JUDGMENT OF THE COURT
16 March 1999 *

In Case C-159/97,

REFERENCE to the Court 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 by the Corte Suprema di Cassazione, Italy, for a preliminary ruling in the proceedings pending before that court between

Trasporti Castelletti Spedizioni Internazionali SpA

and

Hugo Trumpy SpA

on the interpretation of Article 17 of the Convention of 27 September 1968, cited above (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),

* Language of the case: Italian.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, P. J. G. Kapteyn and P. Jann (Rapporteur) (Presidents of Chambers), G. F. Mancini, C. Gulmann, J. L. Murray, D. A. O. Edward, H. Ragnemalm, L. Sevón, M. Wathelet and R. Schintgen, Judges,

Advocate General: P. Léger,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Trasporti Castelletti Spedizioni Internazionali SpA, by Franco di Leo, of the Genoa Bar,

— Hugo Trumpy SpA, by Kristian Kielland, of the Genoa Bar, and Alessandro Sperati, of the Rome Bar,

— the Italian Government, by Professor Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato,

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by Lawrence Collins QC,

— the Commission of the European Communities, by José Luis Iglesias Buhigues, Legal Adviser, and Enrico Altieri, a national civil servant seconded to its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Trasporti Castelletti Spedizioni Internazionali SpA, represented by Franco di Leo; of Hugo Trumpy SpA, represented by Maurizio Dardani, of the Genoa Bar; of the Italian Government, represented by Giacomo Aiello, Avvocato dello Stato; of the United Kingdom Government, represented by Lawrence Collins; and of the Commission, represented by Eugenio de March, Legal Adviser, acting as Agent, at the hearing on 26 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 22 September 1998,

gives the following

Judgment

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

1 — The terminology of the English text was changed by the Convention of 26 May 1989 from 'practices' to 'usages'. The majority of the other language texts use the same terminology (*usage, uso, Handelsbrauch* ...). In the translation of the present judgment, the term 'usages' has been adopted [although it did not appear in the text of the convention under consideration].

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, 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 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 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).

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).

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.

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 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 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] 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.

Costs

53 The costs incurred by the Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Corte Suprema di Cassazione by order of 24 October 1996, hereby rules:

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 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.

Rodríguez Iglesias Kapteyn Jann Mancini

Gulmann Murray Edward Ragnemalm

Sevón Wathelet Schintgen

Delivered in open court in Luxembourg on 16 March 1999.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President