

**Estasis Salotti di Colzani Aimo et Gianmario Colzani**

v.

**Rüwa Polstereimaschinen GmbH**

C-24/76

14 December 1976

*Convention of 27 september 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters – Jurisdiction by consent – Strict interpretation – Consensus between the parties – General conditions of sale printed on the back – Clause conferring jurisdiction – Necessity for an express reference to those conditions in the contract*

**OPERATIVE PART:**

Where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under 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 is fulfilled only if the contract signed by both parties contains an express reference to those general conditions.

In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing under the first paragraph of Article 17 of the Convention is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care.

**EXCERPT FROM THE REASONS:**

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'), certain 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 Köln to hear an action brought by an undertaking established within the area of jurisdiction of that court against an Italian undertaking whose registered office is at Meda (Milan), for failure to perform a contract relating to the supply by the German undertaking to the Italian undertaking of machines for the manufacture of upholstered furniture.

3 It appears from the facts stated in the order making the reference that the delivery in question had been agreed in a written contract, signed at Milan on commercial paper

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*Konvencija od 27. rujna 1968. o nadležnosti i ovrši sudskih odluka u građanskim i trgovačkim predmetima – nadležnost na temelju sporazuma – strogo tumačenje – sporazum strana – opći uvjeti prodaje tiskani na poleđini – klauzula o nadležnosti – potreba za izričitom uputom na te uvjete u ugovoru*

**IZREKA:**

Ako je klauzula o nadležnosti sadržana u općim uvjetima prodaje jedne od ugovornih strana, koji su tiskani na poleđini ugovora, pretpostavka pisanog oblika prema prvom stavku članka 17. Konvencije od 27. rujna 1968. o nadležnosti i ovrši sudskih odluka u građanskim i trgovačkim stvarima ispunjena je samo ako ugovor koji su potpisale obje strane sadrži izričitu uputu na te opće uvjete.

U slučaju ugovora sklopljenog uputom na ranije ponude, koji su pak sami sklopljeni uputom na opće uvjete jedne od ugovornih strana koji sadrže klauzulu o prorogaciji nadležnosti, pretpostavka pisanog oblika prema prvom stavku članka 17. Konvencije ispunjena je samo ako je uputa izričita, tako da je osoba koja postupa s dužnom pozornošću može provjeriti.

**IZ OBRAZLOŽENJA:**

1 Rješenjem od 18. veljače 1976., zaprimljenim u pisarnici Suda 11. ožujka 1976., Bundesgerichtshof (Savezni sud Njemačke) uputio je Sudu na temelju Protokola od 3. lipnja 1971. o tumačenju Konvencije od 27. rujna 1968. o nadležnosti i ovrši sudskih odluka (u daljnjem tekstu: "Konvencija"), određena pitanja koja se tiču tumačenja čl. 17. spomenute Konvencije.

2 Iz odluke o prethodnom pitanju proizlazi da se postupak, koji je pokrenut pred sudom Bundesgerichtshof revizijom zbog primjene prava, u sadašnjem stadiju tiče nadležnosti suda Landgericht Köln za odlučivanje o tužbi koju je podnijelo poduzeće osnovano na području toga suda protiv talijanskog poduzeća čije je registrirano sjedište u Meda (Milano), zbog neispunjenja ugovora o isporuci strojeva za proizvodnju tapeciranog namještaja talijanskom poduzeću od strane njemačkoga.

3 Iz činjenica navedenih u odluci o prethodnom pitanju proizlazi da je odnosna isporuka bila ugovorena pismenim ugovorom potpisanim u Milanu, na poslovnom papiru tr-

bearing the letter-head of the German undertaking, on the reverse of which the general conditions of sale of that undertaking were printed.

Those general conditions include a clause conferring jurisdiction on the courts of Cologne to settle any dispute which might arise between the parties concerning the contract.

Although it is true that the text of the contract does not expressly mention the said general conditions, it refers to previous offers made by the German undertaking which contained an express reference to the same general conditions, which were also printed on the reverse of the papers in question.

4 In a judgment delivered on 9 April 1974, the Landgericht Köln, before which the matter was brought by the German undertaking, declared that it had no jurisdiction to hear the dispute.

It held that the clause conferring jurisdiction had not validly been agreed between the parties, having regard to the provisions of Italian law, to which, in the view of that court, the contract between the parties is subject.

That judgment was reversed by a judgment of 18 November 1974 of the Oberlandesgericht Köln which, taking the view that the contract in question is subject to the provisions of German law, overruled the judgment of the lower court, declared that the Landgericht had jurisdiction and remitted the case to it.

5 The Italian undertaking appealed on a point of law to the Bundesgerichtshof, and that court is of the opinion that the question at issue must be resolved on the basis of Article 17 of the Convention.

In this connection, the Bundesgerichtshof has referred two questions on the interpretation of the first paragraph of that Article.

#### **On the interpretation of Article 17 of the Convention in general**

6 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 connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction'.

7 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 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 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.

govca koje nosi zaglavlje njemačkog poduzeća na čijoj su pozadini bili tiskani opći uvjeti prodaje koje koristi to poduzeće. Ti opći uvjeti sadrže i klauzulu o nadležnosti suda u Kölnu za sve sporove koji mogu proizaći između strana u vezi s ugovorom.

Iako je točno da tekst ugovora ne spominje izričito te opće uvjete, on upućuje na prethodne ponude koje je dalo njemačko poduzeće koje su sadržavale izričitu uputu na te opće uvjete koji su također bili tiskani na poleđini isprava o kojima je riječ.

4 U presudi donesenoj 9. travnja 1974., *Landgericht Köln*, pred kojim je postupak pokrenulo njemačko poduzeće, ustanovio je da nije nadležan za spor.

Sud je zauzeo stajalište da klauzula o prorogaciji nadležnosti nije bila valjana ugovorena između strana, s obzirom na odredbe talijanskog prava, kojima je, po shvaćanju toga suda, ugovor između stranaka bio podvrgnut.

Ta je presuda ukinuta presudom suda *Oberlandesgericht Köln* od 18. studenoga 1974. Tom je presudom sud, smatrajući da je ugovor o kojem je riječ podvrgnut njemačkom pravu, ukinuo presudu nižega suda, utvrdio da je *Landgericht* nadležan i uputio mu spis predmeta na rješavanje.

5 Talijansko poduzeće podnijelo je reviziju *Bundesgerichtshofu*, koji pak smatra da se pitanje o kojem je riječ treba riješiti primjenom članka 17. Konvencije.

S time u vezi, *Bundesgerichtshof* je uputio dva pitanja o tumačenju prvog stavka toga članka.

#### **Općenito o tumačenju članka 17. Konvencije**

6 Prvi stavak članka 17. Konvencije propisuje: "Ako su strane od kojih jedna ili više ima prebivalište u nekoj državi ugovornici sporazumjele, ugovorom u pisanom obliku ili usmenim ugovorom koji je pismeno potvrđen, da će sud ili sudovi neke države ugovornice biti nadležni za sporove koji su proizašli ili mogu proizaći u vezi s određenim pravnim odnosom, taj sud odnosno ti sudovi bit će isključivo nadležni."

7 Ovu odredbu treba tumačiti u svjetlu učinka davanja nadležnosti na temelju suglasnosti, a to je isključivanje kako nadležnosti koja se temelji na općem načelu navedenom u članku 2., tako i posebnim nadležnostima predviđenima u člancima 5. i 6. Konvencije.

S obzirom na posljedice koje takva mogućnost može imati na položaj stranaka u parnici, pretpostavke iz članka 17. koje uređuju valjanost klauzula o nadležnosti moraju se strogo tumačiti.

Time što se ta valjanost uvjetuje postojanjem "sporazuma" između stranaka, članak 17. nameće Sudu pred kojim se postupak pokreće dužnost ispitivanja, prvo, je li klauzula o nadležnosti doista postignuta sporazumom stranaka koji se mora jasno i precizno dokazati.

Svrha formalnih pretpostavki koje propisuje članak 17. jest osigurati da se suglasnost između stranaka doista i ustanovi.

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

#### On the question referred by the Bundesgerichtshof

8 The first question asks whether a clause conferring jurisdiction, which is included among general conditions of sale printed on the back of a contract signed by both parties, fulfils the requirement of a writing under the first paragraph of Article 17 of the Convention.

9 Taking into account what has been said above, it should be stated that the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of Article 17, since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction.

It is otherwise in the case where the text of the contract signed by both parties itself contains an express reference to general conditions including a clause conferring jurisdiction.

10 Thus it should be answered that where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention is fulfilled only if the contract signed by both parties contains an express reference to those general conditions.

11 The second question asks whether the requirement of a writing under the first paragraph of Article 17 of the Convention is fulfilled if the parties expressly refer in the contract to a prior offer in writing in which reference was made to general conditions of sale including a clause conferring jurisdiction.

12 In principle, the requirement of a writing under the first paragraph of Article 17 is fulfilled if the parties have referred in the text of their contract to an offer in which reference was expressly made to general conditions including a clause conferring jurisdiction.

This view of the matter, however, is valid only in the case of an express reference, which can be checked by a party exercising reasonable care, and only if it is established that the general conditions including the clause conferring jurisdiction have in fact been communicated to the other contracting party with the offer to which reference is made.

But the requirement of a writing in Article 17 would not be fulfilled in the case of indirect or implied references to earlier correspondence, for that would not yield any certainty that the clause conferring jurisdiction was in fact part of the subject-matter of the contract properly so called.

13 Thus it should be answered that in the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing under the first paragraph of Article 17 of the Convention is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care.

Pitanja upućena Sudu od strane *Bundesgerichtshofa* moraju se ispitati u svjetlu ovih razmatranja.

#### O pitanju koje upućuje *Bundesgerichtshof*

8 U prvom pitanju traži se odgovor o tome ispunjava li klauzula o prorogaciji nadležnosti koja je uvrštena u opće uvjete prodaje tiskane na poledini ugovora koji su potpisale obje stranke, pretpostavku pisanog oblika prema prvom stavku članka 17. Konvencije.

9 Uzimajući u obzir ranije navedeno, valja ustvrditi da puka činjenica da je klauzula o prorogaciji nadležnosti tiskana među općim uvjetima jedne od strana na poledini ugovora sastavljenom na poslovnom papiru te strane sama po sebi ne udovoljava pretpostavkama članka 17., jer se time ne daju nikakva jamstva da je druga stranka doista pristala na klauzulu odričući se općih pravila o nadležnosti.

Drukčiji je slučaj kada sam tekst ugovora koje su potpisale obje strane sadrži izričitu uputu na opće uvjete koji sadrže klauzulu o prorogaciji nadležnosti.

10 Stoga valja odgovoriti da ako je klauzula o nadležnosti uvrštena u opće uvjete prodaje jedne od strana, koji su tiskani na poledini ugovora, pretpostavka pisanog oblika prema prvom stavku članka 17. Konvencije ispunjena je samo ako ugovor koji su potpisale obje strane sadrži izričitu uputu na te opće uvjete.

11 U drugom pitanju traži se odgovor o tome je li pretpostavka pisanog oblika prema prvom stavku članka 17. Konvencije ispunjena ako strane izrijeком u ugovoru upute na neku prethodnu ponudu u pisanom obliku u kojoj se upućuje na opće uvjete prodaje koji sadrže klauzulu o prorogaciji nadležnosti.

12 U načelu, pretpostavka pisanog oblika prema prvom stavku članka 17. ispunjena je ako su strane u tekstu ugovora uputile na neku ponudu u kojoj se izričito upućuje na opće uvjete koji sadrže klauzulu o prorogaciji nadležnosti.

Ovo shvaćanje međutim vrijedi samo u slučaju izričite upute koju može provjeriti strana koja postupa s dužnom pažnjom te samo ako je ustanovljeno da je o općim uvjetima koji sadrže klauzulu o prorogaciji nadležnosti doista i bila obaviještena druga ugovorna strana ponudom na koju se upućuje.

Ali pretpostavka pisanog oblika iz članka 17. ne bi bila ispunjena u slučaju posredne ili prešutne upute na raniju prepisku, jer to ne bi dovelo do sigurnosti da je klauzula o prorogaciji nadležnosti doista bila dio ugovora u pravom smislu.

13 Stoga valja odgovoriti da je, u slučaju ugovora sklopljenog uputom na ranije ponude koje su same učinjene uputom na opće uvjete prodaje jedne od strana, a koji sadrže klauzulu o prorogaciji nadležnosti, pretpostavka pisanog oblika prema prvom stavku članka 17. Konvencije ispunjena samo ako je uputa izričita tako da je može provjeriti osoba koja postupa s dužnom pažnjom.