particular, they had previously had commercial or trade relations between themselves or with other parties operating in the sector in question or where, in that sector, a particular course of conduct is sufficiently well known because it is generally and regularly followed when a particular type of contract is concluded, with the result that it may be regarded as being a consolidated practice.

25 The answer to the second question must therefore be that the third hypothesis in the second sentence of the first paragraph of Article 17 of the Convention, as amended by the Accession Convention of 9 October 1978, must be interpreted as meaning that, under a contract concluded orally in international trade or commerce, an agreement conferring jurisdiction will be deemed to have been validly concluded under that provision by virtue of the fact that one party to the contract

did not react to a commercial letter of confirmation sent to it by the other party to the contract or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction, provided that such conduct is consistent with a practice in force in the field of international trade or commerce in which the parties in question operate and the latter are aware or ought to have been aware of the practice in question. It is for the national court to determine whether such a practice exists and whether the parties to the contract were aware of it. A practice exists in a branch of international trade or commerce in particular where a particular course of conduct is generally followed by contracting parties operating in that branch when they conclude contracts of a particular type. The fact that the contracting parties were aware of that practice is made out in particular where they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice.

The first question

26 The first question has to be answered in case the national court concludes that there is in this case no practice in the branch of trade or commerce in question of which the parties were or ought to have been aware and that, as a result, a jurisdiction clause was not validly concluded.

27 By this question, the national court essentially asks whether an oral agreement on the place of performance, which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is valid under Article 5(1) of the Convention.

28 Article 5(1) of the Convention provides as follows:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

1) in matters relating to a contract, in the courts for the place of the performance of the obligation in question.'

29 According to the case-law of the Court, jurisdiction derogating from the general rule that the defendant's courts should have jurisdiction was introduced by Article 5(1) in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may be called upon to take cognizance of the matter, with a view to the effective organization of the proceedings (Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473, paragraph 13).

30 Moreover, the Court has also held that the place of performance of a contractual obligation may also be fixed by agreement between the parties and that, if the parties to the contract are permitted by the applicable law, subject to the conditions imposed thereby, to specify the place of performance without satisfying any special condition of form, an agreement on the place of performance of the obligation is sufficient to found jurisdiction in that place within the meaning of Article 5(1) of the Convention (Case 56/79 *Zelger* v *Salinitri* [1980] ECR 89, paragraph 5).

31 It should be noted, however, that whilst the parties are free to agree on a place of performance for contractual obligations which differs from that which would be determined under the law applicable to the contract, without having to comply

with specific conditions as to form, they are nevertheless not entitled, having regard to the system established by the Convention, to designate, with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract at which the obligations arising under the contract could not be performed in accordance with the terms of the contract.

32 This approach is based, in the first place, on the terms of Article 5(1) of the Convention, which confers jurisdiction on the courts for the place 'of performance' of the contractual obligation on which the claim is based. Consequently, that provision has in mind the place of actual performance of the obligation as the jurisdictional criterion by reason of its direct connection with the courts on which it confers jurisdiction.

33 Secondly, it should be considered that to specify a place of performance which has no actual connection with the real subject-matter of the contract becomes fictitious and has as its sole purpose the determination of the place of the courts having jurisdiction. Such agreements conferring jurisdiction are governed by Article 17 of the Convention and are therefore subject to specific requirements as to form.

34 Thus, where there is such an agreement, there is not only no direct connection between the dispute and the courts called upon to determine it, but there is also circumvention of Article 17, which, whilst providing for exclusive jurisdiction by dispensing with any objective connection between the relationship in dispute and the court designated (*Zelger* v *Salinitri*, paragraph 4), requires, for that very reason, compliance with the strict requirements as to form which it sets out.

35 The answer to the national court's first question must therefore be that the Convention must be interpreted as meaning that an oral agreement on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is not governed by Article 5(1) of the Convention, but by Article 17, and is valid only if the requirements set out therein are complied with.

Costs

36 The costs incurred by the German and Greek Governments 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 (Sixth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 6 March 1995, hereby rules:

1) **The third hypothesis in the second sentence of 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, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, must be interpreted as meaning that, under a contract concluded orally in international trade or commerce, an agreement conferring jurisdiction will be deemed to have been validly concluded under that provision by virtue of the fact that one party to the contract did not react to a commercial letter of confirmation sent to it by the other party to the contract or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction, provided that such conduct is consistent with a practice in force in the field of international trade or commerce in which the parties in question operate and the latter are aware or ought to have been aware of the practice in question. It is for the national court to determine whether such a practice exists and whether the parties to the contract were aware of it. A practice exists in a branch of international trade or commerce in particular where a particular**

course of conduct is generally followed by contracting parties operating in that branch when they conclude contracts of a particular type. The fact that the contracting parties were aware of that practice is made out in particular where they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice.

2) The Convention of 27 September 1968 must be interpreted as meaning that an oral agreement on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is not governed by Article 5(1) of the Convention, but by Article 17, and is valid only if the requirements set out therein are complied with.

Murray Kakouris Kapteyn

Hirsch Ragnemalm

Delivered in open court in Luxembourg on 20 February 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber