Article 17 of the Convention are satisfied if the jurisdiction clause has been adjudged valid as between the carrier and the shipper and if, by virtue of the relevant national law, the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations.

In Case 71/83,

REFERENCE to the Court under Article 1 of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters from the Hof van Cassatie [Court of Cassation], Belgium, for a preliminary ruling in the action pending before that court between

1. PARTENREEDEREI MS TILLY RUSS,

2. ERNEST RUSS,

and

1. NV HAVEN- & VERVOERBEDRIJF NOVA,

2. NV GOEMINNE HOUT,

on the interpretation of the first paragraph of Article 17 of the Convention of 27 September 1968,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, A. O'Keeffe, G. Bosco, O. Due and U. Everling, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

The Belgian limited company NV Goeminne Hout, bought a quantity of wood from an American firm. The German shipowner Partenreederei ms Tilly Russ was commissioned to carry the goods by sea from Toronto to Antwerp. The sea carriage was covered by bills of lading CT 108 and CT 118 of 16 August 1976 signed on behalf of the carrier by its American agent. When the cargo was unloaded at Antwerp on 7 September 1976, two lots were damaged and 10 planks were missing.

Goeminne Hout and its agent, NV, Haven- & Vervoerbedrijf Nova, claimed 304 US dollars by way of damage, in proceedings before the Rechtbank van Koophandel [Commercial Court], Antwerp. However, Partenreederei ms Tilly Russ and Ernest Russ objected to the jurisdiction of the Antwerp court on the ground that the following clause appeared on the back of each of the bills of lading: "4 (e): Any dispute arising under this bill of lading shall be decided by the Hamburg court." It was therefore argued that the Antwerp court had no jurisdiction in accordance with Article 17 of the Convention of 27 September 1968. Nevertheless, by judgment of 31 October 1978 the latter held that it had jurisdiction and gave judgment in favour of the plaintiffs.

On 7 October 1981 the Hof van Beroep [Court of Appeal], Antwerp, upheld that judgment. Partenreederei ms Tilly Russ and Ernest Russ, then lodged an appeal in cassation on 1 March 1982. The Hof van Cassatie, considering that the ground of appeal relied on raised a question concerning the interpretation of Article 17 of the Convention of 27 September 1968, decided to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

"Can the bill of lading issued by the carrier to the shipper be considered, having regard to the relevant generally accepted practices, to be an 'agreement in writing' or an 'agreement evidenced by writing' between the parties within the meaning of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and, if so, does that also apply in relation to a third party holding the bill of lading?"

The judgment of the Hof van Cassatie was received at the Court Registry on 28 April 1983.

In accordance with Article 5 (1) of the Protocol of 3 June 1971 and Article 20

of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 5 July 1983 by the Commission of the European Communities, represented by Mr Zimmermann, its Principal Legal Adviser, acting as Agent, assisted by Mr Van Houtte of the Brussels Bar, on 14 July 1983 by Haven- & Vervoerbedrijf Nova and Goeminne Hout, respondents in the main action, represented by Mr Wijffels of the Antwerp Bar, on 9 August 1983 by the Government of the Italian Republic, represented by Mr Fiumara, Avvocato dello Stato, acting as Agent, and on 11 August 1983 by the United Kingdom, represented by Mr Howes of the Treasury Solicitor's Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preliminary inquiry.

II — Written observations submitted by the Court

(a) Observations of the respondents in the main action

The *respondents in the main action* refer first of all to the previous decisions of the Court on Article 17 of the Convention of 27 September 1968, in particular the judgments of 14 December 1976 in Case 24/76 (*Salotti* v *RÜWA*, [1976] ECR 1831), and Case 25/76 (*Segoura* v *Bonakdarian*, [1976] ECR 1851), and to the Opinions delivered by Mr Advocate General Capotorti in those cases. Those cases imply that "a person trading on the basis of general conditions is not entitled to bind the opposite party by a jurisdiction clause included in those conditions, where the opposite party has not confirmed in writing that it agrees to that clause." Therefore a jurisdiction clause cannot be effective without an agreement in writing or confirmation in writing of an agreement between the parties to the dispute. In this regard, the respondents stress that in this case the parties to the dispute are the assignee of the bill of lading and the carrier.

By derogation from the rule set out above, unwritten acceptance of the clause is admitted by the Court where the parties' agreement comes within the framework of a continuing business relationship, since in that case it would be contrary to good faith for the recipient of the confirmation to deny the existence of a jurisdiction agreement, even though he had given no acceptance in writing. In adopting that approach, the Court was resorting to the theory of the abuse of rights in contractual matters: thus it would be an abuse to rely upon the absence of writing in denying an obvious agreement.

As regards the amendment of Article 17 effected by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice (Official Journal 1978, L 304, p. 1), the respondents in the main action consider that it has no effect on the answer to the question submitted to the Court for a preliminary ruling on the ground that it is not yet in force. However, the relaxation introduced by it, namely the fact that in international trade or commerce a jurisdiction agreement must be "in a form which accords

with practices in that trade or commerce of which the parties are or ought to have been aware", in no way derogates from "the absolute requirement that it must be proved that a consensus existed on the applicability of the jurisdiction clause forming part of the general conditions".

Considering next the question of the legal nature of a bill of lading, the respondents in the main action submit that it is not a contract of carriage. Indeed in their view, "the contract of carriage arises when the carrier undertakes to carry certain goods by sea and the shipper agrees to pay a certain freight in that respect", that is to say at the time of reservation, which is generally by telex. At the time when the conditions of carriage are fixed, there is never any discussion of the jurisdiction clauses which may subsequently appear in the bill of lading.

After the contract of carriage has been concluded, the shipper is requested by the loading broker to deliver his goods and receives a shipping note in exchange.

It is only when the goods which have been delivered and brought alongside the ship by the shipper are loaded on board ship and a mate's receipt — a document by which the ship's officers acknowledge that the goods have been received on board — is issued by the first officer to the shipper that the loading broker will issue a "shipped" bill of lading to the shipper.

In conclusion, according to the respondents in the main action, "a bill of lading is merely a receipt for the goods between the shipper and the shipowner and a confirmation of the simple obligation to carry the agreed goods and deliver them to the agreed destination". That also follows from decided cases, national law and legal writing.

Nor is the bill of lading evidence of the terms of the contract of carriage, unless it has been formally signed by the shipper to indicate his agreement, which is rarely the case. Moreover, the existence of conditions printed on the back of the bill of lading, including the jurisdiction clause, is explained by the fact that it is impossible for the shipper to question or require to be amended conditions printed on bills of lading which were not contemplated at the time of the conclusion of the contract of carriage. The shipper cannot refuse such conditions, for the simple reason that by the time the bill of lading is issued the goods are already loaded or are at least in the possession of the carrier and "no shipper can afford to have his goods unloaded and to delay the ship because he refuses a bill of lading containing a jurisdiction clause which had not been agreed on".

That situation is merely the extension of a historical reality, in which shipowners have conferred upon themselves as many rights and exemptions from liability as possible. In support of that view, the respondents in the main action refer to the article by Georges van Bladel, entitled "Connaissements et Règles de La Haye", which states that "the bill of lading became a 'document of irresponsibility', of no practical value, since the only remaining obligation on the captain was to obtain payment of the freight", and "the legal warranty given by the carrier had completely disappeared".

The respondents in the main action then point out that all bills of lading are

divided into two parts: one in blank, on which the contract of carriage will be reproduced, and one printed, containing the clauses printed unilaterally in advance by the carrier. The only part which has any evidential value is the part in blank, which according to Article III (4) of the Hague Rules in only *prima facie* evidence of receipt by the carrier of the goods. The respondents conclude from that that the bill of lading does not constitute "proof that the conditions printed in advance thereon reproduce the consensus existing between the shipper and the carrier at the time when the contract was made".

Moreover, according to the respondents in the main action, there is no general practice in international maritime trade whereby conditions printed in advance on the bill of lading constitute an oral agreement confirmed in writing between the shipper and the carrier. Moreover, those clauses have always been a subject of argument and litigation between the parties concerned, as is apparent from what the respondents regard as the unanimous opinion expressed in legal writings on the subject and from a number of cases.

The respondents in the main action consider next the question whether a jurisdiction clause printed in advance in a bill of lading may be regarded as an agreement in writing between the carrier and the assignee of the bill of lading. They point out in that regard that since the bill of lading is freely negotiable there is often no direct relationship between the shipper and the assignee who accepts delivery of the goods. That means that the condition laid down in Article 17 of the Convention of 27 September 1968 on the need for a *consensus ad idem* between the parties to the dispute is not met, since the assignee will never have had any opportunity of giving his consent to any jurisdiction clause whatsoever. Moreover, it cannot seriously be maintained that there is any permanent relationship between the assignee of a bill of lading and the carrier; the only commercial relationship involving the delivery of the bill of lading is that between the buyer and the seller from whom the buyer received the bill of lading. Under those circumstances, there is no relationship between the assignee of the bill of lading and the carrier of such a kind as to warrant the assumption that as regards clauses printed in advance on bills of lading, it would be contrary to good faith for the assignee to deny the existence of a proved consensus between himself and the carrier.

Examining next the bill of lading in question, the respondents in the main action maintain that it was drawn up after the conclusion of the contract of carriage, after the loading of the goods in a very distant port and without being signed by the shipper. Such a document therefore cannot constitute evidence that the jurisdiction clause was specifically agreed to by the shipper. *A fortiori,* the assignee could not in any event be bound by such a clause.

In addition, the jurisdiction clause in question does not provide for the mandatory application by the foreign court of Article 91 of the Belgian Maritime Law, which nullifies the legal protection which the assignee must be able to expect to enjoy. Thus Article 17 of the Convention could be misused by the carrier, since he would be authorized by means of clauses printed in advance on the bill of lading to apply to goods

consigned to Antwerp provisions which would be void under Belgian law.

Finally, the respondents in the main action submit to the Court extracts from legal writings from many non-member countries and concludes from them that jurisdiction clauses contained in bills of lading "cannot under any circumstances be recognized as valid according to generally accepted usage".

(b) Observations of the Italian Government

In relation to the first question, the *Italian Government* points out that it is clear from previous judgments of the Court that the purpose of the requirement of writing under Article 17 is to ensure that the consensus between the parties, who, by a jurisdiction agreement, depart from the general jurisdiction rules laid down in Article 2, 5 and 6 of the Convention, is clearly and precisely demonstrated and has actually been reached. If such a clause is unequivocal in content and if the parties were easily able to have knowledge of it — the relevant findings of fact are clearly to be made by the national court — it ought to be regarded as equivalent to the agreement in writing provided for in Article 17 of the Brussels Convention. In fact, according to the Italian Government, a bill of lading constitutes a document of title to the goods and evidence of the contract of carriage. It is issued in two originals: one is signed by the shipper or his representative; the other is signed by the carrier and is issued to the shipper and is normally transferable. Thus there is a *consensus ad idem* between the parties and the agreement is signed by each of them.

The second question concerns a situation exhibiting certain similarities to that which gave rise to the judgment of 14 July 1983 in Case 201/82 (*Gerling Konzern*, [1983] ECR 2503). In that case, concerning a contract of insurance, the Court stated that "it is neither the purpose nor the effect of Article 17 of the Convention, in imposing a requirement of writing between the parties, to subject a third party to the same requirement of writing where the clause conferring jurisdiction was included for his benefit and he seeks to rely on it in a dispute between him and the insurer".

In fact, under such a contract concluded for the benefit of a third party, the Italian Government observes that the third party seeking to benefit from the stipulation made in his favour acquires the rights arising from the contract, itself, irrespective of any acceptance, purely by virtue of the stipulation entered into between the parties.

The same solution ought to be adopted in the case of the assignee of a bill of lading, since, as from the transfer of the bill to that assignee, the latter may exercise the rights specified therein and is by the same token subject to the obligations and restrictions arising therefrom, provided of course that they are clear and that there is no possibility of error in the wording of the document itself.

Consequently, the Italian Government proposes that the questions referred to the Court by the Hof van Cassatie, Belgium, should be answered as follows:

"(a) A jurisdiction clause contained in a bill of lading may be regarded as equivalent to an agreement in writing for the purposes of Article 17 of the Brussels Convention if its terms are clear, precise and unequivocal.

(b) In so far as the clause is valid between the parties who adopted it,

it is also valid as against an assignee of the bill of lading."

(c) Observations of the United Kingdom

The *United Kingdom* requests that the case be decided in plenary session.

As regards the first question, the United Kingdom considers that the view of the Hof van Beroep, Antwerp, to the effect that the bill of lading is "essentially a document intended as a receipt for the goods to be carried" fails to recognize the nature and functions of the bill of lading in international commerce; moreover, great damage would be done to international commerce if all the terms expressly stated in the bill of lading were not given full effect, not only as between the carrier and the original shipper, but also in relation to third parties to whom bills of lading have been assigned.

According to the United Kingdom, a bill of lading not only constitutes a receipt for the goods received by the carrier but also the contract subject to whose terms the goods are carried and a document of title of the goods. The truth of that statement is demonstrated by reference to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924, and generally known as the "Hague Rules", especially Articles 1 (b), III (c), V and VI.

Unless, in international commerce, a bill of lading is treated as containing all the terms of the contract, and full effect is given to them, it cannot fulfil its dual function "as a document whose assignment transfers both the rights and obligations under the contract of carriage and also the title to the goods which are subject to those terms". There cannot, in practice, be any scope for some additional document which evidence a more specific agreement between the parties, such as the specific acceptance of a jurisdiction clause. Furthermore, there is no logical basis for distinguishing such a clause in a bill of lading from other clauses contained therein. The choice of jurisdiction may well be an important factor in determining the meaning of a number of other clauses in the bill of lading. Thus, a clause conferring jurisdiction on the English courts may well be dictated by the fact that the interpretation given to specific terms of shipping law by the English courts is well known in maritime circles.

The United Kingdom admits that the question whether a bill of lading ought to be categorized as an oral agreement evidenced in writing rather than as an actual agreement in writing has not been resolved beyond dispute in the United Kingdom. However, that does not affect the force of the previous argument, since under Article 17 of the Brussels Convention the two possibilities are valid. Furthermore, it follows from Article X of the Hague Rules that a bill of lading is either an agreement in writing or an oral agreement evidenced in writing.

Should that interpretation not be accepted, the United Kingdom brings to the attention of the Court the amendment introduced by the 1978 Convention, which will, when it comes into force, put it beyond doubt that a bill of lading complies with the formal

requirements of Article 17. In that context, the United Kingdom further notes that the question asked expressly refers to "the relevant generally accepted practices".

In relation to the second question, the United Kingdom submits first that it is a fundamental principle of contract law that an assignee of a contract takes on the same conditions as those on which the assignor held a contract. It follows from that that if a jurisdiction clause binds the original parties it must also bind their successors, especially as a bill of lading is freely assignable. As the carrier plainly cannot be a party to the transfer of the bill of lading from one holder to another, a ruling that jurisdiction clauses in bills of lading do not bind successive holders would mean that carriers could not rely on any binding agreement to confer jurisdiction on specific courts.

Analysing next the previous decisions of the Court, the United Kingdom states that it is well aware that the Court construes Article 17 strictly and that moreover that principle cannot be called in question. However, it is a question of the strict interpretation of the formal requirements for the validity of a jurisdiction agreement. The United Kingdom stresses the importance of the parties' ability to decide jurisdiction by agreement in commercial cases. It is therefore of special importance that the Court should interpret Article 17 in the light of commercial realities, as was expressly stated by Mr Jenard in his report on the Brussels Convention. Article 17 would be deprived of a considerable proportion of its usefulness in commercial transactions if the assignee of a bill of lading were not bound by the jurisdiction clause. It is indeed clear from the terms of Article 17 that "the parties" contemplated by that article must be the parties to the litigation and that those parties must have agreed to the jurisdiction clause; however, there is no requirement in Article 17 that the parties must have agreed to the jurisdiction clause *inter se*, and there is no objection, in the United Kingdom's submission, to the agreement being reached through the intervention of one or more third parties. Moreover, the Court has already adopted such an approach in relation to a contract of insurance in its judgment in *Gerling Konzern*, in particular in paragraph 18.

The United Kingdom also relies, in support of its view, upon Articles 8 and 9 of the 1978 Convention, which provide that a jurisdiction clause in a contract of insurance covering damage to the goods in transit is valid; as the principles which govern the seller's obligations in respect of the bill of lading and the contract of insurance are analagous, it would be damaging to international trade if the Brussels Convention of 1968 did not likewise accept the validity of a jurisdiction clause contained in a bill of lading.

In conclusion, the United Kingdom submits "that a jurisdiction clause in a bill of lading complies with the formal requirements of Article 17 both in respect of the original parties to the bill of lading and in respect of a third party holding the bill of lading."

(d) Observations of the Commission

The *Commission* stresses first that the questions submitted to the Court do not concern the undisputed primacy of

Article 17 of the Brussels Convention over national jurisdiction rules, in particular Article 91 of Book II of the Belgian Commercial Code (Sea and Inland Shipping). The Belgian courts have accepted that primacy since September 1976, although they have nevertheless continued to reject jurisdiction clauses in bills of lading on the ground that they do not comply with the requirements of Article 17 of the Brussels Convention.

Like the respondents in the main action, the Commission takes the view that it is clear from the judgments of the Court that Article 17 must be interpreted strictly, especially in relation to jurisdiction clauses in bills of lading, in view of the fact that the court designated is in general the court for the place where the carrier has its registered office, which very often has no fundamental link with the carriage and therefore with the disupute.

The Commission adds that, notwithstanding the suggestion made by the Hof van Cassatie, the interpretation of Article 17 ought not to take into account the generally accepted practices in the field in question. Indeed in its view, an agreement implied by reference to commercial practice does not constitute an "agreement" within the meaning of Article 17, since clear and precise acceptance is required for that purpose. Moreover, the strict formal requirements — an agreement in writing or evidenced in writing — cannot be relaxed on account of commercial practice and should be interpreted independently, without reference to such practice. The history of the negotiations relating to the Convention of Accession of 1978 also shows that Article 17 does not permit the existence of a written agreement by reference to commercial practice to be established, since that article was supplemented by a paragraph providing that in international trade or commerce it is to be possible for the agreement to be concluded "in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware". But that Convention has not yet come into force.

Analysing next the nature of the bill of lading, the Commission submits that it is a document universally used in sea transport and, issuing from the carrier, constitutes "evidence of an agreement between the shipper and the carrier but not an agreement in itself". The bill of lading is often an oral agreement evidenced in writing within the meaning of Article 17 of the Brussels Convention. Thus it is necessary to apply the principles formulated by the Court in *Segoura* and *Salotti.* Pointing out that in almost all cases the shipper is not aware of the conditions contained in the bill of lading at the time when the contract of carriage is concluded, the Commission contends that under those circumstances the jurisdiction clause is not valid under Article 17 unless it has been expressly accepted in writing by the shipper. In practice, the shipper rarely signs the bill of lading and in any event did not do so in this case.

Consequently, for the jurisdiction clause to be valid under Article 17 of the Brussels Convention it is necessary for the parties either to sign the back of the bill of lading on which the clause appears or to sign the front, expressly manifesting their intention to accept all the clauses and conditions contained in the bill of lading. It would only be exceptionally, in the case where there is a continuing trading relationship be-

tween the shipper and the carrier, that it would be contrary to good faith for the shipper to deny the existence of a jurisdiction conferred by consent, even though he had given no acceptance in writing (cf. *Segoura).*

In relation to the second question, the Commission considers various hypotheses:

1. Either the bill of lading is a negotiable instrument, which can be pledged and which incorporates the right of property in the goods. In that case, the requirements of commerce would imply that the provisions of the bill of lading binding the shipper should also bind the third party to whom the bill of exchange is assigned. However, the jurisdiction clause would not constitute an "agreement" within the meaning of Article 17 of the Brussels Convention.

   or

2. The jurisdiction clause is regarded as a contractual clause. In that case, if the bill of lading is signed by the third party, the jurisdiction clause is valid under Article 17 on the same conditions as those postulated in the examination of the first question. If the third party has not signed the bill of lading, there are different theories in the national legal systems whereby he may be held to be bound on a contractual basis by the clauses of the bill of lading. It is for the national court to determine whether there is a contractual basis founded on one of those theories. The Commission refers to three theories:

   (i) The theory of assignment, according to which the shipper assigns his rights and obligations to the third party. That theory has been widely criticized on the ground that the third party acts in his own right and not as the successor-in-title of the shipper and cannot rely upon the defences available to the shipper. However, if the Court accpets that theory, the jurisdiction clause is binding on the third party by virtue of Article 17, provided that it is binding on the shipper and the assignment is valid under the law of contract.

   (ii) The theory of implied agreement, according to which the fact that the third party claims delivery of the goods in reliance upon the bill of lading constitutes acceptance of the carrier's offer; however, such an agreement, which is not confirmed in writing and accepted by the third party, does not comply with the requirements of Article 17.

   (iii) The theory of the clause for the benefit of third parties, according to which the bill of lading contains clauses concluded by the shipper for the benefit of the third party to whom the bill is assigned. In that case, the third party may rely upon the jurisdiction clause but that clause cannot be raised against him if he elects to sue before the court which has jurisdiction under Articles 2, 5 and 6 of the Brussels Convention.

In conclusion, the Commission considers that the questions referred to the Court by the Hof van Cassatie should be answered as follows:

"Question 1

The bill of lading issued by the carrier to the shipper may be regarded as an

'agreement evidenced in writing' between the parties within the meaning of Article 17. The jurisdiction clause is applicable if the parties have assigned the bill of lading. If the jurisdiction clause appears in the general conditions, the shipper must have accpeted them expressly and in writing. The text of the bill of lading signed by the two parties must expressly refer to those general conditions. However, if there is a continuing trading relationship between the carrier and the shipper which is as a whole governed by the conditions contained in the carrier's bill of lading, the jurisdiction clause is applicable even in the absence of acceptance in writing.

Question 2

The bill of lading issued by the carrier to the shipper cannot be regarded as an 'agreement evidenced in writing' within the meaning of Article 17 as regards a third party to whom the bill of lading is assigned, unless the third party is bound by an agreement with the carrier under the relevant national law and the bill of lading, as evidence in writing of that agreement, complies with the formal conditions laid down in Article 17."

III — Oral procedure

At the sitting on 31 January 1984 oral argument was presented, and answers to the questions put by the Court were given, by the respondent in the main proceedings, represented by R. Wijffels, the Italian Government, represented by O. Fiumara, the United Kingdom, represented by Mr Donaldson and Mr Muttukumaru, and the Commission of the European Communities, represented by Professor H. Van Houtte and E. Zimmermann.

The *Italian Government* explained more precisely its views on the first question. It stated that in its opinion a bill of lading constitutes a document proving the existence of the contract of carriage and at the same time a document of title to the goods and that the jurisdiction clause constitutes a kind of oral clause confirmed in writing, provided that it bears the signature of the party against whom the clause is relied upon. Finally, such a clause forms part of the general conditions of the contract. Therefore, it submitted that if those requirements are satisfied, that is to say, if the jurisdiction clause constitutes an oral clause confirmed in writing and bearing the signature either of the shipper or of the shipping agent and if it constitutes one of the general conditions of the contract, in that case it may be in conformity with Article 17 of the Brussels Convention. However, according to the Italian Government, only the national court may determine whether there is a real signature in the sense described above and how the clause was included in the bill of lading.

The *United Kingdom* stated that the question was of fundamental importance, essentially because the choice of forum might give rise to different solutions. Since the choice was of fundamental importance to international trade, the parties ought to be made to respect that choice. It was not therefore, in the opinion of the United Kingdom, a question merely of legal policy.

As regards the first question submitted by the Belgian Court of Cassation, the United Kingdom considers that its scope

should be limited. Thus, the question should not relate to the bill of lading but only to the jurisdiction clause, and the question should be worded as follows: Was that jurisdiction clause incorporated in the bill of lading in a manner showing that there was a genuine agreement between the parties, account being taken of the principle of good faith? According to the United Kingdom, the reply to such a question depends on the precise facts of the case, which are unkown. Consequently, according to the United Kingdom, only the national court is in a position, on the basis of the precise facts of the case, to determine the nature of the bill of lading. Only at a subsequent stage does Community law come into play. Therefore the United Kingdom is of the opinion that no general reply should be given to the first question, on the ground that there are several possible sets of circumstances.

The Advocate General delivered his opinion at the sitting on 21 March 1984.

Decision

1 By an order dated 8 April 1983, which was received at the Court on 28 April 1983, the Hof van Cassatie [Court of Cassation], Belgium, submitted, in accordance with 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 [hereinafter referred to as "the Convention"], a question for a preliminary ruling on the interpretation of Article 17 of that Convention.

2 The question was raised in proceedings brought by the Belgian limited company "NV Goeminne Hout" against the German shipowner "Partenreederei ms Tilly Russ" and Mr Ernest Russ, both of Hamburg, concerning the validity of a jurisdiction clause contained in bills of lading Nos CT 108 and CT 118 dated 16 August 1976. It appears from the documents before the Court that those bills of lading were drawn up for the carrier by Tolmar International Inc., Cleveland, as agent for Europe Canada Lakes Line, Ernest Russ — North America, Inc., Chicago, to the order of the shipper, American Lumber International Inc., Union City, Pennsylvania, Goeminne Hout being indicated as "notify party" and Tilly Russ as "exporting carrier".

3 When the cargo was delivered in Antwerp on 7 September 1976 the packaging of two lots was found to be damaged and about 10 planks were missing. Goeminne Hout therefore claimed USD 304 in damages before the Rechtbank van Koophandel [Commercial Court], Antwerp.

4 Tilly Russ objected to the jurisdiction of the Antwerp court, relying on a jurisdiction clause appearing on the reverse of each of the bills of lading which stated as follows: "Any dispute arising under this bill of lading shall be decided by the Hamburg courts."

5 Nevertheless, by judgment of 31 October 1978, the Antwerp court held that it had jurisdiction and gave judgment in favour of Goeminne Hout; that judgment was confirmed by the Hof van Beroep [Court of Appeal], Antwerp, by judgment of 7 October 1981 and, on 1 March 1982, Tilly Russ appealed to the Hof van Cassatie.

6 The Hof van Cassatie submitted the following question for a preliminary ruling:

"Can the bill of lading issued by the carrier to the shipper be considered, having regard to the relevant generally accepted practices, to be an 'agreement in writing' or an 'agreement evidenced by writing' between the parties within the meaning of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters and, if so, does that also apply in relation to a third party holding the bill of lading?"

7 That question must be construed as asking whether the jurisdiction clause contained in the bills of lading satisfies the conditions laid down in Article 17 of the Convention as regards, first, the relationship between the shipper and the carrier and, secondly, the relationship between the carrier and a third party holding the bill.

The first part of the question

8 According to Goeminne Hout and the Commisison of the European Communities, Article 17 of the Convention should be interpreted as meaning that where a jurisdiction clause is not expressly accepted by the shipper and the carrier it is not valid within the meaning of that provision.

9 The Commission adds, however, that even if it was not signed by the shipper such a clause may nevertheless be valid under Article 17 of the Convention, provided that there is a continuing trading relationship between the parties.

10 The Italian Government considers that a bill of lading is a document proving the existence of the contract of carriage and that the jurisdiction clause therefore constitutes an oral agreement evidenced in writing. If it is signed by the party against whom it is invoked and forms part of the general conditions of the contract, then it may be in conformity with Article 17 of the Convention. However, according to the Italian Government, it is for the national court to ascertain whether there is a signature in the sense indicated above and in what circumstances the jurisdiction clause was incorporated in the bill of lading.

11 At the hearing, the United Kingdom emphasized the importance of the issue raised and suggested that the question submitted by the national court should be reformulated as follows: Was the jurisdiction clause incorporated in the bill of lading in a manner enabling it to be shown that there was a genuine agreement between the parties, account being taken of the principle of good faith? A reply to that question is possible, according to the United Kingdom, only if the precise facts of the case are known; however, since in this instance they have not been established no general reply should be given to the first question, on the ground that there are several possibilities, and the national court should be left to determine the precise nature of the bill of lading.

12 The first paragraph of Article 17 of the Convention, as now in force, states: "If the parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, agreed that a court or the courts of a Contracting State are to have

jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction."

13 It may be observed that for Article 17 of the Convention to apply at least one of the parties must be domiciled in a Contracting State, that being a matter for the national court to determine.

14 As the Court held in its judgments of 14 December 1976 (Case 24/76, *Salotti* v *RÜWA*, [1976] ECR 1831, and Case 25/76, *Segoura* v *Bonakdarian*, [1976] ECR 1851) and of 6 May 1980 (Case 784/79, *Porta-Leasing* v *Prestige International*, [1980] ECR 1517), the requirements set out in Article 17 governing the validity of jurisdiction clauses must be strictly construed since the purpose of Article 17 is to ensure that the parties have actually consented to such a clause, which derogates from the ordinary jurisdiction rules laid down in Articles 2, 5 and 6 of the Convention, and that their consent is clearly and precisely demonstrated.

15 In order to decide whether the conditions laid down in Article 17 are satisfied, it is necessary to consider separately whether the agreement of the parties to the choice of jurisdiction was expressed in the form of a written agreement or in the form of an oral agreement evidenced in writing.

16 In the first place, it must be observed that, where a jurisdiction clause appears in the conditions printed on a bill of lading signed by the carrier, the requirement of an "agreement in writing" within the meaning of Article 17 of the Convention is satisfied only if the shipper has expressed in writing his consent to the conditions containing that clause, either in the document in question itself or in a separate document. It must be added that the mere printing of a jurisdiction clause on the reverse of the bill of lading does not satisfy the requirements of Article 17 of the Convention, since such a procedure gives no guarantee that the other party has actually consented to the clause derogating from the ordinary jurisdiction rules of the Convention.

17 Secondly, if it was established that the jurisdiction clause contained in the conditions printed on a bill of lading was the subject of a prior oral agreement between the parties expressly relating to the jurisdiction clause and that the bill of lading, signed by the carrier, was to be regarded as the written conformation of that oral agreement, such a clause would satisfy the conditions laid down in Article 17 of the Convention, even if it was not signed by the shipper and therefore bore only the signature of the carrier. In fact, not only is the letter of Article 17, which expressly provides for the possibility of an oral agreement evidenced in writing, thereby observed but in addition its function, which is to ensure that the agreement of the parties is clearly established, is also fulfilled.

18 Finally, such a jurisdiction clause not signed by the shipper may still satisfy the requirements laid down in Article 17 of the Convention, even in the absence of a prior oral agreement relating to that clause, provided that the bill of lading comes within the framework of a continuing business relationship between the shipper and the carrier, in so far as it is thereby established that that relationship is governed as a whole by general conditions containing the jurisdiction clause drawn up by the author of the written confirmation, in this case the carrier (see the *Ségoura* judgment, cited above), and provided that the bills of lading are all issued on pre-printed forms systematically containing such a jurisdiction clause. In those circumstances, it would be contrary to good faith to deny the existence of a jurisdiction agreement.

19 Consequently, the reply to the first part of the question submitted must be that a jurisdiction clause contained in the printed conditions on a bill of lading satisfies the conditions laid down by Article 17 of the Convention:

If the agreement of both parties to the conditions of the bill of lading containing that clause has been expressed in writing; or

If the jurisdiction clause has been the subject of a prior oral agreement between the parties expressly relating to that clause, in which case the bill of lading, signed by the carrier, must be regarded as confirmation in writing of the oral agreement; or

If the bill of lading comes within the framework of a continuing business relationship between the parties, in so far as it is thereby established that that relationship is governed by general conditions containing the jurisdiction clause.

The second part of the question

20 As regards the validity of the jurisdiction clause as between the carrier and a third party holding the bill of lading, Goeminne Hout and the Commission are of the opinion that if the third party has not signed the bill of lading the jurisdiction clause appearing on it is not enforceable against him since the agreement between the parties is not established.

21 According to the Commission, an exception may be made to that rule only if the national legal order in question embodies a theory of assignment whereby the shipper assigns his rights and obligations to the third party.

22 The Governments of the Italian Republic and the United Kingdom consider that, in so far as the jurisdiction clause is valid as between the shipper and the carrier, it should also be valid as against a third party holding the bill of lading, on the ground that if, by acquiring the bill of lading, such a third party becomes entitled to exercise the rights mentioned therein he must at the same time also become subject to the obligations and limitations deriving thereform; both governments base their view on the judgment of the Court of 14 July 1983 in Case 201/82 (*Gerling* v *Amministrazione del Tesoro dello Stato*, [1983] ECR 2503).

23 In this regard, it must be noted that the *Gerling* decision concerned a case in which a third party to an insurance contract, containing a stipulation made for his benefit by the insured, relied upon a jurisdiction clause as against the insurer, the clause being inspired, as the Court pointed out by a concern to protect the insured, who "is in a weaker economic position". The same considerations are not necessarily relevant to the carriage of goods by sea.

24 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, and in so far as a third party, by acquiring the bill of lading, has succeeded to the shipper's rights and obligations under the relevant national law, the fact of allowing the third party to remove himself from the compulsory jurisdiction provided for in the bill of lading on the ground that he did not signify his consent thereto would be alien to the purpose of Article 17, which is to neutralize the effect of jurisdiction clauses that might pass unnoticed in contracts.

25 In fact, in the circumstances outlined above, acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it. The third party holding the bill of lading thus becomes vested with all the rights, and at the same time becomes subject to all the obligations, mentioned in the bill of lading, including those relating to the agreement on jurisdiction.

26 It is apparent from all the foregoing considerations that the reply to the second part of the question submitted must be that the conditions laid down in Article 17 of the Convention are satisfied in the case of a jurisdiction clause contained in a bill of lading, provided that the clause has been adjudged valid as between the carrier and the shipper and provided that, by virtue of the relevant national law, the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations.

Costs

27 The costs incurred by the Government of the Italian Republic and the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 reply to the question submitted to it by the Belgian Hof van Cassatie by order of 8 April 1983, hereby rules:

1. **A jurisdiction clause contained in the printed conditions on a bill of lading satisfies the conditions laid down by Article 17 of the Convention:**

   If the agreement of both parties to the conditions containing that clause has been expressed in writing, or

   If the jurisdiction clause has been the subject-matter of a prior oral agreement between the parties expressly relating to that clause, in which case the bill of lading, signed by the carrier, must be regarded as confirmation in writing of the oral agreement, or

   If the bill of lading comes within the framework of a continuing business relationship between the parties, in so far as it is thereby established that that relationship is governed by general conditions containing the jurisdiction clause;

2. **As regards the relationship between the carrier and a third party holding the bill of lading, the conditions laid down by Article 17 of the Convention are satisfied if the jurisdiction clause has been adjudged valid as between the carrier and the shipper and if, by virtue of the relevant national law, the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations.**

Mackenzie Stuart Koopmans Bahlmann Galmot

Pescatore O'Keeffe Bosco Due Everling

Delivered in open court in Luxembourg on 19 June 1984.

P. Heim
Registrar

T. Koopmans
President of the Fourth Chamber