Trasporti Castelletti Spedizioni Internazionali SpA

v.

Hugo Trumpy SpA

C-159/97

16 March 1999

Convention on Jurisdiction and the Enforcement of Judgments – Prorogation of jurisdiction – Conditions as to form – Clause included in the general conditions on the reverse of the contract – Need for an express reference to those conditions in the contract – Agreement made in a form according with usages in international trade or commerce

OPERATIVE PART:

The third case 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, 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, is to be interpreted as follows:

1. The contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware.

2. The existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

It is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States.

A specific form of publicity cannot be required in all cases.

The fact that a course of conduct amounting to a usage is challenged before the courts is not sufficient to cause the conduct no longer to constitute a usage.

3. The specific requirements covered by the expression 'form which accords' must be assessed solely in the light of the commercial usages of the branch of international trade or commerce concerned, without taking into account any particular requirements which national provisions might lay down.

4. Awareness of the usage must be assessed with respect to the original parties to the agreement conferring jurisdiction, their nationality being irrelevant in this regard. Awareness of the usage will be established when, regardless of any specific form of publicity, in the branch of trade or commerce in which the parties operate a

Trasporti Castelletti Spedizioni Internazionali SpA

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Konvencija o nadležnosti i ovrsi sudskih odluka – sporazum o nadležnosti – pretpostavke u pogledu oblika – klauzula uvrštena u opće uvjete poslovanja na poleđini ugovora – nužnost izričitog upućivanja na te uvjete u ugovoru – sporazum u obliku koji odgovara međunarodnim trgovačkim običajima

IZREKA:

Članak 17. stavak 1. rečenica 2. treća točka Konvencije od 27. rujna 1968. o nadležnosti i ovrsi sudskih odluka u građanskim i trgovačkim stvarima u verziji Konvencije od 9. listopada 1978. o pristupanju Kraljevine Danske, Irske i Ujedinjenog Kraljevstva Velike Britanije i Sjeverne Irske treba se tumačiti na sljedeći način:

1. Predmnijeva se da postoji sporazum ugovornih strana o klauzuli o nadležnom sudu ako njihovo ponašanje odgovara trgovačkom običaju u području međunarodnog prometa u kojemu stranke posluju te ako im je taj trgovački običaj poznat ili im je morao biti poznat.

2. Postojanje trgovačkog običaja za gospodarsku granu u kojoj posluju ugovorne stranke smatra se dokazanim ako se trgovci iz te gospodarske grane pri sklapanju određene vrste ugovora općenito i redovito ponašaju na određeni način.

Takvo se ponašanje ne mora dokazati za određene zemlje, posebice ne za sve države ugovornice.

Određeni oblik publiciteta ne može se zahtijevati u svim slučajevima.

Ponašanje koje predstavlja trgovački običaj ne gubi to svojstvo samim time što se pred sudovima dovodi u pitanje.

3. Konkretne pretpostavke koje obuhvaća pojam "oblik koji odgovara međunarodnim trgovačkim običajima" moraju se razmatrati isključivo na temelju trgovačkih običaja odnosne grane međunarodnog prometa, ne uzimajući u obzir eventualne posebne pretpostavke nacionalnih propisa.

4. Kod prvobitnih ugovornih strana sporazuma o nadležnom sudu treba ustanoviti je li im taj trgovački običaj bio poznat, s time što njihovo državljanstvo pritom ne igra nikakvu ulogu. To je znanje, neovisno o bilo kakvu posebnom obliku publiciteta, utvrđeno ako se u gospodarskoj grani u kojoj stranke posluju pri sklapanju određene vrste ugovora svi redovito ponašaju na određeni način, stoga se to ponašanje može smatrati ustaljenom praksom.

particular course of conduct is generally and regularly followed in the conclusion of a particular type of contract, so that it may be regarded as an established usage.

5. The choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down in Article 17 of the Convention of 27 September 1968. Considerations about the links between the court designated and the relationship at issue, about the validity of the clause, or about the substantive rules of liability applicable before the chosen court are unconnected with those requirements.

EXCERPT FROM THE REASONS:

1 By order of 24 October 1996, received at the Court on 25 April 1997, the Corte Suprema di Cassazione (Supreme Court of Cassation) 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 fourteen questions on the interpretation of Article 17 of the Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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').

2 The questions have been raised in proceedings for compensation for damage allegedly caused during the unloading of goods carried under a number of bills of lading from Argentina to Italy, between Trasporti Castelletti Spedizioni Internazionali SpA ('Castelletti'), having its registered office in Milan, Italy, to which the goods were delivered, and Hugo Trumpy SpA ('Trumpy'), having its registered office in Genoa, Italy, in its capacity as agent for the vessel and for the carrier Lauritzen Reefers A/S ('Lauritzen'), whose registered office is in Copenhagen.

The Convention

3 The first and second sentences of the first paragraph of Article 17 of the Convention provide:

'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 (1) in that trade or commerce of which the parties are or ought to have been aware.'

4 That version was amended, after the events which are the subject of the main proceedings, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1). The first paragraph of Article 17 now provides:

'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,

5. Izbor nekog suda u klauzuli o nadležnom sudu može se preispitati samo na temelju razmatranja koja su povezana sa zahtjevima iz članka 17. Konvencije od 27. rujna 1968. Razmatranja o vezi između ugovorenog suda i spornog pravnog odnosa, o primjerenosti klauzule i o materijalnom pravu vezanom za odgovornost koje vrijedi u mjestu odabranog suda nisu ni u kakvoj vezi s tim zahtjevima.

IZ OBRAZLOŽENJA:

1 *Corte suprema di cassazione* rješenjem od 24. listopada 1996., koje je Sud zaprimio 25. travnja 1997., sukladno Protokolu od 3. lipnja 1971. o tumačenju Konvencije od 27. rujna 1968. o nadležnosti i ovrsi sudskih odluka u građanskim i trgovačkim stvarima od strane Suda u okviru postupka prethodnog tumačenja postavio je četrnaest pitanja o tumačenju članka 17. Konvencije od 27. rujna 1968. (Sl. 1972, L 299, str. 32) u verziji Konvencije od 9. listopada 1978. o pristupanju Kraljevine Danske, Irske i Ujedinjenog Kraljevstva Velike Britanije i Sjeverne Irske (Sl. L 388, str. 1 i – izmijenjeni tekst – str. 77; u daljnjem tekstu: Konvencija).

2 Ta su pitanja postavljena u sporu radi naknade štete, koja je navodno nastala prilikom istovara robe koja je po različitim teretnicama prevezena iz Argentine u Italiju, a koji se vodi između društva Trasporti Castelletti Spedizioni Internazionali SpA (u daljnjem tekstu: Castelletti) sa sjedištem u Milanu (Italija), kojemu je roba isporučena, i društva Hugo Trumpy SpA (u daljnjem tekstu: Trumpy) sa sjedištem u Genovi (Italija), kao predstavnika brodara i agenta Lauritzen Reefers A/S (u daljnjem tekstu: Lauritzen) sa sjedištem u Kopenhagenu.

Konvencija

3 Članak 17. stavak 1. rečenice 1. i 2. Konvencije propisuje:

"Ako su stranke, od kojih barem jedna ima prebivalište u nekoj državi ugovornici, ugovorile da sud ili sudovi neke države ugovornice trebaju odlučiti o sporu koji je već nastao ili o budućem sporu koji može proizaći iz određenog pravnog odnosa, sud ili sudovi te države isključivo su nadležni. Sporazum o nadležnom sudu mora se sklopiti u pisanom ili usmenom obliku uz pismenu potvrdu ili, u međunarodnom trgovačkom prometu, u obliku koji odgovara međunarodnim trgovačkim običajima koji su strankama poznati ili za koje se mora smatrati da su im poznati."

4 Nakon događaja iz glavnog postupka te su odredbe izmijenjene Konvencijom od 26. svibnja 1989. o pristupanju Kraljevine Španjolske i Portugalske Republike (Sl. L 285, str. 1), pa članak 17. stavak 1. sada određuje:

"Ako su stranke, od kojih barem jedna ima prebivalište u jednoj državi ugovornici, ugovorile da sud ili sudovi neke države ugovornice trebaju odlučiti o sporu koji je već nastao

that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing, or

(b) in a form which accords with practices which the parties have established between themselves, or

(c) in international trade or commerce, in a form which accords with a usage 1 of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.'

The main proceedings

5 The goods at issue in the main proceedings were, according to 22 bills of lading issued in Buenos Aires on 14 March 1987, placed by various Argentine shippers on board a vessel operated by Lauritzen, bound for Savona, Italy, where they were to be delivered to Castelletti. As a result of problems which arose during the unloading of the goods, Castelletti brought an action against Trumpy before the Tribunale di Genova (Genoa District Court) seeking an order for payment of compensation.

6 Trumpy, relying on clause 37 of the bills of lading, which confers jurisdiction on the High Court of Justice, London, argued that the Genoa court had no jurisdiction.

7 Clause 37, which is drawn up in English as are all the bills of lading in which it is inserted in small, but legible, characters, is the last to appear on the reverse of the printed document. It is worded as follows: 'The contract evidenced by this Bill of Lading shall be governed by English Law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English Law to the exclusion of the Courts of any other country'.

8 On the face of the bills of lading there is, inter alia, a box to be filled in with particulars of the cargo, and a reference, in characters more obvious than those used for the other clauses, to the conditions set out on the reverse side. Below that reference are added the date and place of issue of the bill of lading and the signature of the carrier's local agent. The signature of the original shipper appears below the particulars of the cargo and above the reference to the reverse side.

9 By judgment of 14 December 1989, the Tribunale di Genova upheld the objection, taking the view that, having regard to the bill of lading produced before it, the clause conferring jurisdiction, although contained in a form which had not been signed by the shipper, was valid in the light of the usages of international trade. By decision of 7 December 1994, the Corte d'Appello (Court of Appeal), Genoa, upheld that judgment, but on different grounds. After examining all the bills of lading, it found that the shipper's signature on their face implied Castelletti's acceptance of all the clauses, including those on the reverse.

10 Castelletti therefore appealed on a point of law, claiming that the signature of the original shipper could not have entailed acceptance by it of all the clauses, but only, as is clear from its location, those relating to the particulars of the cargo.

11 The Corte Suprema di Cassazione found that this plea was admissible and that the signature of the original shipper could not be deemed to imply consent to all the clauses

ili o budućem sporu koji može proizaći iz određenog pravnog odnosa, sud ili sudovi te države isključivo su nadležni. Sporazum o nadležnom sudu mora se sklopiti

a) u pisanom ili usmenom obliku uz pismenu potvrdu,

b) u obliku koji odgovara običajima koji su se razvili među strankama,

c) u međunarodnom trgovačkom prometu, u obliku koji odgovara međunarodnom trgovačkom običaju koji je strankama poznat ili im je morao biti poznat, a koji je ugovornim stranama u ugovorima ove vrste u odnosnoj gospodarskoj grani općepoznat i kojeg se redovito pridržavaju."

Glavni postupak

5 Roba koja je predmet glavnog postupka bila je, na temelju 22 teretnice koje su izdane u Buenos Airesu 14. ožujka 1987., ukrcana od strane različitih argentinskih krcatelja na brod kojim je upravljao Lauritzen. Roba je trebala biti prevezena u Savonu (Italija), gdje je trebala biti isporučena društvu Castelletti. Zbog poteškoća nastalih prilikom istovara robe, Castelletti je Trumpyja tužio pred sudom *Tribunale Genova* radi isplate naknade štete i kamata.

6 Trumpy je, pozivajući se na klauzulu br. 37 teretnice prema kojoj je nadležan sud *High Court of Justice* u Londonu, istaknuo prigovor nenadležnosti suda pred kojim je pokrenut postupak.

7 Ta je klauzula, koja je kao i sve teretnice u kojima se nalazi, pisana na engleskom i sitnijim, ali čitljivim slovima, posljednji podatak koji se nalazi na poleđini obrasca, a glasi: "*The contract evidenced by this Bill of Lading shall be governed by English Law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English Law to the exclusion of the Courts of any other country*."

8 Na prednjoj stranici teretnice nalazi se, među ostalim, rubrika u koju se trebaju upisati podaci o svojstvima utovarene robe te napomena koja upućuje na uvjete na poleđini, koja se ističe u odnosu na ostale klauzule. Ispod te napomene nalaze se datum i mjesto izdavanja teretnice te potpis lokalnog predstavnika agenta; potpis prvobitnog krcatelja dijela broda nalazi se ispod podataka o svojstvima o utovarenoj robi te iznad napomene koja upućuje na poleđinu.

9 *Tribunale Genova* presudom od 14. studenoga 1989. usvojio je taj prigovor te je na temelju predočene teretnice zauzeo stajalište da je klauzula o nadležnom sudu, iako se nalazi u obrascu krcatelj nije potpisao, valjana prema međunarodnim trgovačkim običajima. Presudom od 7. prosinca 1994. *Corte d'appello Genoa* potvrdio je tu presudu, ali s drukčijim obrazloženjem. Sud je naime nakon pregleda svih teretnica ustanovio da krcateljev potpis na prednjoj stranici znači da je Castletti prihvatio sve klauzule, uključujući i one na poleđini obrasca.

10 Castelletti je nakon toga podnio kasacijsku tužbu te je istaknuo da prvobitni krcatelj svojim potpisom nije odobrio sve klauzule već, kao što jasno proizlazi iz mjesta gdje se nalazi potpis, samo klauzule o svojstvima robe koja se prevozi, a koje se nalaze ispred potpisa.

11 *Corte suprema di cassazione* to je stajalište našao uvjerljivim i utvrdio da se potpisu prvobitnog krcatelja ne može pripisati značaj izjave o suglasnosti sa svim klauzulama teretnice. Budući da prema tomu ne postoji sporazum o nadležnom sudu koji je sklopljen u

of the bill of lading. Since the court had thus ruled out the possibility that an agreement conferring jurisdiction had been made in writing or even evidenced in writing, it considered that the resolution of the dispute depended upon the interpretation of Article 17 of the Convention, in that it provides that an agreement conferring jurisdiction can be made, 'in international trade or commerce, in a form which accords with practices (usages) in that trade or commerce of which the parties are or ought to have been aware.'

12 In those circumstances, the Corte Suprema di Cassazione decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. The first question to be put to the Court of Justice is as follows:

In the case-law of the Court of Justice relating to the original wording of Article 17, reference has been made to the need to ascertain and protect the actual will of the parties with regard to the jurisdiction clause by means of the requirements laid down by that provision in respect of the validity of such clauses; that is also the case where the clause is adjudged valid, when the bill of lading containing the clause comes within the framework of a continuing business relationship between the parties, and it is thereby established that the relationship is governed by the general terms and conditions (drawn up by one of the parties, namely the carrier) containing that clause (see Case 71/83 Tilly Russ v Nova [1984] ECR 2417, which cites earlier judgments underscoring the need for the consent of the parties to be clearly and precisely demonstrated).

However, in the light of the insertion into the new wording of the provision of the reference to usage, which is prescriptive (and thus unconnected to the will of the parties, at least so far as specifically concerns a particular contract), the question arises whether the requirement of (actual) knowledge, or of lack of awareness arising out of negligent and inexcusable ignorance, is sufficient in view of the consistent incorporation (in all agreements similar to that in issue) of the jurisdiction clause. The question arises, in other words, whether it is any longer necessary to ascertain the will of the parties, despite the fact that Article 17 uses the word "concluded" [in the Italian version], which implies an expression of will and thus "commercial" usage (customary clauses).

2. The second question concerns the meaning of the expression "form which accords". The first aspect concerns the way in which the clause appears, that is whether it must necessarily be in writing signed by the party who has drawn it up and who has therefore expressed the intention of relying upon it – for example – by signing the bill of lading referring specifically to a clause which in turn refers to an agreement conferring exclusive jurisdiction, even in the absence of the signature of the other party (the shipper).

The second aspect consists in establishing whether it is necessary for the jurisdiction clause to stand out prominently on its own within the contract as a whole, or whether it is sufficient (and therefore of no consequence as regards the validity of the clause) for it to be inserted amongst numerous other clauses drawn up in order to regulate the contract of carriage in every respect.

The third aspect relates to the language in which the clause is drawn up, that is to say, whether it must be in some way related to the nationality of the parties to the contract or whether it is sufficient for it to be a language regularly used in international trade or commerce.

3. The third question is concerned with whether the designated court must, as well as being a court of a Contracting State, be in some way related to the nationality and/or the

pisanom ili usmenom obliku uz pismenu potvrdu, za donošenje odluke u ovom pravnom sporu potrebno je tumačenje članka 17. Konvencije u onom dijelu u kojem se, prema tom članku, "u međunarodnom trgovačkom prometu" može sklopiti sporazum o nadležnom sudu "u obliku koji odgovara međunarodnim trgovačkim običajima koji su strankama poznati ili za koje se mora smatrati da su im poznati."

12 Zbog toga je *Corte suprema di cassazione* prekinuo postupak te se sa sljedećim pitanjima obratio Sudu:

1. Prvo pitanje upućeno Sudu:

U svojim tumačenjima o prvobitnom tekstu članka 17., Sud je ukazao na potrebu da se na temelju pretpostavki navedenih u toj odredbi u pogledu valjanosti klauzula o nadležnosti utvrdi i zaštiti stvarni sporazum ugovornih strana o nadležnosti; to vrijedi i onda kada je utvrđena valjanost klauzule kada je teretnica u kojoj je sadržana dio tekućih poslovnih odnosa između stranaka te iz toga proizlazi da se na te odnose primjenjuju Opći uvjeti poslovanja (jedne ugovorne strane, tj. agenta) koji sadrže takvu klauzulu (vidi presudu od 19. lipnja 1984. u predmetu C-71/83, *Tilly Russ,* [1984] ECR, 2417, u kojima su citirane starije presude iz kojih proizlazi da sporazum stranaka jasno i nedvojbeno mora doći do izražaja).

No, budući da je u novi tekst propisa uvrštena uputa na trgovački običaj koji je normativni kriterij (i kao takav neovisan o volji stranaka, barem u odnosu na pojedinačni ugovor), postavlja se pitanje je li pretpostavka (stvarnog) znanja ili skrivljenog i neopravdanog neznanja, dovoljna s obzirom na opetovano uvrštavanje klauzule (u svim ugovorima koji su slični predmetnom ugovoru)? Znači li to da se više ne treba utvrđivati volja stranaka, iako se u članku 17. koristi riječ "sklopiti" koja se odnosi na očitovanja volje i prema tomu na "trgovačke običaje" (uobičajena klauzula)?

2. Drugo se pitanje odnosi na značenje izraza "u obliku … koji odgovara trgovačkim običajima". Prvi se aspekt odnosi na pojavni oblik klauzule: mora li klauzula biti sadržana u pismenu koje je potpisano od strane koja ju je sastavila i koja je time očitovala svoju namjeru da se na nju poziva npr. potpisujući teretnicu koja izrijekom upućuje na klauzulu koja pak upućuje na ugovor kojim se ustanovljuje isključiva nadležnost, čak i onda kada nedostaje potpis druge ugovorne strane (krcatelja)?

Drugi se aspekt odnosi na pitanje je li potrebno da se klauzula o nadležnom sudu ističe u odnosu na ostali tekst ugovora ili je dostatno (pa stoga bez značaja za valjanost klauzule) da je uvrštena kao jedna od mnogih klauzula koje uređuju ugovor o prijevozu u svakom pogledu?

Treći se aspekt odnosi na jezik klauzule: mora li taj jezik biti u nekom odnosu s državljanstvom ugovornih strana ili je dovoljno da se radi o jeziku koji se redovito koristi u međunarodnom trgovačkom prometu?

3. Treće pitanje glasi: mora li ugovoreni sud, pored pretpostavke da se mora raditi o sudu neke države ugovornice, biti u nekom odnosu s državljanstvom, odnosno prebivali-

residence of the parties to the contract or to the place of performance and/or conclusion of the contract, or whether the first condition is sufficient without there being any other link with the substance of the relationship.

4. The fourth question concerns the process by which usage comes into being; that is, whether consistent incorporation of the clause in bills of lading issued by trade associations or a significant number of maritime transport undertakings is sufficient or whether it must be demonstrated that since users of such transport (whether traders or otherwise) have not made any observations or expressed reservations regarding consistent incorporation of the clause, they have tacitly acquiesced to the conduct of the other party, so that there may no longer be considered to be a dispute between them.

5. The fifth question concerns the form in which such consistent practice is publicised: must the form of bill of lading in which the jurisdiction clause appears be lodged at a particular office (trade association, chamber of commerce, port authorities, and so on) for consultation or made public in some other way?

6. The sixth question concerns the validity of the clause, even where, by virtue of the substantive rules applicable in the chosen court, it takes the form of a clause exempting the carrier from, or limiting, his liability.

7. The seventh question is concerned with whether the court (other than the chosen court) which has been called upon to assess the validity of the clause may examine the reasons for it, that is to say, the intention of the carrier in the choice of court made, as distinct from the court which would have had jurisdiction according to the usual criteria laid down in the Brussels Convention or by the lex fori.

8. The eighth question consists in ascertaining whether the fact that many shippers and/or endorsees of bills of lading have challenged the validity of the clause by bringing an action before a court other than that designated by the clause itself is indicative of the fact that usage regarding the insertion of the clause in forms has not become well established.

9. The ninth question consists in ascertaining whether the usage must exist in all the countries of the European Community or whether the expression "international trade or commerce" is intended to mean that it is sufficient for the usage to be practised in those countries which, in the context of international trade or commerce, have traditionally played a prominent role.

10. The tenth question consists in ascertaining whether the usage in question may derogate from mandatory statutory provisions of individual States, such as, in Italy, Article 1341 of the Civil Code which, with regard to the general contractual terms and conditions drawn up by one of the parties, provides that, in order for the usage to be valid, the other party must be or ought to have been aware of it and provides that clauses laying down particular limitations to or derogating from the jurisdiction of the courts must be specifically approved in writing.

11. The eleventh question concerns the circumstances in which insertion of the clause in question in a standard form, not signed by the party not involved in drawing it up, may be considered to be grossly unfair or even abusive.

12. The twelfth question involves ascertaining whether the party concerned was or ought to have been aware of the usage, other than with regard to the condition set forth in paragraph 5, above, as regards the bill of lading itself, which contained numerous clauses appearing on the reverse (paragraph 2, above).

štem ugovornih strana ili s mjestom ispunjenja, odnosno mjestom sklapanja ugovora ili je dovoljna prva pretpostavka, a da ne mora postojati neka druga veza sa sadržajem ugovornog odnosa?

4. Četvrto se pitanje odnosi na nastanak trgovačkog običaja: je li dostatno da se klauzula stalno ponavlja u teretnicama stručnih udruženja ili u teretnicama velikog broja brodarskih poduzeća ili se mora dokazati da su se oni koji (komercijalno ili nekomercijalno) koriste takve usluge prijevoza prešutno suglasili s uvjetima koje je odredila druga ugovorna strane time što nisu prigovorili zbog njihova stalnog korištenja, odnosno da nisu iznijeli nikakve ograde u pogledu klauzule, tako da se više ne može polaziti od sukoba među ugovornim stranama?

5. Peto se pitanje odnosi na oblike publiciranja stalne prakse: mora li se obrazac teretnice koji sadrži klauzulu o nadležnom sudu negdje pohraniti (stručno udruženje, trgovačka komora, lučka kapetanija itd.) kako bi se u njega mogao dobiti uvid ili mora li i inače biti općepoznat?

6. Šesto se pitanje odnosi na valjanost klauzule: je li ona i onda valjana ako (zbog materijalnog prava koje važi u mjestu odabranog nadležnog suda) za agenta u stvarnosti znači oslobođenje ili ograničenje odgovornosti?

7. Sedmo pitanje glasi: može li sud (različit od onoga koji je izabran) pred kojim je pokrenut postupak radi ocjene valjanosti klauzule preispitati razloge za sklapanje klauzule, to jest preispitati koja je bila svrha koju je krcatelj htio postići izborom ugovorenog suda (dakle suda koji nije sud koji bi bio nadležan prema općim kriterijima Bruxelleske konvencije ili prema pravu suda pred kojim je pokrenut postupak)?

8. Osmo pitanje: može li se okolnost da su brojni krcatelji odnosno indosatari teretnice pred drugim sudovima, osim suda iz klauzule, tužbama doveli u pitanje valjanost klauzule smatrati naznakom za to da se, s obzirom na preuzimanje klauzule u tiskanice ili obrasce, još nije razvio ustaljeni trgovački običaj?

9. Deveto pitanje: je li se trgovački običaj morao ustaliti u svim državama Europske zajednice ili izraz "međunarodni trgovački promet" znači da se trgovački običaj morao razviti samo u državama koje u međunarodnom trgovačkom prometu tradicionalno imaju vodeću ulogu?

10. Deseto pitanje: smije li takav trgovački običaj odstupati od prisilnih pravnih propisa pojedinih država kao npr. u Italiji od članka 1341. *Codice civilea*, prema kojem su Opći uvjeti poslovanja koje koristi jedna ugovorna strana valjani samo ako su drugoj ugovornoj strani bili poznati ili su morali biti poznati i ako su klauzule koje predviđaju posebna ograničenja ili odstupanja od sudske nadležnosti potvrđene posebnim potpisom?

11. Jedanaesto pitanje: pod kojim se pretpostavkama uključivanje predmetne klauzule u obrazac, koji ugovorna strana korisnika nije potpisala, može smatrati prekomjerno opterećujućim ili zloporabom?

12. Dvanaesto pitanje: treba li u okviru utvrđenja da je trgovački običaj poznat ili je morao biti poznat preispitati samo pretpostavku iz petog pitanja ili se preispitivanje odnosi i na konkretnu teretnicu na čijoj su poleđini otisnute brojne klauzule (vidi drugo pitanje)?

13. The thirteenth question involves identifying the person who is or ought to have been aware of the usage; whether it must be the original shipper, even if he is a national of a non-Contracting State (such as, in the present case, Argentina), or whether it is sufficient for it to be the endorsee of the bill, who is a national of a Contracting State (in the present case, Italy).

14. The fourteenth question is concerned with whether the phrase "ought to have been aware" refers to a criterion of good faith and honesty when a particular contract was drawn up or to a criterion of ordinary care on the part of individuals who must be fully informed of current practices in international trade, for the purposes of paragraph 9, above.'

The questions submitted for a preliminary ruling

13 In Case 24/76 Estasis Salotti v RÜWA [1976] ECR 1831, paragraph 9, the Court of Justice held that, whilst the mere fact that a clause conferring jurisdiction is printed on the reverse of a contract drawn up on the commercial paper of one of the parties does not of itself satisfy the requirements of Article 17, it is otherwise where the text of the contract signed by both parties itself contains an express reference to general conditions which include a clause conferring jurisdiction.

14 Further, under the division of responsibilities in the preliminary ruling procedure laid down by the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention, it is for the national court alone to define the subject-matter of the questions which it proposes to refer to the Court. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Cases C-220/95 Van den Boogaard v Laumen [1997] ECR I-1147, paragraph 16, and C-295/95 Farrell v Long [1997] ECR I-1683, paragraph 11).

15 It is apparent from the wording of the questions submitted that the national court seeks clarification of four factors affecting the validity of a jurisdiction clause which is drawn up in a form which accords with established practices (usages) – the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention – namely:

– the consent of the parties to the clause (first question);
– the notion of usage in international trade or commerce (ninth, fourth, fifth and eighth questions);
– the notion of form which accords with established usages (second, eleventh and tenth questions);
– the parties' awareness of the usage (thirteenth, fourteenth and twelfth questions).

16 It is also clear from its questions that the national court is unsure whether there are any restrictions as to the choice of court under Article 17 of the Convention (third, seventh and sixth questions).

13. Trinaesto se pitanje odnosi na određivanje pravnog subjekta kojem je trgovački običaj poznat ili je morao biti poznat: mora li se kod te osobe raditi o prvobitnom krcatelju, čak i ako je pripadnik države koja nije država ugovornica (kao u ovom slučaju Argentina) ili se može raditi i o indosataru teretnice koji je pripadnik neke države ugovornice (kao u ovom slučaju Italija)?

14. Četrnaesto pitanje: odnosi li se izraz "za koje se mora smatrati da su im poznati" na kriterij dobre vjere kod nastanka ugovora ili na kriterij uobičajene subjektivne pažnje s obzirom na obvezu da se u potpunosti treba informirati u uobičajenoj praksi u međunarodnom trgovačkom prometu u smislu devetoga pitanja?

O prethodnim pitanjima

13 U presudi od 14. prosinca 1976. u predmetu C-24/76 (*Estasis Salotti*, [1976] ECR, 1831, točka 9.) Sud je odlučio da, prema članku 17. doduše nije dovoljno da je klauzula o nadležnom sudu otisnuta na poleđini ugovora na poslovnom papiru neke od ugovornih strana, ali da je situacija drukčija ako sam tekst ugovora koji su potpisale obje ugovorne strane izričito upućuje na opće uvjete poslovanja koji sadrže klauzulu o nadležnom sudu.

14 S obzirom na podjelu nadležnosti u okviru postupka prethodnog tumačenja koja je predviđena u Protokolu od 3. lipnja 1971. o tumačenju Konvencije od strane Suda isključivo je na nacionalnom sudu da odredi predmet pitanja koja želi postaviti Sudu. Prema stalnoj sudskoj praksi isključivo je na nacionalnim sudovima, pred kojima se vodi spor i koji su odgovorni za završnu sudsku odluku da, uzimajući u obzir posebnosti spora, ocijene nužnost prethodnog tumačenja za odluku koju trebaju donijeti, kao i značaj prethodnih pitanja koja treba uputiti Sudu (presude od 27. veljače 1997. u predmetu C-220/95, *Van den Boogaard*, [1997] ECR, I-1147, točka 16. i od 20. ožujka 1997. u predmetu C-295/95, *Farrell*, [1997] ECR, I-1683, točka 11.).

15 Iz formulacije pitanja proizlazi da sud koji je uputio zahtjev za prethodnim tumačenjem traži razjašnjenje sljedećih četiriju elemenata o kojima ovisi valjanost klauzule o nadležnom sudu koja je ugovorena u obliku sukladnom međunarodnim trgovačkim običajima (članak 17. stavak 1. rečenica 2. treća točka):

– suglasnost stranaka o klauzuli (prvo pitanje);
– pojam međunarodnog trgovačkog običaja (deveto, četvrto, peto i osmo pitanje);
– pojam oblika koji je u skladu s međunarodnim trgovačkim običajima (drugo, jedanaesto i deseto pitanje);
– svijest stranaka o trgovačkom običaju (trinaesto, četrnaesto i dvanaesto pitanje).

16 Iz tih pitanja nadalje proizlazi da sud koji je uputio zahtjev za prethodnim pitanjem želi znati podliježe li, s obzirom na članak 17. Konvencije, izbor ugovorenog suda nekim ograničenjima (treće, sedmo i šesto pitanje).

The first question: parties' consent to the jurisdiction clause

17 By its first question, the national court is asking essentially whether Article 17 of the Convention, as amended by the Accession Convention of 9 October 1978, in so far as it refers to the notion of 'practices' (usages) whilst using the term 'concluded' [in the Italian version], necessarily requires that the consent of the parties to the jurisdiction clause be established.

18 In its original version, Article 17 made the validity of a jurisdiction clause subject to the existence of an agreement in writing or an oral agreement evidenced in writing. It was in order to take account of the specific practices and requirements of international trade that the Accession Convention of 9 October 1978 added to the second sentence of the first paragraph of Article 17 a third case providing that, in international trade or commerce, a jurisdiction clause may be validly concluded in a form which accords with usages in that trade or commerce of which the parties are, or ought to have been, aware (Case C-106/95 MSG v Gravières Rhénanes [1997] ECR I-911, paragraph 16).

19 At paragraph 17 of MSG, the Court held that, in spite of the flexibility introduced into Article 17, the provision's aim was still to ensure that there was real consent on the part of the persons concerned so as to protect the weaker party to the contract by avoiding jurisdiction clauses, incorporated in a contract by one party, going unnoticed.

20 The Court went on to state, however, that the amendment made to Article 17 makes it possible to presume that such consent exists where commercial usages of which the parties are or ought to have been aware exist in this regard in the relevant branch of international trade or commerce (MSG, paragraphs 19 and 20).

21 The answer to the first question must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention is to be interpreted as meaning that the contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware.

The ninth, fourth, fifth and eighth questions: usage in international trade or commerce

22 By these questions, the national court seeks to ascertain the countries in which a usage must be found to exist, the process by which it comes into being, the forms in which it must be publicised, and the consequences to be drawn, as to the existence of a usage in this area, from actions challenging the validity of jurisdiction clauses inserted in bills of lading.

23 At paragraph 21 of MSG, the Court stated that it is for the national court to determine, first, whether the contract in question is one forming part of international trade or commerce and, second, whether there is a usage in the branch of international trade or commerce in which the parties operate.

24 As to the first point, it is common ground that, in the main proceedings, the contract is one forming part of international trade or commerce.

25 As to the second point, the Court explained in MSG, at paragraph 23, that whether a usage exists is not to be determined by reference to the law of one of the Contracting Parties or in relation to international trade or commerce in general, but in relation to the branch of trade or commerce in which the parties to the contract operate.

O prvom pitanju: suglasnost stranaka o klauzuli o nadležnom sudu

17 Sa svojim prvim pitanjem sud koji je uputio zahtjev za prethodnim tumačenjem želi u biti znati pretpostavlja li članak 17. u verziji Konvencije o pristupanju od 9. listopada 1978., time što se poziva na izraz "trgovački običaji" i istovremeno koristi pojam "sklopiti", da se mora ustanoviti suglasnost stranaka o klauzuli o nadležnom sudu.

18 Članak 17. u svojoj prvobitnoj verziji zahtijeva za valjanost klauzule o nadležnom sudu pismeni ili usmeni, ali u pisanom obliku potvrđen sporazum. No, kako bi se uzeli u obzir posebni običaji i zahtjevi međunarodnog trgovačkog prometa, Konvencijom o pristupanju od 9. listopada 1978. u članku 17. stavku 1. rečenici 2. dodana je i treća točka koja u međunarodnom trgovačkom prometu dopušta poseban oblik sporazuma o nadležnom sudu koji odgovara međunarodnim trgovačkim običajima koji su strankama poznati ili se moraju smatrati kao njima poznati (presuda od 20. veljače 1997. u predmetu C-106/95, *MSG,* [1997] ECR, I-911, točka 16.).

19 U točki 17. presude *MSG* Sud je ustanovio da članak 17. unatoč tom dodanom objašnjenju i nadalje treba osigurati da doista postoji stvarna suglasnost stranaka; to je opravdano time što se želi zaštiti slabija ugovorna strana tako da se spriječi da klauzule o nadležnom sudu koje su jednostrano dodane ugovoru ostanu neprimijećene.

20 Sud je međutim nadalje naveo da izmjena članka 17. omogućuje predmnjevu da je takva suglasnost postignuta ako u određenoj grani međunarodnog trgovačkog prometa postoje odgovarajući trgovački običaji koji su strankama poznati ili za koje se mora smatrati da su im poznati (točke 19. i 20. presude *MSG*).

21 Na prvo se pitanje stoga treba odgovoriti da se članak 17. stavak 1. rečenica 2. treća točka treba tumačiti tako da se predmnijeva da je među ugovornim stranama postignuta suglasnost o klauzuli o nadležnom sudu ako njihovo ponašanje odgovara trgovačkom običaju u području u kojem stranke posluju te ako im je taj trgovački običaj poznat ili se mora smatrati da im je poznat.

O devetom, četvrtom, petom i osmom pitanju: pojam međunarodnog trgovačkog običaja

22 Ovim pitanjima sud koji je uputio zahtjev za prethodnim tumačenjem u biti želi znati u kojim se državama treba utvrditi postojanje trgovačkog običaja, kako on nastaje, koji oblici publiciteta za njega vrijede i koje zaključke u vezi s postojanjem trgovačkog običaja u određenom području treba izvesti iz toga što se tužbom dovodi u pitanje valjanost klauzule o nadležnom sudu koja je uvrštena u teretnicu.

23 U točki 21. presude *MSG*, Sud je ustanovio da je zadaća nacionalnih sudova odlučiti radi li se kod nekog ugovora o međunarodnom trgovačkom prometu i postoji li u području međunarodnog trgovačkog prometa u kojem stranke posluju trgovački običaj.

24 Što se tiče prve točke, utvrđeno je da se u glavnom postupku radi o ugovoru o međunarodnom trgovačkom prometu.

25 U vezi s drugom točkom Sud je u točki 23. presude *MSG* ustvrdio da se postojanje trgovačkog običaja ne određuje ni prema pravu neke države ugovornice ni u pogledu međunarodne trgovine općenito, već samo za granu u kojoj posluju ugovorne strane.

26 It went on to hold in the same paragraph that there is a usage in the branch of trade or commerce in question where in particular a certain course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

27 It follows that it is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States. The fact that a practice is generally and regularly observed by operators in the countries which play a prominent role in the branch of international trade or commerce in question can be evidence which helps to prove that a usage exists. The determining factor remains, however, whether the course of conduct in question is generally and regularly followed by operators in the branch of international trade in which the parties to the contract operate.

28 Since Article 17 of the Convention does not contain any reference to forms of publicity, it must be held, as the Advocate General considered at point 152 of his Opinion, that, although any publicity which might be given in associations or specialised bodies to the standard forms on which a jurisdiction clause appears may help to prove that a practice is generally and regularly followed, such publicity cannot be a requirement for establishing the existence of a usage.

29 A course of conduct satisfying the conditions indicative of a usage does not cease to be a usage because it is challenged before the courts, whatever the extent of the challenges, provided that it still continues to be generally and regularly followed in the trade with which the type of contract in question is concerned. Therefore, the fact that numerous shippers and/or endorsees of bills of lading have challenged the validity of a jurisdiction clause by bringing actions before courts other than those designated would not cause the incorporation of that clause in those documents to cease to constitute a usage, as long as it is established that it amounts to a usage which is generally and regularly followed.

30 The answer to the ninth, fourth, fifth and eighth questions must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention is to be interpreted as follows:

The existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

It is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States.

A specific form of publicity cannot be required in all cases.

The fact that a course of conduct amounting to a usage is challenged before the courts is not sufficient to cause the conduct no longer to constitute a usage.

The second, eleventh and tenth questions:
'form which accords with practices'

31 By its second question, the national court seeks to ascertain what is specifically required for there to be a 'form which accords' within the meaning of Article 17 of the Convention. It asks more precisely whether the jurisdiction clause must be contained in a written document, bearing the signature of the party stipulating it, with the signature itself

26 Sud je nadalje u točki 23. presude *MSG* utvrdio da u nekoj grani trgovački običaj osobito postoji onda kada se trgovci iz te grane pri sklapanju određene vrste ugovora općenito i redovito ponašaju na određeni način.

27 Prema tomu, takvo ponašanje ne mora postojati u određenim državama, a posebno ne u svim državama ugovornicama. Okolnost da se trgovci onih zemalja koji u određenoj grani međunarodnog trgovačkog prometa imaju vodeći položaj općenito i redovito drže određene prakse može biti naznaka koja olakšava dokazivanje trgovačkog običaja. No, mjerodavan kriterij ostaje i nadalje ponašaju li se trgovci iz te grane međunarodnog trgovačkog prometa općenito i redovito na taj određeni način.

28 Budući da članak 17. Konvencije ne sadrži podatke o oblicima publiciteta, u skladu s navodima nezavisnog odvjetnika iz točke 152. njegova mišljenja, treba poći od toga da publicitet koji za obrasce s klauzulom o nadležnom sudu eventualno stvaraju stručna udruženja ili organizacije, doduše, olakšava dokaz o općenitoj i redovitoj praksi, ali se ne može tražiti kao dokaz za trgovački običaj.

29 Ponašanje koje odgovara obilježjima trgovačkog običaja ne gubi to svojstvo time što se pred sudom protiv toga ističu prigovori, bez obzira na njihov broj, sve dok se taj običaj u području kojem ta vrsta ugovora pripada primjenjuje općenito i redovito. Tako okolnost što su brojni krcatelji i/ili indosatari teretnice pred drugim sudovima koji nisu nadležni sud doveli u pitanje valjanost klauzule o nadležnom sudu ne mijenja ništa u pogledu toga odgovara li uvrštavanje te klauzule u odnosne isprave trgovačkom običaju, ako i sve dok se radi o općeprihvaćenoj i redovitoj praksi.

30 Iz tog razloga na deveto, četvrto, peto i osmo pitanje treba odgovoriti da članak 17. stavak 1. rečenicu 2. treću točku Konvencije treba tumačiti na sljedeći način:

Postojanje trgovačkog običaja za gospodarsku granu u kojoj posluju ugovorne stranke smatra se dokazanim, ako se trgovci iz te gospodarske grane pri sklapanju određene vrste ugovora općenito i redovito ponašaju na određeni način.

Takvo se ponašanje ne mora dokazati za određene države, posebice ne za sve države ugovornice.

Određeni oblik publiciteta ne može se zahtijevati u svakom slučaju.

Ponašanje koje predstavlja trgovački običaj ne gubi to svojstvo samim time što se pred sudovima dovodi u pitanje.

O drugom, jedanaestom i desetom pitanju:
izraz "oblik koji odgovara međunarodnim trgovačkim običajima"

31 Sud koji je podnio zahtjev za prethodnim tumačenjem sa svojim drugim pitanjem želi znati koja su konkretna obilježja izraza "oblik koji odgovara međunarodnim trgovačkim običajima" u smislu članka 17. Konvencije. Sud želi znati mora li klauzula o nadležnom sudu biti sadržana u jednom pismenu na kojem je i korisnik potpisao napomenu o

being accompanied by a reference to the clause, whether that clause must stand out prominently from the other clauses and whether the language in which it is drawn up must be related to the nationality of the parties.

32 By its eleventh question, the national court seeks to ascertain the circumstances in which insertion of the clause in question in a standard form, which has not been signed by the party not involved in drawing it up, may be considered to be grossly unfair or even abusive.

33 By its tenth question, the national court asks whether it is acceptable, in the context of Article 17 of the Convention, to rely on a usage which would derogate from mandatory statutory provisions adopted by certain Contracting States as regards the form of jurisdiction clauses.

34 As the Court held in Case 150/80 Elefanten Schuh v Jacqmain [1981] ECR 1671, paragraph 25, Article 17 is intended to lay down itself the conditions as to form which jurisdiction clauses must meet, so as to ensure legal certainty and to ensure that the parties have given their consent.

35 It follows that the validity of a jurisdiction clause may be subject to compliance with a particular condition as to form only if that condition is linked to the requirements of Article 17.

36 It is therefore for the national court to refer to the commercial usages in the branch of international trade or commerce concerned in order to determine whether, in the case before it, the physical appearance of the jurisdiction clause, including the language in which it is drawn up, and its insertion in a standard form, which has not been signed by the party not involved in drawing it up, are consistent with the forms according with those usages.

37 In Elefanten Schuh, at paragraph 26, the Court stated that Contracting States are not at liberty to lay down formal requirements other than those laid down in the Convention.

38 Therefore, the usages to which Article 17 refers cannot be nullified by national statutory provisions which require compliance with additional conditions as to form.

39 The answer to the second, eleventh and tenth questions must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention is to be interpreted as meaning that the specific requirements covered by the expression 'form which accords' must be assessed solely in the light of the commercial usages of the branch of international trade or commerce concerned, without taking into account any particular requirements which national provisions might lay down.

The thirteenth, fourteenth and twelfth questions: the parties' awareness of the usage

40 By these questions, the national court seeks to ascertain, first, which party must be aware of the usage and whether his nationality is relevant in this regard, next, what degree of awareness that party must have of the usage and, finally, whether any publicity must be given to the standard forms containing jurisdiction clauses and, if so, in what form.

41 As to the first point, the Court of Justice held in Tilly Russ, at paragraph 24, that, in so far as a jurisdiction clause incorporated in a bill of lading is valid under Article 17 of the Convention as between the shipper and the carrier, it can be pleaded against the third

klauzuli, mora li se klauzula isticati u odnosu na ostale klauzule i mora li jezik na kojem je napisana biti u određenom odnosu s državljanstvom stranaka.

32 Svojim jedanaestim pitanjem sud koji je uputio zahtjev za prethodnim tumačenjem želi znati pod kojim se uvjetima može smatrati da je uključivanje predmetne klauzule u obrazac, koji nije potpisan od strane ugovornog partnera korisnika, preopterećujuće ili zloporaba.

33 Svojim desetim pitanjem sud koji je podnio zahtjev za prethodnim tumačenjem želi znati dopušta li članak 17. Konvencije pozivanje na trgovački običaj koji odstupa od prisilnih pravnih propisa pojedinih država ugovornica vezano za oblik klauzule o nadležnom sudu.

34 U presudi od 24. lipnja 1981. u predmetu C-150/80 (*Elefanten Schuh*, [1981] ECR, 1671, točka 25.) Sud je ustanovio da članak 17. u interesu pravne sigurnosti i osiguranja suglasnosti stanaka sam određuje uvjete vezane za oblik klauzule o nadležnom sudu.

35 Sukladno tomu, valjanost klauzule o nadležnom sudu može ovisiti o ispunjenju određenog oblika samo onda ako je taj uvjet vezan za zahtjeve iz članka 17.

36 Iz tog je razloga dakle zadaća nacionalnog suda da, vodeći računa o trgovačkim običajima u odnosnoj gospodarskoj grani međunarodnog trgovačkog prometa, odredi je li u predmetu koji se vodi pred njim vanjski izgled klauzule o nadležnosti suda, uključujući i jezik na kojem je sastavljena te njezino preuzimanje u obrazac koji nije potpisan od ugovornog partnera korisnika, sukladan oblicima koji odgovaraju tim trgovačkim običajima.

37 U točki 26. presude *Elefanten Schuh*, Sud je jasno utvrdio da države ugovornice nisu ovlaštene, pored odredaba o obliku iz Konvencije, propisati dodatne zahtjeve vezane za oblik.

38 Prema tome trgovački običaji na koje se poziva članak 17. ne mogu se potisnuti nacionalnim pravnim propisima koji zahtijevaju ispunjenje dodatnih uvjeta vezanih za oblik.

39 Na drugo, jedanaesto i deseto pitanje stoga se mora odgovoriti da se članak 17. stavak 1. rečenica 2. treća točka Konvencije treba tumačiti tako da se konkretna obilježja izraza "oblik koji odgovara međunarodnim trgovačkim običajima" moraju preispitati isključivo na temelju trgovačkih običaja odnosne grane međunarodnog prometa, ne uzimajući u obzir eventualne posebne pretpostavke nacionalnih propisa.

O trinaestom, četrnaestom i dvanaestom pitanju: znanje stranaka za trgovački običaj

40 Ovim pitanjima sud koji je uputio zahtjev za prethodnim tumačenjem u suštini želi znati koja stranka mora znati za taj trgovački običaj i ima li državljanstvo neku ulogu, koliko konkretno to znanje mora biti i podliježu li obrasci s klauzulama o nadležnom sudu publicitetu i ako da, u kojem obliku.

41 Vezano za prvi aspekt, Sud je u točki 24. presude *Tilly Russ* ustanovio da se klauzula o nadležnom sudu sadržana u teretnici, koja je u odnosu između krcatelja i agenta važeća u smislu članka 17. Konvencije, može istaknuti u odnosu na trećeg vlasnika ako je imatelj

party holding the bill of lading so long as, under the relevant national law, the holder of the bill of lading succeeds to the shipper's rights and obligations.

42 Since the validity of the clause under Article 17 must be assessed by reference to the relationship between the original parties, it follows that it is those parties whose awareness of the usage must be assessed, the parties' nationality being irrelevant for the purposes of that investigation.

43 As to the second point, it is clear from paragraph 24 of MSG that actual or presumed awareness of a usage on the part of the parties to a contract can be made out, in particular, by showing either that the parties had previously had commercial or trade relations between themselves or with other parties operating in the sector in question, or that, 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, so that it may be regarded as being an established usage.

44 As to the third point, given the Convention's silence on the means by which awareness of a usage may be proved, it must be held that, although any publicity which might be given in associations or specialised bodies to the standard forms containing jurisdiction clauses would make it easier to prove awareness, it cannot be essential for this purpose.

45 The answer to the thirteenth, fourteenth and twelfth questions must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention is to be interpreted as meaning that awareness of the usage must be assessed with respect to the original parties to the agreement conferring jurisdiction, their nationality being irrelevant in this regard. Awareness of the usage will be established when, regardless of any specific form of publicity, in the branch of trade or commerce in which the parties operate a particular course of conduct is generally and regularly followed in the conclusion of a particular type of contract, so that it may be regarded as an established usage.

The third, seventh and sixth questions: choice of court

46 By these questions, the national court seeks to ascertain whether there are, under Article 17 of the Convention, any limitations as to the choice of court. It asks whether it is necessary for the parties to choose a court having some link to the case, whether the court seised may review the validity of the clause as well as the intention of the party which inserted it, and whether the fact that the substantive provisions applicable before the chosen court tend to reduce that party's liability may affect the validity of the jurisdiction clause.

47 In that regard, it should be recalled that the Convention does not affect rules of substantive law (Case 25/79 Sanicentral v Collin [1979] ECR 3423, paragraph 5), but has the aim of establishing uniform rules of international jurisdiction (Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, paragraph 25).

48 As the Court has repeatedly stated, it is in keeping with the spirit of certainty, which constitutes one of the aims of the Convention, that the national court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case (Cases 34/82 Peters v ZNAV [1983]

teretnice, prema mjerodavnom nacionalnom pravu, stjecajem teretnice preuzeo prava i obveze krcatelja.

42 Budući da se valjanost klauzule, s obzirom na članak 17., treba ocijeniti u odnosu između prvobitnih stranaka, onda se kod tih stranaka mora i preispitati znanje za trgovački običaj; njihovo državljanstvo pritom nema nikakvu ulogu.

43 Što se tiče drugog aspekta, iz točke 24. presude *MSG* proizlazi da je osobito onda utvrđeno ili se pretpostavlja da je ugovornim stranama poznat takav trgovački običaj, ako su međusobno ili s drugim ugovornim partnerima koji posluju u toj gospodarskoj grani već i prije imali poslovne odnose i ako se u toj gospodarskoj grani pri sklapanju određene vrste ugovora općenito svi redovito tako ponašaju da je to ponašanje tako poznato da se može smatrati stalnim.

44 Što se tiče trećeg aspekta, na temelju šutnje Konvencije o pitanju kojim se dokazima može potvrditi znanje o trgovačkom običaju može se poći od toga da publicitet koji možda obrascima koji sadrže klauzulu o nadležnom sudu pribavljaju stručna udruženja ili organizacije, doduše, olakšava potreban dokaz, ali da za njega nije neizostavno nužan.

45 Iz tog razloga na četrnaesto i dvanaesto pitanje treba odgovoriti da se članak 17. stavak 1. rečenica 2. treća točka Konvencije trebaju tumačiti tako da se znanje o trgovačkom običaju mora preispitati kod prvobitnih stranaka sporazuma o nadležnom sudu i da pritom njihovo državljanstvo ne igra nikakvu ulogu. To se znanje smatra potvrđenim, neovisno o bilo kojem posebnom obliku publiciteta, ako se u poslovnom području u kojem stranke posluju pri sklapanju određene vrste ugovora svi i redovito ponašaju na određeni način te se to ponašanje stoga može smatra ustaljenom praksom.

O trećem, sedmom i šestom pitanju: odabir ugovorenog suda

46 Ovim pitanjem sud koji je uputio zahtjev za prethodnim tumačenjem želi znati podliježe li izbor ugovorenog suda, s obzirom na članak 17., nekim ograničenjima. Sud želi znati mora li odabrani sud biti u nekoj vezi s predmetom, smije li preispitati primjerenost klauzule i cilj koji korisnik klauzule želi postići te ima li utjecaja na valjanost klauzule ako materijalno pravo koje se primjenjuje u mjestu nadležnog suda dovodi do ograničenja odgovornosti za korisnika.

47 Konvencija ne utječe na odredbe materijalnog prava (presuda od 13. studenog 1979. u predmetu C-25/79 (*Sanicentral*, [1979] ECR, 3423, točka 5.); njezin je cilj naime stvaranje jedinstvenih pravila o međunarodnoj sudskoj nadležnosti (presuda od 3. srpnja 1997. u predmetu C-269/95, *Benincasa*, [1997] ECR, I-3767, točka 25.).

48 Kao što je Sud u više navrata ustanovio, nacionalni sud u interesu pravne sigurnosti, koja je jedan od ciljeva Konvencije, mora biti u stanju na temelju pravila Konvencije, bez ikakvih poteškoća, odlučiti o svojoj nadležnosti bez preispitivanja same stvari (presude od 22. ožujka 1983. u predmetu C-34/82, *Peters*, [1983] ECR, 987, točka 17., od 29. lip-

ECR 987, paragraph 17; C-288/92 Custom Made Commercial v Stawa Metallbau [1994] ECR I-2913, paragraph 20; and Benincasa, paragraph 27). In Benincasa, at paragraphs 28 and 29, the Court explained that the aim of securing legal certainty by making it possible reliably to foresee which court will have jurisdiction has been interpreted, in connection with Article 17 of the Convention, by fixing strict conditions as to form, since the purpose of that provision is to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus between the parties.

49 It follows that the choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down by Article 17.

50 It is for those reasons that the Court has repeatedly held that Article 17 of the Convention dispenses with any objective connection between the relationship in dispute and the court designated (Case 56/79 Zelger v Salinitri [1980] ECR 89, paragraph 4; MSG, paragraph 34; and Benincasa, paragraph 28).

51 For the same reasons, in a situation such as that in the main proceedings, any further review of the validity of the clause and of the intention of the party which inserted it must be excluded and substantive rules of liability applicable in the chosen court must not affect the validity of the jurisdiction clause.

52 The answer to the third, seventh and sixth questions must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 is to be interpreted as meaning that the choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down in Article 17 of the Convention. Considerations about the links between the court designated and the relationship at issue, about the validity of the clause, or about the substantive rules of liability applicable before the chosen court are unconnected with those requirements.

nja 1994. u predmetu C-288/92, *Custom Made Commercial*, [1994] ECR, I-2913, točka 20. i *Benincasa,* točka 27.). U točkama 28. i 29. presude *Benincasa*, Sud je izložio da je nastojanje da se pravna sigurnost zajamči tako da se sa sigurnošću može predvidjeti koji će sud biti nadležan, u okviru članka 17. Konvencije vidljivo kroz utvrđenje strogih formalnih pretpostavki, budući da je cilj članka 17. da se jasno i jednoznačno odredi sud jedne države ugovornice koji će prema jedinstvenoj volji stranaka biti isključivo nadležan.

49 Prema tome izbor ugovorenog suda može se provjeriti samo na temelju razmatranja koja su vezana za pretpostavke iz članka 17.

50 Iz tih je razloga Sud već u nekoliko navrata odlučio da članak 17. ne traži nikakvu objektivnu vezu između spornog pravnog odnosa i ugovorenog suda (presude od 17. siječnja 1980. u predmetu C-56/79, *Zelger*, [1980] ECR, 89, točka 4., *MSG,* točka 34. i *Benincasa,* točka 28.).

51 Iz istih je razloga u situaciji poput one u glavnom postupku isključeno dodatno preispitivanje primjerenosti klauzule te cilja koji strana koja ju je uvrstila njome želi postići, a materijalno pravo vezano za odgovornost, koje je primjenjivo u odabranom mjestu suda, nema nikakva utjecaja na valjanost klauzule.

52 Prema tomu, na treće, sedmo i šesto pitanje treba odgovoriti da članak 17. stavak 1. rečenicu 2. treću točku Konvencije treba tumačiti tako da se izbor suda koji je učinjen u klauzuli o nadležnom sudu može preispitati samo na temelju razmatranja koja su povezana s pretpostavkama članka 17. Konvencije. Razmatranja o vezi između ugovorenog suda i spornog pravnog odnosa, o primjerenosti klauzule i o materijalnom pravu vezanom za odgovornost koje je primjenjivo u mjestu odabranog suda nisu ni u kakvoj vezi s tim pretpostavkama.