2. In the case of an orally concluded contract, the requirements of the first paragraph of Article 17 of the Convention of 27 September 1968 as to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser. The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction, unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring juridiction.

In Case 25/76,

Reference to the Court under Article 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 by the Bundesgerichtshof in the action pending before that court between

GALERIES SEGOURA, a limited partnership having its registered office in Brussels,

and

RAHIM BONAKDARIAN, an import-export company, having its registered office in Hamburg,

for a preliminary ruling on the interpretation of the first paragraph of Article 17 of the Convention of 27 September 1968,

THE COURT

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

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

gives the following

JUDGMENT

Facts

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

On 14 September 1971 in the free port of Hamburg, the limited partnership Galeries Segoura (hereinafter referred to as Segoura) by an oral contract purchased a batch of oriental carpets at the total price of US $ 28 263·59 from the company Rahim Bonakdarian (hereinafter referred to as Bonakdarian).

On the same date, 14 September 1971, in part-payment of the purchase price, Segoura gave to Bonakdarian three bills of exchange for a total of US $ 15 000. On its side, Segoura received two documents described as 'confirmation of order and invoice', which begin with the following paragraph:

Subject to the following conditions we have sold and delivered to you on behalf of our Iranian supplier, Firma Hussein Bonakdarian and Brothers, Iran, ex warehouse Hamburg free port, customs dues and taxes unpaid, as seen and accepted, at your expense and risk in transit: ... (there followed the description of the goods).

Bonakdarian's 'Sales, Delivery and Payment Condition' printed on the reverse of this confirmation of order contained *inter alia* the following clause 10:

All disputes are to be decided exclusively by the Hamburg courts in accordance with the provisions of law applicable in the Federal Republic of Germany.

By formal notices of 7 June, 17 July and 1 November 1972, Bonakdarian sought unsuccessfully to obtain payment of the balance, and on 7 February 1973 brought an action before the Landgericht Hamburg. By a judgment in default delivered on 16 May 1973, this court ordered Segoura to pay to Bonakdarian the sum DM 45 998·45, with interest thereon at 9 % from 16 November 1972.

On 13 July 1973 Segoura entered an objection against this judgment.

By a judgment of 17 December 1973, the Landgericht Hamburg annulled the judgment in default of 16 May and declared that it had no jurisdiction, on the ground that the parties did not conclude any agreement conferring jurisdiction within the meaning 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, which provides:

If the parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement confirmed 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 juridiction.

After an application for rectification of this judgment, submitted on 27 December 1973, was rejected by the Landgericht Hamburg by an order of 22 January 1974, Bonakdarian appealed, on 24 January 1974, to the Hanseatisches Oberlandesgericht.

By a judgment of 28 May 1974, rectified by an order of 29 July 1974, this latter court quashed the judgment of the Landgericht, stated that the Landgericht did have jurisdiction and remitted the case to that court.

Segoura appealed on a point of law to the Bundesgerichtshof. The 8th Civil Chamber of the Bundesgerichtshof considered that the case raised questions of interpretation of the first paragraph of Article 17 of the Convention of 27 September 1968 and accordingly, by an order of 18 February 1976, it decided, pursuant to Article 2 (1) and 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, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

1. Are the requirements of Article 17 of the Convention satisfied if, at the oral conclusion of a contract of sale, a vendor has stated that he wishes to rely on his general conditions of sale and if he subsequently confirms the contract in writing to the purchaser and annexes to this confirmation his general conditions of sale which contain a clause conferring jurisdiction?
2. Are the requirements of Article 17 of the Convention satisfied if, in dealings between merchants, a vendor, after the oral conclusion of a contract of sale, confirms in writing to the purchaser the conclusion of the contract subject to his general conditions of sale and annexes to this document his conditions of sale which include a clause conferring jurisdiction and if the purchaser does not challenge this written confirmation?

The order of the Bundesgerichtshof was lodged at the Registry of the Court of Justice on 11 March 1976.

In accordance with Article 5 (1) of the Protocol of 3 June 1971 and with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 17 May 1976 by the Commission of the European Communities, on 24 May by the Bonakdarian, the respondent to the appeal, and on 25 May by the Galeries Segoura, the appellant.

Upon 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 — Written observations submitted to the Court

The appellant, *Galeries Segoura,* alludes to the origins of the Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters, and submits that its purpose is to ensure, as regards the 'free movement' of judgments, equal treatment for the nationals of all the Member States, regardless of their nationality. The Convention is also directed towards protecting the rights of the defendant in proceedings pending in the State in which judgment is to be given. Article 17 of the Convention contains a uniform basic rule concerning the conferring of jurisdiction, which demands application in a uniform manner. Its terms are identical to those of the rule contained in the Convention on Enforcement between Germany and Belgium, which was itself based on Article 2 of the Hague Convention of 15 April 1958 on the Jurisdiction of the Contractual Forum in matters relating to the International Sale of Goods.

The first concern of the authors of the 1968 Convention was not to impede

commercial practice, yet at the same time to neutralize the effects of clauses purporting to confer jurisdiction in contracts which might pass unnoticed. Such clauses are therefore to be taken into consideration only if they are the subject of an agreement, which implies the consent of all the parties. In the interests of legal certainty, such agreement is moreover required to be in writing or confirmed in writing by the other party to the contract.

(a) The fact that a clause purporting to confer jurisdiction has been included in general conditions of sale and that a contracting party refers to it at the time when the contract is concluded does not of itself satisfy the requirement for confirmation in writing laid down in the first paragraph of Article 17 of the Convention of 1968.

The Convention is directed towards preventing the surreptitious insertion in a contract of clauses conferring jurisdiction. Therefore an agreement conferring jurisdiction cannot be validly concluded merely by reference to general conditions of sale. Express reference to the clause conferring jurisdiction which is contained therein is a mandatory requirement.

A reference, at the oral conclusion of the contract, to the general conditions of sale does not constitute an agreement conferring jurisdiction. The fact of attaching the general conditions of sale to the confirmation in writing of an order could certainly constitute an invitation to conclude such an agreement .However it fails to satisfy the requirement of the first paragraph of Article 17 of the Convention. It is necessary to have confirmation in writing from the contracting party against whom the clause conferring jurisdiction operates. The first paragraph of Article 17 of the Convention is directed towards protecting the contracting party against whom the clause conferring jurisdiction operates. That party alone has the power to confirm in writing the clause which operates against him.

The first of the questions referred to the Court should therefore be answered in the following terms:

The requirements of Article 17 of the Convention are not satisfied if, at the oral conclusion of a contract of sale, a vendor has stated that he wishes to rely on his general conditions of sale and if he subsequently confirms the contract in writing to the purchaser and annexes to this confirmation his general conditions of sale which contain a clause conferring jurisdiction.

(b) Mere reference to general business conditions of sale does not of itself fulfil the protective aim of Article 17 of the Convention. There must be an express reference to the agreement conferring jurisdiction to be concluded.

Moreover, the confirmation in writing of an agreement conferring jurisdiction should come from the contracting party against whom such agreement operates. Furthermore, it is not consonant either with the spirit or with the letter of Article 17 to equate silence in the face of a commercial letter of confirmation with a positive declaration, namely confirmation. In regard to agreements conferring jurisdiction, Article 17 of the Convention contains a uniform basic rule, which calls for uniform interpretation and which must be construed strictly. Comparison with the law of the Member States, in particular, lends support to this view. Thus Article 1341 of the Italian Civil Code requires express confirmation in respect of an agreement conferring jurisdiction.

Therefore the second question should receive the following answer:

The requirements of Article 17 of the Convention are not satisfied if, in dealings between merchants, a vendor, after the oral conclusion of a contract of

sale, confirms in writing to the purchaser the conclusion of the contract subject to his general conditions of sale and annexes to this document his general conditions of sale which include a clause conferring jurisdiction and if the purchaser does not challenge this written confirmation.

The respondent, Rahim Bonakdarian, takes the view that both of the questions referred to the Court should be answered in the affirmative.

(a) The first paragraph of Article 17 of the Convention of 27 September 1968 acknowledges both agreements in writing conferring jurisdiction and oral agreements confirmed in writing.

Agreement in writing should be taken to mean a document signed by both parties or their representatives in their own hand. Confirmation in writing of an oral agreement is something different from an agreement in writing. In particular, it is not required that it be signed by both parties. In the case of an agreement conferring jurisdiction entered into orally, it is enough if one of the parties confirms it in writing and the other accepts such confirmation without challenging it, thus acknowledging that the confirmation accords with the oral agreement. Thus in the first paragraph of Article 17 of the Convention the view is taken that, in the interest of enabling legal relations to be entered into more easily and more quickly, a 'half requirement of written form' suffices.

A similar rule is laid down in Article 3 (1) (2) of the Convention between Germany and Belgium of 30 June 1958. Under that provision an oral agreement confirmed in writing is an agreement concluded orally and confirmed in writing to one of the parties by the other, provided that the former party does not challenge that confirmation.

The oral negotiations on a contract frequently concern only the essential points of it. As regards the other details of the contract, not dealt with expressly, the parties frequently refer to their general business conditions. When one of the parties makes it clear that it is his intention to incorporate his general conditions of sale into the contract, the other contracting party is able to object to his doing so. Such a refusal could be expressed during the oral negotiations. It could still be expressed when the other party annexes his general conditions of sale to the confirmation in writing of the contract concluded orally. If the other contracting party does not make clear his disagreement on receiving the document declaring the general conditions of sale to be applicable, he is clearly indicating that he sees no objection to the application of those contractual clauses.

(b) In business dealings between merchants, it is the general rule for one of the parties to require the contract to be based on his general conditions of sale. The principle of free movement of goods within the Community implies that trading operations should be able to be carried out rapidly, without hindrance and without excessive formality contrary to practical needs. The first paragraph of Article 17 of the Convention is intended to take this into account. For this reason, at least between merchants and under normal circumstances, silence on the part of the recipient of a letter of confirmation should be interpreted as an acceptance of the contents of the letter by the recipient. Silence amounts to acceptance.

A merchant carrying out international transactions is aware that the question of the court which is to have jurisdiction in case any disputes should arise is frequently governed by the general conditions of sale of the other contracting party. Thus in the interests of clarity and of certainty in commercial dealings, when a letter of confirmation is sent to him by the other contracting party *inter alia* confirming a clause conferring jurisdiction, he should

immediately challenge that confirmation as soon as he receives the letter. A response coming after a delay is ineffective.

The principle according to which, in commercial matters, the conduct of the parties to a contract must be assessed in accordance with the criteria of good faith applies also in Community law and in particular to agreements within the meaning of Article 17. In German commercial law, the lack of a response to a commercial letter of confirmation amounts to agreement, unless the contents of the confirmation involve such significant differences in relation to what was agreed orally that the recipient of the letter could not reasonably expect them. The rule that silence amounts to acquiescence is of particular importance in commercial law. It applies unreservedly if the contents of the letter of confirmation are not of such a kind as to surprise the recipient, which is particularly true of clauses conferring jurisdiction.

The *Commission of the European Communities* points out that Article 17 of the Convention of 27 September 1968 has two essential purposes: to ensure legal certainty and to avoid excessive formality.

(a) In the light of these two purposes, the first of the questions referred by the Bundesgerichtshof should be answered in the affirmative.

In the present case, the contract of sale was first of all concluded orally; this oral contract also related to the general conditions of sale of the vendor, who had unquestionably stated, at the oral conclusion of the contract, that he wished to rely on his general conditions of sale. As these conditions contain a clause conferring jurisdiction, that clause also constitutes a part of the orally concluded contract of sale.

Taking into account the fact that the vendor referred to his general conditions of sale, it is of little importance whether the purchaser was actually aware of them, in particular of the clause conferring jurisdiction: in any event, he could easily have acquainted himself with them and it must be borne in mind that the insertion in general conditions of sale of a clause conferring jurisdiction is quite usual.

The orally concluded contract of sale was confirmed in writing and the general conditions of sale, containing a clause conferring jurisdiction, were annexed to that confirmation in writing. The requirements laid down in Article 17 of the Convention as to the form of the contract are therefore satisfied, provided that the purchaser did not challenge the written confirmation of the contract. In these circumstances, it cannot be claimed that the clause conferring jurisdiction was added to the contents of the contract without the purchaser's knowledge. In such a case, to purport to make the agreement conferring jurisdiction subject to any stricter conditions would be to insist upon a degree of formality incompatible with commercial practice.

(b) The second of the questions differs from the first in that it lays stress upon the fact that the contracting parties are merchants and that the purchaser does not challenge the written confirmation of the contract. On the other hand, it does not state whether, at the time of the oral conclusion of the contract of sale, the vendor has pointed out that he proposed to make the contract subject to his general conditions of sale. This point is however decisive: it is necessary in effect to assume that the orally-concluded contract did not contain any clause conferring jurisdiction. In those circumstances, the requirements of Article 17 concerning agreements conferring jurisdiction are not satisfied. The contents of the confirmation in writing must be the same as those of the orally-concluded contract; if not, the document would not constitute a confirmation and one of the contracting

parties would be exposed to the risk of learning of the existence of a clause conferring jurisdiction only at the time of reading what purported to be the 'confirmation in writing'. Under Article 17, agreements conferring jurisdiction imply a true consensus between the contracting parties. Such is not the case in the situation contemplated by the second of the questions referred by the Bundesgerichtshof.

However it must be asked whether different considerations might not apply if the two contracting parties are merchants. Under the law of certain Member States, in particular of the Federal Republic of Germany, the absence of any response to a confirmation in writing of a commercial contract counts as acquiescence. The confirmation in writing can contain a fresh offer of a contract which is considered as accepted if the recipient of the confirmation in writing does not immediately challenge it, as he is bound to do by virtue of the rules of good faith. However this method of making a contract is not provided for by Article 17 of the Convention, which contemplates only two forms of agreement, an agreement in writing or an oral agreement confirmed in writing, but does not provide any special rules for merchants.

(c) The questions referred by the Bundesgerichtshof should be answered in the following terms:

1. The requirements of Article 17 of the Convention of 27 September 1968 are satisfied if, at the oral conclusion of a contract of sale, a vendor has stated that he wishes to rely on his general conditions of sale and if he subsequently confirms the contract in writing to the purchaser and annexes to this confirmation his general conditions of sale which contain a clause conferring jurisdiction.
2. On the other hand, the requirements of Article 17 are not satisfied, even in dealings between merchants, if a vendor, after the oral conclusion of a contract of sale, confirms in writing to the purchaser the conclusion of the contract subject to his general conditions of sale and annexes to this document his conditions of sale which include a clause conferring jurisdiction, even if the purchaser does not challenge this written confirmation.

III — Oral procedure

The respondent, Bonakdarian, represented by Oliver C. Brändel, Advocate of the Bundesgerichtshof in Karlsruhe, and the Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, presented oral argument at the hearing on 13 October 1976.

The Advocate-General delivered his opinion at the hearing on 17 November 1976.

Law

1 By an order of 18 February 1976, received at the Court Registry on 11 March 1976, the Bundesgerichtshof referred to the Court of Justice, pursuant to the Protocol of 3 June 1971 on the Interpretation 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'), two questions concerning the interpretation of Article 17 of the said Convention.

2 It appears from the order making the reference that at the present stage the action, which was brought before the Bundesgerichtshof by way of appeal on a point of law, concerns the jurisdiction of the Landgericht Hamburg to hear an action brought by a trading undertaking established within the area of its jurisdiction against a trading company having its registered office in Brussels, for payment of the balance of the price of a batch of carpets bought in Hamburg by the Brussels firm.

The contract was concluded orally between the parties, and the vendor performed his side of it on the same day in consideration of a part-payment made by the purchaser.

On handing over the goods, the vendor delivered to the purchaser a document described as 'Confirmation of order and invoice', which stated that the sale and the delivery had taken place 'subject to the conditions stated on the reverse'.

The 'Conditions of Sale, Delivery and Payment' printed on the reverse of this document contained *inter alia* a clause stipulating that all disputes were to be decided exclusively by the Hamburg courts.

This document was not confirmed by the purchaser.

3 After the purchaser had received formal notice to pay the balance of the purchase price, the vendor brought an action before the Landgericht Hamburg which, by a judgment in default delivered on 16 May 1973, ordered the purchaser to pay the balance with interest thereon for delay.

On the purchaser's entering an objection, the Landgericht, by a judgment of 17 December 1973, withdrew its first judgment and declared that it had no jurisdiction, on the ground that the parties had not concluded any agreement conferring jurisdiction within the meaning of Article 17 of the Convention.

The vendor brought an appeal before the Hanseatisches Oberlandesgericht which quashed the decision of the Landgericht and remitted the case to that court, holding that an agreement conferring jurisdiction had been validly concluded between the parties under Article 17 of the Convention.

4 An appeal on a point of law by the purchaser against this judgment is at present before the Bundesgerichtshof.

In this connexion, the Bundesgerichtshof has referred to the Court two questions concerning the interpretation of the first paragraph of Article 17.

The interpretation of Article 17 of the Convention in general

5 The first paragraph of Article 17 of the Convention provides:

'If the parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement confirmed 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'.

6 The way in which that provision is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention.

In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed.

By making such validity subject to the existence of an 'agreement' between the parties, Article 17 imposes upon the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated.

The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.

The questions referred to the Court by the Bundesgerichtshof must be examined in the light of these considerations.

The questions referred by the Bundesgerichtshof

7 The *first question* is whether the requirements of Article 17 of the Convention are satisfied if, at the oral conclusion of a contract of sale, a vendor has stated that he wishes to rely on his general conditions of sale and if he subsequently confirms the contract in writing to the purchaser and annexes to this confirmation his general conditions of sale which contain a clause conferring jurisdiction.

8 In accordance with the foregoing general considerations, it cannot be presumed that one of the parties waives the advantage of the provisions of the Convention conferring jurisdiction.

Even if, in an orally concluded contract, the purchaser agrees to abide by the vendor's general conditions, he is not for that reason to be deemed to have agreed to any clause conferring jurisdiction which might appear in those general conditions.

It follows that a confirmation in writing of the contract by the vendor, accompanied by the text of his general conditions, is without effect, as regards any clause conferring jurisdiction which it might contain, unless the purchaser agrees to it in writing.

9 The *second question* then asks whether Article 17 of the Convention applies if, in dealings between merchants, a vendor, after the oral conclusion of a contract of sale, confirms in writing to the purchaser the conclusion of the contract subject to his general conditions of sale and annexes to this document his conditions of sale which include a clause conferring jurisdiction and if the purchaser does not challenge this written confirmation.

10 It emerges from a comparison of the wording of the two questions and from the explanations given during the proceedings before the Court that the second of the two questions concerns the hypothetical situation of a sale being concluded without any reference being made at all to the existence of general conditions of sale.

In such a case, it is patent that a clause conferring jurisdiction which might be included in those general conditions did not form part of the subject-matter of the contract concluded orally between the parties.

Therefore subsequent notification of general conditions containing such a clause is not capable of altering the terms agreed between the parties, except if those conditions are expressly accepted in writing by the purchaser.

11 It follows from the foregoing, in both of the alternative cases suggested by the Bundesgerichtshof, that a unilateral declaration in writing such as the one in the present case is not sufficient to constitute an agreement on jurisdiction by consent.

However, it would be otherwise where an oral agreement forms part of a continuing trading relationship between the parties, provided also that it is established that the dealings taken as a whole are governed by the general conditions of the party giving the confirmation, and these conditions contain a clause conferring jurisdiction.

Indeed, in such a context, it would be contrary to good faith for the recipient of the confirmation to deny the existence of a jurisdiction conferred by consent, even if he had given no acceptance in writing.

12 It is therefore possible to give a single answer to the two questions referred to the Court as follows: in the case of an orally concluded contract, the requirements of the first paragraph of Article 17 as to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser.

The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction, unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction.

Costs

13 The costs incurred by the Commission of the European Communities, which has 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 order of 18 February 1976, hereby rules:

In the case of an orally concluded contract, the requirements 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 to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser.

The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction.

Kutscher Donner Pescatore

Mertens de Wilmars Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 14 December 1976.

A. Van Houtte
Registrar

H. Kutscher
President