

**Judgment of the Court of 14 December 1976. - Estasis Salotti di Colzani Aimò et Gianmario Colzani v Rüwa Polstereimaschinen GmbH. - Reference for a preliminary ruling: Bundesgerichtshof - Germany. - Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Article 17 (jurisdiction by consent). - Case 24-76.**

Summary

*1 . THE WAY IN WHICH ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 IS TO BE APPLIED MUST BE INTERPRETED IN THE LIGHT OF THE EFFECT OF THE CONFERRMENT OF JURISDICTION BY CONSENT , WHICH IS TO EXCLUDE BOTH THE JURISDICTION DETERMINED BY THE GENERAL PRINCIPLE LAID DOWN IN ARTICLE 2 AND THE SPECIAL JURISDICTIONS PROVIDED FOR IN ARTICLES 5 AND 6 OF THAT CONVENTION . IN VIEW OF THE CONSEQUENCES THAT SUCH AN OPTION MAY HAVE ON THE POSITION OF THE PARTIES TO THE ACTION , THE REQUIREMENTS SET OUT IN ARTICLE 17 GOVERNING THE VALIDITY OF CLAUSES CONFERRING JURISDICTION MUST BE STRICTLY CONSTRUED .*

*BY MAKING THE VALIDITY OF CLAUSES CONFERRING JURISDICTION SUBJECT TO THE EXISTENCE OF AN ' AGREEMENT ' BETWEEN THE PARTIES , ARTICLE 17 IMPOSES ON THE COURT BEFORE WHICH THE MATTER IS BROUGHT THE DUTY OF EXAMINING , FIRST , WHETHER THE CLAUSE CONFERRING JURISDICTION UPON IT WAS IN FACT THE SUBJECT OF A CONSENSUS BETWEEN THE PARTIES , WHICH MUST BE CLEARLY AND PRECISELY DEMONSTRATED , FOR THE PURPOSE OF THE FORMAL REQUIREMENTS IMPOSED BY ARTICLE 17 IS TO ENSURE THAT THE CONSENSUS BETWEEN THE PARTIES IS IN FACT ESTABLISHED .*

*2 . IN THE CASE OF A CLAUSE CONFERRING JURISDICTION , WHICH IS INCLUDED AMONG THE GENERAL CONDITIONS OF SALE OF ONE OF THE PARTIES , PRINTED ON THE BACK OF THE CONTRACT , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 IS ONLY FULFILLED IF THE CONTRACT SIGNED BY THE TWO PARTIES INCLUDES AN EXPRESS REFERENCE TO THOSE GENERAL CONDITIONS .*

*3 . IN THE CASE OF A CONTRACT CONCLUDED BY REFERENCE TO EARLIER OFFERS , WHICH WERE THEMSELVES MADE WITH REFERENCE TO THE GENERAL CONDITIONS OF ONE OF THE PARTIES INCLUDING A CLAUSE CONFERRING JURISDICTION , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 IS SATISFIED ONLY IF THE REFERENCE IS EXPRESS AND CAN THEREFORE BE CHECKED BY A PARTY EXERCISING REASONABLE CARE .*

## **Parties**

*IN CASE 24/76*

*REFERENCE TO THE COURT FOR A PRELIMINARY RULING PURSUANT TO ARTICLE 1 OF THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS BY THE BUNDESGERICHTSHOF ( FEDERAL COURT OF JUSTICE ) IN THE ACTION PENDING BEFORE THAT COURT BETWEEN*

*ESTASIS SALOTTI DI COLZANI AIMO E GIANMARIO COLZANI , HAVING ITS REGISTERED OFFICE AT MEDA ( MILAN ),*

*AND*

*RUWA POLSTEREIMASCHINEN GMBH , HAVING ITS REGISTERED OFFICE AT COLOGNE ,*

**Subject of the case**

*ON THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ,*

**Grounds**

*1 BY AN ORDER OF 18 FEBRUARY 1976 , RECEIVED AT THE COURT REGISTRY ON 11 MARCH 1976 , THE BUNDESGERICHTSHOF REFERRED TO THE COURT OF JUSTICE PURSUANT TO THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ( HEREINAFTER REFERRED TO AS ' THE CONVENTION ' , CERTAIN QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 17 OF THE SAID CONVENTION .*

*2 IT APPEARS FROM THE ORDER MAKING THE REFERENCE THAT AT THE PRESENT STAGE THE ACTION , WHICH WAS BROUGHT BEFORE THE BUNDESGERICHTSHOF BY WAY OF APPEAL ON A POINT OF LAW , CONCERNS THE JURISDICTION OF THE LANDGERICHT KOLN TO HEAR AN ACTION BROUGHT BY AN UNDERTAKING ESTABLISHED WITHIN THE AREA OF JURISDICTION OF THAT COURT AGAINST AN ITALIAN UNDERTAKING WHOSE REGISTERED OFFICE IS AT MEDA ( MILAN ) , FOR FAILURE TO PERFORM A CONTRACT RELATING TO THE SUPPLY BY THE GERMAN UNDERTAKING TO THE ITALIAN UNDERTAKING OF MACHINES FOR THE MANUFACTURE OF UPHOLSTERED FURNITURE .*

*3 IT APPEARS FROM THE FACTS STATED IN THE ORDER MAKING THE REFERENCE THAT THE DELIVERY IN QUESTION HAD BEEN AGREED IN A WRITTEN CONTRACT , SIGNED AT MILAN ON COMMERCIAL PAPER BEARING THE LETTER-HEAD OF THE GERMAN UNDERTAKING , ON THE REVERSE OF WHICH THE GENERAL CONDITIONS OF SALE OF THAT UNDERTAKING WERE PRINTED .*

*THOSE GENERAL CONDITIONS INCLUDE A CLAUSE CONFERRING JURISDICTION ON THE COURTS OF COLOGNE TO SETTLE ANY DISPUTE WHICH MIGHT ARISE BETWEEN THE PARTIES CONCERNING THE CONTRACT .*

*ALTHOUGH IT IS TRUE THAT THE TEXT OF THE CONTRACT DOES NOT EXPRESSLY MENTION THE SAID GENERAL CONDITIONS , IT REFERS TO PREVIOUS OFFERS MADE BY THE GERMAN UNDERTAKING WHICH CONTAINED AN EXPRESS REFERENCE TO THE SAME GENERAL CONDITIONS , WHICH WERE ALSO PRINTED ON THE REVERSE OF THE PAPERS IN QUESTION .*

*4 IN A JUDGMENT DELIVERED ON 9 APRIL 1974 , THE LANDGERICHT KOLN , BEFORE WHICH THE MATTER WAS BROUGHT BY THE GERMAN UNDERTAKING , DECLARED THAT IT HAD NO JURISDICTION TO HEAR THE DISPUTE .*

*IT HELD THAT THE CLAUSE CONFERRING JURISDICTION HAD NOT VALIDLY BEEN AGREED BETWEEN THE PARTIES , HAVING REGARD TO THE PROVISIONS OF ITALIAN LAW , TO WHICH , IN THE VIEW OF THAT COURT , THE CONTRACT BETWEEN THE PARTIES IS SUBJECT .*

THAT JUDGMENT WAS REVERSED BY A JUDGMENT OF 18 NOVEMBER 1974 OF THE OBERLANDESGERICHT KOLN WHICH , TAKING THE VIEW THAT THE CONTRACT IN QUESTION IS SUBJECT TO THE PROVISIONS OF GERMAN LAW , OVERRULED THE JUDGMENT OF THE LOWER COURT , DECLARED THAT THE LANDGERICHT HAD JURISDICTION AND REMITTED THE CASE TO IT .

5 THE ITALIAN UNDERTAKING APPEALED ON A POINT OF LAW TO THE BUNDESGERICHTSHOF , AND THAT COURT IS OF THE OPINION THAT THE QUESTION AT ISSUE MUST BE RESOLVED ON THE BASIS OF ARTICLE 17 OF THE CONVENTION .

IN THIS CONNEXION , THE BUNDESGERICHTSHOF HAS REFERRED TWO QUESTIONS ON THE INTERPRETATION OF THE FIRST PARAGRAPH OF THAT ARTICLE .

ON THE INTERPRETATION OF ARTICLE 17 OF THE CONVENTION IN GENERAL

6 THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION PROVIDES : ' IF THE PARTIES , ONE OR MORE OF WHOM IS DOMICILED IN A CONTRACTING STATE , HAVE , BY AGREEMENT IN WRITING OR BY AN ORAL AGREEMENT CONFIRMED IN WRITING , AGREED THAT A COURT OR THE COURTS OF A CONTRACTING STATE ARE TO HAVE JURISDICTION TO SETTLE ANY DISPUTES WHICH HAVE ARISEN OR WHICH MAY ARISE IN CONNEXION WITH A PARTICULAR LEGAL RELATIONSHIP , THAT COURT OR THOSE COURTS SHALL HAVE EXCLUSIVE JURISDICTION ' .

7 THE WAY IN WHICH THAT PROVISION IS TO BE APPLIED MUST BE INTERPRETED IN THE LIGHT OF THE EFFECT OF THE CONFERMENT OF JURISDICTION BY CONSENT , WHICH IS TO EXCLUDE BOTH THE JURISDICTION DETERMINED BY THE GENERAL PRINCIPLE LAID DOWN IN ARTICLE 2 AND THE SPECIAL JURISDICTIONS PROVIDED FOR IN ARTICLES 5 AND 6 OF THE CONVENTION .

IN VIEW OF THE CONSEQUENCES THAT SUCH AN OPTION MAY HAVE ON THE POSITION OF THE PARTIES TO THE ACTION , THE REQUIREMENTS SET OUT IN ARTICLE 17 GOVERNING THE VALIDITY OF CLAUSES CONFERRING JURISDICTION MUST BE STRICTLY CONSTRUED .

BY MAKING SUCH VALIDITY SUBJECT TO THE EXISTENCE OF AN ' AGREEMENT ' BETWEEN THE PARTIES , ARTICLE 17 IMPOSES ON THE COURT BEFORE WHICH THE MATTER IS BROUGHT THE DUTY OF EXAMINING , FIRST , WHETHER THE CLAUSE CONFERRING JURISDICTION UPON IT WAS IN FACT THE SUBJECT OF A CONSENSUS BETWEEN THE PARTIES , WHICH MUST BE CLEARLY AND PRECISELY DEMONSTRATED .

THE PURPOSE OF THE FORMAL REQUIREMENTS IMPOSED BY ARTICLE 17 IS TO ENSURE THAT THE CONSENSUS BETWEEN THE PARTIES IS IN FACT ESTABLISHED .

THE QUESTIONS REFERRED TO THE COURT BY THE BUNDESGERICHTSHOF MUST BE EXAMINED IN THE LIGHT OF THESE CONSIDERATIONS .

ON THE QUESTION REFERRED BY THE BUNDESGERICHTSHOF

8 THE FIRST QUESTION ASKS WHETHER A CLAUSE CONFERRING JURISDICTION , WHICH IS INCLUDED AMONG GENERAL CONDITIONS OF SALE PRINTED ON THE BACK OF A CONTRACT SIGNED BY BOTH PARTIES , FULFILS THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION .

9 TAKING INTO ACCOUNT WHAT HAS BEEN SAID ABOVE , IT SHOULD BE STATED THAT THE MERE FACT THAT A CLAUSE CONFERRING JURISDICTION IS PRINTED AMONG THE GENERAL CONDITIONS OF

ONE OF THE PARTIES ON THE REVERSE OF A CONTRACT DRAWN UP ON THE COMMERCIAL PAPER OF THAT PARTY DOES NOT OF ITSELF SATISFY THE REQUIREMENTS OF ARTICLE 17 , SINCE NO GUARANTEE IS THEREBY GIVEN THAT THE OTHER PARTY HAS REALLY CONSENTED TO THE CLAUSE WAIVING THE NORMAL RULES OF JURISDICTION .

IT IS OTHERWISE IN THE CASE WHERE THE TEXT OF THE CONTRACT SIGNED BY BOTH PARTIES ITSELF CONTAINS AN EXPRESS REFERENCE TO GENERAL CONDITIONS INCLUDING A CLAUSE CONFERRING JURISDICTION .

10 THUS IT SHOULD BE ANSWERED THAT WHERE A CLAUSE CONFERRING JURISDICTION IS INCLUDED AMONG THE GENERAL CONDITIONS OF SALE OF ONE OF THE PARTIES , PRINTED ON THE BACK OF A CONTRACT , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION IS FULFILLED ONLY IF THE CONTRACT SIGNED BY BOTH PARTIES CONTAINS AN EXPRESS REFERENCE TO THOSE GENERAL CONDITIONS .

11 THE SECOND QUESTION ASKS WHETHER THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION IS FULFILLED IF THE PARTIES EXPRESSLY REFER IN THE CONTRACT TO A PRIOR OFFER IN WRITING IN WHICH REFERENCE WAS MADE TO GENERAL CONDITIONS OF SALE INCLUDING A CLAUSE CONFERRING JURISDICTION .

12 IN PRINCIPLE , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 IS FULFILLED IF THE PARTIES HAVE REFERRED IN THE TEXT OF THEIR CONTRACT TO AN OFFER IN WHICH REFERENCE WAS EXPRESSLY MADE TO GENERAL CONDITIONS INCLUDING A CLAUSE CONFERRING JURISDICTION .

THIS VIEW OF THE MATTER , HOWEVER , IS VALID ONLY IN THE CASE OF AN EXPRESS REFERENCE , WHICH CAN BE CHECKED BY A PARTY EXERCISING REASONABLE CARE , AND ONLY IF IT IS ESTABLISHED THAT THE GENERAL CONDITIONS INCLUDING THE CLAUSE CONFERRING JURISDICTION HAVE IN FACT BEEN COMMUNICATED TO THE OTHER CONTRACTING PARTY WITH THE OFFER TO WHICH REFERENCE IS MADE .

BUT THE REQUIREMENT OF A WRITING IN ARTICLE 17 WOULD NOT BE FULFILLED IN THE CASE OF INDIRECT OR IMPLIED REFERENCES TO EARLIER CORRESPONDENCE , FOR THAT WOULD NOT YIELD ANY CERTAINTY THAT THE CLAUSE CONFERRING JURISDICTION WAS IN FACT PART OF THE SUBJECT-MATTER OF THE CONTRACT PROPERLY SO-CALLED .

13 THUS IT SHOULD BE ANSWERED THAT IN THE CASE OF A CONTRACT CONCLUDED BY REFERENCE TO EARLIER OFFERS , WHICH WERE THEMSELVES MADE WITH REFERENCE TO THE GENERAL CONDITIONS OF ONE OF THE PARTIES INCLUDING A CLAUSE CONFERRING JURISDICTION , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION IS SATISFIED ONLY IF THE REFERENCE IS EXPRESS AND CAN THEREFORE BE CHECKED BY A PARTY EXERCISING REASONABLE CARE .

#### **Decision on costs**

COSTS

*14 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , THE GOVERNMENT OF THE ITALIAN REPUBLIC AND 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 ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE BUNDESGERICHTSHOF , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .*

**Operative part**

*ON THOSE GROUNDS ,*

*THE COURT*

*IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 18 FEBRUARY 1976 , HEREBY RULES :*

*WHERE A CLAUSE CONFERRING JURISDICTION IS INCLUDED AMONG THE GENERAL CONDITIONS OF SALE OF ONE OF THE PARTIES , PRINTED ON THE BACK OF A CONTRACT , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IS FULFILLED ONLY IF THE CONTRACT SIGNED BY BOTH PARTIES CONTAINS AN EXPRESS REFERENCE TO THOSE GENERAL CONDITIONS .*

*IN THE CASE OF A CONTRACT CONCLUDED BY REFERENCE TO EARLIER OFFERS , WHICH WERE THEMSELVES MADE WITH REFERENCE TO THE GENERAL CONDITIONS OF ONE OF THE PARTIES INCLUDING A CLAUSE CONFERRING JURISDICTION , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION IS SATISFIED ONLY IF THE REFERENCE IS EXPRESS AND CAN THEREFORE BE CHECKED BY A PARTY EXERCISING REASONABLE CARE .*