

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 23 March 2000 *

I — Introduction

1. In this reference for a preliminary ruling relating to the Convention on Jurisdiction (known as the Brussels Convention, see part II below), the Hoge Raad der Nederlanden has referred to the Court four questions and a number of sub-questions on the validity of jurisdiction clauses in bills of lading. In particular, the national court wishes to know whether the jurisdiction clause in these documents of title must be worded in such a way that it must be possible even for third parties, including courts, to ascertain the competent court from the wording alone or whether it is sufficient for that to be clear to the parties (only), if necessary in the light of other circumstances in the particular case.

2. The Hoge Raad der Nederlanden also wishes to know how far successive third-

party holders of bills of lading are bound by jurisdiction clauses between the parties, namely the shipper and the carrier, and whether a third-party holder is always bound by the clause or only when he has succeeded to the shipper's rights and obligations. As to whether the jurisdiction clause is binding, the national court also asks whether the particular circumstances of the case may be relevant, for example, a long-standing business relationship between the parties to the bill of lading, and whether, if the terms of the bill of lading do not make it sufficiently clear to the third-party holder that the clause is valid, he may be required to inquire as to the particular circumstances of the case.

3. In addition, the national court wishes to know which national law governs the question of succession and related matters.

* Original language: German.

II — The Brussels Convention

*Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Convention')*¹

4. Under Article 5 of the Protocol on the Interpretation of the Convention, the Court of Justice has jurisdiction to give rulings on the interpretation of the Convention by way of preliminary ruling.

5. With regard to the general scheme of the Convention, it should first be observed that it provides, as the normal rule, that persons domiciled in a Contracting State are to be sued in the courts of that State (Article 2). Under Article 53,² the seat of a company or other legal person is treated as its domicile.

6. Persons may be sued in other Contracting States only in accordance with the provisions of Sections 2 to 6 (Article 3).³ Article 5(1), which is the provision referred to by the national court, provides that contractual claims are to be brought in the court for the place of performance of the obligation in question. Section 6 (Articles 17 and 18), which concerns the prorogation of jurisdiction, applies to the questions relevant in this case.

7. The first paragraph of Article 17, which is relevant here, reads as follows:

'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

1 — 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, and — amended text — p. 77), the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1). The original Convention was signed in Brussels on 27 September 1968 and is therefore generally referred to as the Brussels Convention.

2 — The first paragraph of Article 53 reads as follows: 'For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law.'

3 — Section 2 (Articles 5 to 6A) deals with special jurisdiction, e.g. for claims relating to contract, maintenance payments, damages based on acts giving rise to criminal proceedings, etc.

Section 3 (Articles 7 to 12A) regulates jurisdiction in matters relating to insurance and Section 4 (Articles 13 to 15) consumer contracts. Section 5 (Article 16) regulates exclusive jurisdiction in proceedings concerning rights in immovable property, tenancies, patents, trade marks, etc.

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

9. The purpose of this addition was purely, by simplifying the formal requirements, to remove the 'excessive formalism'⁴ of the requirement for writing laid down under subparagraph (a). As the Schlosser Report shows, the existence of a consensus, which was still necessary, was not intended to be replaced as such.⁵

III — Facts

(c) in international trade or commerce, in a form which accords with a usage 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.'

10. In 1991 several consignments of groundnut kernels were shipped by a Russian vessel from China to the Netherlands. This was done on the basis of contracts of carriage concluded with the shipper by Coreck Maritime GmbH of Hamburg ('Coreck' or 'the plaintiff') as time charterer of the vessel. In respect of the carriage of the goods Coreck issued a number of Conlinebill bills of lading in English, which included the following clauses:

'3. Jurisdiction

8. The Convention has been amended several times, in each case in connection with the accession of new Contracting States. In 1978, for example, in addition to the possibility of making an agreement conferring jurisdiction 'in writing' or 'evidenced in writing', the further possibility set out under (c) was added.

Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of

4 — See the Opinion of Advocate General Tesauero in Case C-106/95 *MSG* [1997] ECR I-911, paragraph 23.

5 — See the Schlosser Report, cited in paragraph 23 et seq. of the Opinion in Case C-106/95 (cited in footnote 4).

business and the law of such country shall apply except as provided elsewhere herein.’

11. The following wording appeared in the top right-hand corner of the front of the bills of lading:

“CORECK” MARITIME GmbH HAMBURG.’

‘17. Identity of Carrier

The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that the said Shipowner only shall be liable for any damage or loss due to any breach of non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel’s seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.

12. On 5 March 1993 Handelsveem BV, V. Berg and Sons Ltd, Man Producten Rotterdam BV and The Peoples Insurance Company of China (collectively ‘Handelsveem’ or ‘the defendant’⁶) as holders of the bills of lading (according to Handelsveem), and owners and insurers of the cargo, brought an action against the Russian owner of the vessel⁷ and Coreck for damage allegedly caused during carriage. They claimed USD 1 million before the Rechtbank Rotterdam as the court for the port of discharge designated in the bills of lading, in accordance with the jurisdiction rule in Article 5(1) of the Convention.

13. Coreck submitted that the Rechtbank should decline jurisdiction by way of an interlocutory judgment. However, the court found that it did have jurisdiction by way of an interlocutory judgment of 24 February 1995. Coreck appealed to the Gerechts-

It is further understood and agreed that as the Line, Company or Agents who has [sic] executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, or as Carrier or bailee of the goods.’

6 — It is not always clear, as in the plaintiff’s pleading, whether the submissions relate to all the defendants or only to Handelsveem. For reasons of clarity, it will not be stated below whether reference is being made to all the defendants or only to the first defendant.

7 — Sevrybkhodoflot (Murmansk), also trading under the name Sevryba.

hof Den Haag, which upheld the previous judgment by judgment of 22 April 1997. Coreck then appealed on a point of law to the Hoge Raad.

14. In the main proceedings the plaintiff sought to rely on Articles 2 and 17 of the Convention and the jurisdiction clause in the bills of lading. It argued that as its principal place of business was in Hamburg, of which the defendant was aware and which was also apparent from the bills of lading, the Rechtbank Rotterdam did not have jurisdiction. The defendant replied that the jurisdiction clause was invalid because it was not clear. The Rechtbank took the view that there were two possible carriers, so that it was uncertain which was the relevant principal place of business. In that respect also, the jurisdiction clause was insufficiently precise.

IV — The questions referred

15. The Hoge Raad has referred the following questions to the Court for a preliminary ruling:

‘(1) Must the first sentence of Article 17 of the Brussels Convention (in particular, the words “have agreed”), read in

conjunction with the case-law of the Court of Justice according to which “the purpose of Article 17 is to ensure that the [consent of the] parties... to such a clause, which derogates from the ordinary jurisdiction rules laid down in Articles 2, 5 and 6 of the Convention,... is *clearly and precisely demonstrated*”, be interpreted as meaning:

(a) that, in order for a clause vesting jurisdiction in a given court, as provided for in that article, to be valid as between the parties, it is necessary in each case for that clause to be formulated in such a way that its wording alone makes it quite clear or at least easy to ascertain (even) for persons other than the parties — and in particular to the court concerned — which court is to have jurisdiction to settle disputes arising from the legal relationship in the context of which that clause is stipulated; or

(b) that — generally or now, in consequence of or in connection with the progressive relaxation of the rules in Article 17 of the Brussels Convention,⁸ together with the case-law of the Court of Justice concerning the circumstances in which such a clause is to be regarded as having been validly concluded — in order for such a

⁸ — This no doubt refers to the simplification of the formal requirements referred to in paragraph 9 of this Opinion.

clause to be valid, it is enough that the parties themselves clearly know, on the basis (*inter alia*) of the (other) circumstances of the case, which court is to have jurisdiction to settle such disputes?

- (2) Does Article 17 of the Brussels Convention also govern the validity, as against a third party holding a bill of lading, of a clause which specifies as the forum having jurisdiction to settle disputes "under this Bill of Lading" the courts of the place where the carrier has his "principal place of business" and which is laid down in a bill of lading also containing an "identity of carrier" clause, that bill of lading being issued for the purposes of the carriage of the goods, where
- (a) the shipper and one of the possible carriers are not established in a Contracting State and
- (b) the second possible carrier is indeed established in a Contracting State but it is not certain whether his "principal place of business" is situated in that State or in a State which is not a party to the Convention?
- (3) If the answer to Question 2 is in the affirmative:
- (a) Does the fact that the jurisdiction clause contained in the bill of lading must be regarded as valid as between the carrier and the shipper mean that it is also binding on any third party holding the bill of lading, or is that the position only as regards a third party who, upon acquiring the bill of lading, succeeds by virtue of the applicable national law to the shipper's rights and obligations?
- (b) Assuming that the jurisdiction clause contained in the bill of lading must be regarded as valid as between the carrier and the shipper, does the answer to the question whether it is also binding on a third party holding the bill of lading also possibly depend to some extent on the contents of the bill of lading and/or the particular circumstances of the case, such as the particular state of knowledge of the third party concerned or the fact that the latter has a long-standing business relationship with the carrier and, if so, can the third party be deemed to be aware of the particular circumstances of the case if the contents of the bill of lading do not make it

sufficiently clear to him that the clause in question is valid?

- (4) If the answer to Question 3(a) is as just suggested, which national law governs the decision as to whether the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations, and what is the position if the national law in question has not hitherto provided, either in its legislation or in its case-law, an answer to the question whether the third party, upon acquiring the bill of lading, succeeds to the shipper's rights and obligations?'

V — Answers to the questions referred

1. *The first question*

The parties' submissions

16. The plaintiff considers that this question should be answered in accordance with variant 1(b) of the order for reference. According to the plaintiff, the phrase cited by the Hoge Raad, that the parties' consent must be 'clearly and precisely demonstra-

ted', which goes back to the *Tilly Russ* judgment,⁹ does not mean, as a further elaboration on the words 'have agreed' in Article 17 itself, that the competent court must be immediately identifiable from the wording of the jurisdiction clause or be expressly named in it. Rather, going beyond the wording, it is necessary to take into account what was clearly agreed by the parties or what their established practice was. Trade usage in the sector in question also plays a part.

17. As the defendants wrote to the plaintiff several times, every letter having been addressed to Hamburg as the plaintiff's principal place of business and the plaintiff being described in the letters as the carrier, the defendants could have been in no doubt whatever as to the carrier's identity or its principal place of business. The wording of the bills of lading also conforms to the standard bill of lading drawn up in 1950 and amended in 1978 by BIMCO, the Baltic and International Maritime Council, which the plaintiff had previously used 77 times in dealings with Handelsveem.

18. The plaintiff cites various judgments in which the Court is said to have found that it was not necessary for the competent

⁹ — Case 71/83 [1984] ECR 2417.

court to be designated absolutely unambiguously in the jurisdiction clause.¹⁰

19. The defendant contends, on the other hand, that question one should be answered in accordance with variant 1(a) of the order for reference, that is to say, the jurisdiction clause must be worded in such a way as to enable anyone to ascertain clearly which court has jurisdiction. The defendant says that, according to the settled case law of the Court of Justice, Article 17 requires not only that there actually be consensus between the parties as to the designation of the court with jurisdiction, but also that this be clearly and precisely apparent to third parties.

20. According to the defendant, the choice of forum entails a particular need for legal certainty which the successive versions of Article 17 did not call into question. The only purpose of the adjustments made by the accession conventions of 9 October 1978 and 26 May 1989 was to simplify the conclusion of agreements conferring jurisdiction in international trade, but the adjustments had nothing to do with the requirements as to clarity in the wording of such agreements.

¹⁰ — These are the judgments in Case 784/79 *Porta-Leasing* [1980] ECR 1517; Case 201/82 *Gerling* [1983] ECR 2503; Case 48/84 *Spitzley* [1985] ECR 787; Case 22/85 *Anterist* [1986] ECR 1951, and Case C-214/89 *Powell Duffryn* [1992] ECR I-1745.

21. In the opinion of the Netherlands Government, for a jurisdiction clause to be valid it is not sufficient that it is clear only to the parties themselves, particularly on the basis of the circumstances of the case, which court is to have jurisdiction. The Netherlands Government also examines the individual versions of Article 17 and concludes that none of the modifications introduced for concluding such agreements led to any relaxation of the formal requirements. It is for the national court to decide whether it has jurisdiction or not.

22. In this connection, the Netherlands Government considers that the question whether the national court should be guided solely by the wording of the agreement conferring jurisdiction or whether it should take other circumstances of the case into account depends on whether the agreement was concluded according to the method in Article 17(a), (b) or (c).

23. In the opinion of the Italian Government, for an agreement conferring jurisdiction to be valid, it is an essential condition that the competent court can be ascertained clearly and precisely. This requirement must apply not only as between the parties who originally concluded the agreement, but also in relation to all persons against whom it is to be effective.

24. In reply to the first question, the United Kingdom, referring to the *Tilly Russ* judgment, suggests that the effectiveness of a jurisdiction clause is to be determined by reference to the position of the original parties to a bill of lading. It is not essential for the original parties to have had actual knowledge of the meaning of the clause, provided that such knowledge can be inferred on the basis of trade practice.

25. If the jurisdiction clause provides that disputes are to be dealt with in the country where the carrier has his principal place of business, it is for the national court to establish who is the carrier and whether he has his principal place of business in a Contracting State.

26. The Commission considers it sufficient if the court identified can be established from the clause and the particular circumstances of the case, provided that it is clear that there was actual consensus or that it could be deemed to exist between the parties.

27. The case law already cited more than once, to the effect that consent must be clearly and precisely demonstrated, merely requires the agreement to show that there was consensus between the parties with regard to the court which was to have jurisdiction. On the other hand, Article 17 does not require the wording of the agreement itself to indicate which court is to

have jurisdiction. For this purpose it is sufficient if the court in question can be established on the basis of objective factors. The jurisdiction clause in the present case enables the competent court to be determined.

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28. The wording used in the question before the Court, referring to the case law to the effect that 'the purpose of Article 17 is to ensure that the [consent of the] parties... is clearly and precisely demonstrated' can be found in, for example, the *Tilly Russ* judgment.¹¹ One of the questions in that case was whether such an agreement could be regarded as valid even if it was not signed. The Court referred to its earlier judgments which stated that the conditions for the validity of jurisdiction clauses under Article 17 are to be narrowly 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'.¹² In the *MSG* judgment¹³ the Court confirmed that con-

11 — See the judgment in Case 71/83, cited in footnote 9, paragraph 14. See also the judgments in Case 24/76 *Estasis Salotti* [1976] ECR 1831, paragraph 7; Case 25/76 *Segoura* [1976] ECR 1851, paragraph 6, and Case 784/79, cited in footnote 10, paragraph 5. In some cases the wording in question varies slightly.

12 — See the *Tilly Russ* judgment, cited in footnote 9, paragraph 14.

13 — Cited in footnote 4, paragraph 17.

sensus between the parties was still necessary with regard to the new wording of Article 17, which made an additional reference to commercial practice. Consequently, in spite of such relaxation of the formal requirements, Article 17 still aims to ensure that there is real consent between the parties. As, by reason of the amendments to Article 17, writing is no longer necessary, such consent can sometimes be presumed to exist.¹⁴ This decision was followed in the *Castelletti* judgment.¹⁵

29. It is true that the observations in the last-mentioned case relate to the problem of whether there was consent at all and, if so, the date when it could be presumed to have come into existence. In the present case it is common ground that the parties agreed, in accordance with Article 17, that disputes arising from the bill of lading should be settled in, and according to the law of, the country where the carrier has his principal place of business so that, under Article 2 of the Convention, the courts of that place would have jurisdiction. The issue in the present case is rather the degree of precision with which such an agreement must be worded, which is different from the question whether consent actually exists. In this connection it may be asked whether the case-law cited above can be extended to this problem, which would mean that 'clarity and precision' would also be required in the wording of jurisdiction clauses.

30. The wording of Article 17 does not give rise to any requirements as to the manner in which jurisdiction clauses are formulated. Nor does the protective purpose of Article 17 require that the competent court be apparent from the wording alone of the jurisdiction clause. As the Court found in the *MSG* judgment, the protective purpose consists in protecting the weaker party by preventing jurisdiction clauses from being incorporated in a contract by one party and going unnoticed. However, where such a clause is actually agreed by the parties, it may still be necessary to protect the weaker party if the clause is not worded sufficiently clearly for the weaker party to be able to rely on it. Clear wording does not, however, mean that it must be possible to identify the competent court from the actual words. A clause which can be amplified by means of objective criteria is also sufficiently specific. Then it will be for the national court to determine, according to those criteria, which court has jurisdiction.

31. Objective criteria enable third parties, particularly the national court before which the matter is brought, to establish clearly which court is supposed to have jurisdiction. Therefore it may not be sufficient that the parties alone can identify the court in question on the basis of the particular circumstances of the case. The clause must be worded in such a way that the national court before which the matter is brought and whose jurisdiction may be contested can determine clearly whether it has jurisdiction or not. It will very probably be necessary for it to carry out a further

14 — See the *MSG* judgment, cited in footnote 4, paragraphs 17 and 19.

15 — Case C-159/97 [1999] ECR I-1597, paragraph 19 et seq.

examination for that purpose. In the *Cas-telletti* judgment, the Court, referring to the *MSG* judgment, also found that it was for the national court to determine whether there was an international trade custom.¹⁶ In this connection it may also be possible for the national court to use supplementary information supplied by the party relying on the jurisdiction clause. In the present case, for example, such information may relate to the place where the plaintiff has its principal place of business.

32. Accordingly, in several cases where the jurisdiction clause merely indicated that the court for the principal place of business of a company was to have jurisdiction, the Court found that the clause was not in any event invalid on the ground that it was not sufficiently precise in conferring jurisdiction by means of a reference to the principal place of business (or domicile).¹⁷ As the Commission correctly observes, such a clause cannot be invalid on the ground that the full address is not given. The national court can easily ascertain the address, so that on the basis of that objective information, the competent court can be determined precisely.

33. Therefore it must be concluded that a jurisdiction clause is valid if the national court can, on the basis of objective criteria in the clause itself — and possibly taking account of supplementary information from the parties — determine clearly whe-

ther it has jurisdiction or not. If such examination does not lead to a clear-cut conclusion, the clause must be deemed invalid. The same applies to subjective elements. Consequently, the agreement mentioned as an example by the defendant conferring jurisdiction on the court 'most familiar with maritime law', would not be precise, because the criterion is subjective, and it would therefore be invalid.

34. The jurisdiction clause in the present case refers to the 'principal place of business', according to the original English, that is, the undertaking's principal office. It should be possible for the national court to determine this clearly, if necessary by referring to the plaintiff's documents.

35. Finally, the jurisdiction clause may be imprecise in that it does not identify the carrier beyond doubt because both the plaintiff and Sevryba may be regarded as the actual carrier. However, this does not mean that they are both carriers for the purpose of the bill of lading. According to the information given by the national court, the bills of lading were issued by the plaintiff and bore the name Coreck GmbH Hamburg. This probably indicates that the bill of lading shows that the plaintiff was one of the original parties to the agreement and must therefore be regarded as the carrier for the purposes of the bills of

16 — See the judgments in Case C-159/97, cited in footnote 16, paragraph 23, and Case C-106/95, cited in footnote 5, paragraph 21.

17 — See the judgments in Cases 784/79, 201/82, 48/84, 22/85 and C-214/89 (cited in footnote 11).

lading in question. The situation would no doubt be different if the name Sevryba also appeared on them, in which case the jurisdiction clause would probably be imprecise. However, it is for the national court to establish whether it is clear from the bill of lading who, *for the purposes of the bill of lading* (and this is the only question which matters), is to be deemed the carrier. If that cannot be determined or if there is more than one carrier for the purposes of the bill of lading, the clause must indeed be regarded as invalid.

37. In addition, the factual findings of the national court, which are binding on the Court of Justice and which cannot now be challenged, show that the plaintiff's principal place of business is in Hamburg and that the plaintiff was the carrier and therefore a party to the agreement conferring jurisdiction.

38. The defendants assume that Article 17 cannot apply in the present case because it has not been shown that one of the requirements, i.e. that one of the parties be domiciled in a Contracting state, is fulfilled.

2. *The second question*

The parties' submissions

36. The plaintiff contends that Article 17 requires that one of the parties to the agreement conferring jurisdiction have its registered place of business or domicile in a Contracting State and that a court in a Contracting State be chosen as the competent court. With regard to the first condition, this need not be the principal place of business.

39. The Netherlands Government considers that the important element with regard to Article 17 is the relationship between the shipper and the carrier. Where a contract includes a jurisdiction clause, if the shipper and one of the possible carriers are not domiciled in a Contracting State, it is necessary to establish whether at least one of contracting parties is domiciled in a Contracting State at the time when the matter is brought before a court.

40. If the carrier is domiciled in a Contracting state, but it has not been proved that he has his principal place of business there, the jurisdiction clause would fulfil only the condition concerning the parties' domicile. If the court upon which jurisdiction is conferred is that for the principal

place of business, but there is doubt as to whether that place is in a Contracting State, the further requirement that the designated court must be in a Contracting State will not be fulfilled.

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41. The Commission maintains that, by its second question, the national court is asking whether Article 17 is applicable only if at least one of the parties has its principal place of business in the Community, or whether it is sufficient if one of the parties is domiciled in a Contracting State. In the Commission's opinion, there appears to be no reason why the applicability of Article 17 should be confined to cases where one party has its principal place of business in the Community. The only question which arises is whether Article 17 applies at all.

42. The Commission adds that it is clear from the second paragraph of Article 17 that the question whether one of the parties is domiciled in a Contracting State is of no great importance, because under that provision, parties from non-Contracting States may also enter into an agreement conferring jurisdiction upon a court of a Contracting State.¹⁸

43. The second question concerns the requirements laid down by the first sentence of the first paragraph of Article 17. These must be fulfilled if Article 17 is to apply at all. Although the national court refers here again to the relationship with the third-party holder of the bill of lading, this only falls to be considered in relation to the reply to the third question. However, it may be observed at this point that a jurisdiction clause can be relied on against a third-party holder of the bill of lading only if the clause is valid. According to the Court's case law,¹⁹ for this purpose it is the relationship between the original parties, not the relationship with the third-party holder, which is decisive. In this respect, the first sentence of the first paragraph of Article 17 requires at least one of the original parties who concluded the agreement conferring jurisdiction to be domiciled in a Contracting State, and, under Article 53, the seat of companies and other legal persons is treated as their domicile. Under Article 53, it is for the national court to decide where the seat of a company is situated.

44. The question whether the seat of a company is situated in a Contracting State is decisive for the (theoretical) validity of a jurisdiction clause, but it must be distinguished from the question of the location of the *principal place of business*. The latter is important for establishing precisely which

18 — The second paragraph of Article 17 reads as follows: 'Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction'.

19 — See the judgment in Case 71/83, cited in footnote 9.

court has jurisdiction under the jurisdiction clause in the present case. The fact that the competent court is that for the principal place of business does not mean that it is the principal place of business alone which will determine whether Article 17 applies. There is no reason to restrict Article 17 and its application in this way. Nor can any such restriction be inferred from Articles 17 or 53 of the Brussels Convention. It must also be borne in mind that, by virtue of the second paragraph of Article 17 (see footnote 18), such a jurisdiction clause may be concluded by parties neither of which is domiciled or has its seat in a Contracting State. Therefore it follows from the second paragraph of Article 17 that the right to enter into agreements conferring jurisdiction should certainly not be narrowly construed. If companies which have no place of business at all in a Contracting State can conclude agreements conferring jurisdiction, there is no reason why they should be deprived of that possibility if one of the parties has a place of business, but perhaps not its *principal* place of business, in a Contracting State.

45. If, after considering the first question, the national court reaches the conclusion that the plaintiff must be deemed the carrier for the purpose of the bill of lading and that the jurisdiction clause is therefore worded sufficiently precisely, it must then determine whether the plaintiff has a *place of business* in a Contracting State. However, the jurisdiction clause cannot be invalidated by the fact that the carrier's *principal place of business* may not be in a Contracting State. For the agreement conferring jurisdiction to be valid under the

first paragraph of Article 17 — apart from the issue of whether the jurisdiction clause is sufficiently precise for the purpose of the first question — it is sufficient if one of the original parties to the agreement has a place of business in a Contracting State and the other party (Sevryba) does not. If Sevryba is not one of the original parties, its place of business is in any case irrelevant to the question of validity under the first paragraph of Article 17. The information provided by the national court shows only that Sevryba's place of business is in Russia. No indication is given of whether it has any other establishment. Nor is it known whether and, if so, how Sevryba agreed to the original jurisdiction clause and might as a result be bound by it.

46. The details necessary for ascertaining the principal place of business follow from the reply to the first question. If it is found that there is a place of business or an establishment, but not the principal place of business, in a Contracting State, the first requirement of the first paragraph of Article 17 (one of the parties to be domiciled in a Contracting State) would be fulfilled. On the other hand, the second requirement (designation of a court in a Contracting State) would not be fulfilled. However, as the reply to the first question shows, it should be possible to determine, by reference to objective criteria, that the plaintiff's principal place of business is situated in a Contracting State.

3. *The third question*

The parties' submissions

47. In the plaintiff's opinion, the reply to Question 3(a) should be that the jurisdiction clause is valid as regards any third-party holder of the bill of lading, and not only if the third party has succeeded to the shipper's rights and obligations.

48. With regard to Question 3(b), the plaintiff submits that the circumstances of the particular case may be important for deciding whether the third-party holder is bound by the jurisdiction clause. In this connection the plaintiff stresses once again that it had a long-standing and active business relationship with the defendant, so that the latter must have had far fewer doubts about the bills of lading than any other third-party holder would have had. A third party who accepts such a clause in a bill of lading with full knowledge of all the circumstances cannot rely on Article 17 and plead that the clause is invalid because the protection which Article 17 seeks to confer means not only safeguarding against jurisdiction clauses to which consent has not been given, but also promoting compliance with clauses which have been accepted.

49. The defendants consider that a jurisdiction clause in a bill of lading is valid as against a third-party holder only if, on receiving the bill, he succeeds to the shipper's rights and obligations by virtue of the relevant national law. In this connection the defendants also refer to the *Tilly Russ* judgment, which states that Article 17 is satisfied if a jurisdiction clause is valid as between the carrier and the shipper and, by virtue of the relevant national law, the third party, upon acquiring the bill of lading, succeeds to the shipper's rights and obligations.²⁰ The defendant adds that both conditions must be fulfilled in order for the jurisdiction clause to be effective as against a third-party holder.

50. With regard to the reply to Question 3(b), the defendants submit that the circumstances of the particular case, such as here the special knowledge of the third-party holder or his long-standing business relationship with the carrier, can be of no importance in this connection. If it is impossible to determine the competent court by reference to a jurisdiction clause, the particular circumstances of the individual case should not be taken into account and the third-party holder can certainly not be expected to inquire as to those circumstances.

51. In reply to the third question, the Netherlands Government, referring to the *Tilly Russ* judgment, states that the

²⁰ — See the judgment in Case 71/83, cited in footnote 9, paragraph 26.

national law applicable to the jurisdiction clause determines whether and, if so, to what extent, the third-party holder succeeds to the shipper's rights and obligations upon acquiring the bill of lading. National law also determines whether the particular circumstances of the individual case affect the extent to which the third-party holder succeeds to the rights and obligations.

52. The Italian Government refers to its submissions on the second question and contends that the third-party holder is bound by the clause only if he succeeds to the legal relationship and takes over all the rights and obligations. If that is not the case, the original clause cannot be effective as against him automatically, but only on the basis of a clear, specific agreement accepted by him.

53. The United Kingdom submits that the question whether the consignee succeeds to the shipper's rights and obligations depends on the relevant national law to be applied. Whether a third party holding the bill of lading who does not succeed to such rights and obligations will be bound by the jurisdiction clause is also a question governed by national law. The United Kingdom adds that if the third-party holder does not succeed to the shipper's rights and obligations, it is difficult to see what rights he can claim under the bill of lading.

54. The Commission also refers to the *Tilly Russ* judgment, which it says indicates the answer to the question. Because the third-party holder succeeds to the rights and obligations of one of the original contracting parties, the jurisdiction clause may also be relied upon as against him. The circumstances mentioned in connection with Question 3(b) are irrelevant to the reply to the third question. The question is not whether the third-party holder consented to the jurisdiction clause or whether consent may be presumed. He is bound by the clause because he is the successor in law.

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55. Here the parties rightly refer to the *Tilly Russ* judgment in which the Court considered the question whether a third-party holder of the bill of lading is bound by the jurisdiction clause. According to that judgment '[i]n 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... .

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'.²¹

56. Therefore the conditions laid down by Article 17 of the Convention are fulfilled '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'.²²

57. It follows that, in order for a jurisdiction clause to be valid as against a third-party holder of the bill of lading, the clause must first of all be valid as between the original parties. If this condition is fulfilled and if the third-party holder succeeds to the shipper's rights and obligations, the jurisdiction clause may be effective as against the third party. This applies regardless of the particular circumstances of the individual case or the third party's knowledge of the jurisdiction clause. As the Commission rightly observed, the question is not whether the third party consented to the

jurisdiction clause or whether such consent may be presumed. Particular circumstances may at the most be relevant in relation to the question of succession under national law. However, if it is shown that, under the relevant national law, the third party has succeeded to all the shipper's rights and obligations, the particular circumstances of the individual case are immaterial.

58. Whether those circumstances may affect the validity of the jurisdiction clause must be determined in the context of the relationship between the original parties. The third-party holder and his particular relationship with one of the original parties are irrelevant in this connection. In the *Castelletti* judgment the Court once again confirmed the conditions set out in the *Tilly Russ* judgment for the validity of a jurisdiction clause as against a third-party holder and, regarding the question as to which party must know of the trade usage, stated that '[s]ince 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.'²³ Consequently the argument that the jurisdiction clause is not sufficiently precise and is therefore not effective as against the third-party holder is not relevant to the third question, but must rather be assessed against the relationship between the original parties. To that extent reference must be made to the replies to the first two questions.

21 — See the judgment in Case 71/83, cited in footnote 9, paragraph 24 et seq.

22 — See the judgment in Case 71/83, cited in footnote 9, paragraph 26.

23 — See the judgment in Case C-159/97, cited in footnote 15, paragraph 42.

59. It must therefore be concluded that a third-party holder of a bill of lading is bound by a jurisdiction clause in the bill of lading if the clause is valid as between the shipper and the carrier, that is to say, the original parties, and the third party, by virtue of the relevant national law, succeeded to the shipper's rights and obligations on acquiring the bill of lading.

60. However, if he has not succeeded to the shipper's rights and obligations, he is not bound by the jurisdiction clause. It is difficult to see why the obligation to abide by the jurisdiction clause stipulated by the original parties should also apply to a person who has not succeeded to the rights and obligations of one of the original parties. Legal certainty requires a restrictive approach to the question whether an agreement conferring jurisdiction binds third parties, that is, those who were not party to the agreement. It is also advisable because such an agreement constitutes an exception to the general jurisdiction rules.

61. Accordingly, in his opinion in the *Tilly Russ* case, Advocate General Slynn observed as follows:

'If the holder does not stand in the shoes of the original shipper under the applicable national law, then a new agreement has to be found between the holder and the

carrier, either in writing or evidenced by writing, on a choice of jurisdiction clause. It does not seem to me that the mere presentation by the holder of the bill, who has already purchased the goods, to the carrier would in itself constitute such an agreement or evidence of an agreement for the purposes of Article 17.'²⁴

62. This question was not expressly considered by the Court in the *Tilly Russ* judgment, paragraph 23 of which refers to the *Gerling* case. The issue in that case was whether a person not privy to a contract of insurance, but benefitting thereunder, could invoke a jurisdiction clause as against third parties. In the present case, however, the situation is the opposite as it is the third party who considers the jurisdiction clause to be invalid.

63. In the *Tilly Russ* judgment, however, the Court stated that a third party who has succeeded to the shipper's rights and obligations by acquiring the bill of lading cannot be allowed to remove himself from the compulsory jurisdiction provided for in the bill of lading on the ground that he did not consent thereto. In such a case, acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it.²⁵ It may be concluded from this that a third-party holder who has not in fact succeeded to all

24 — Opinion in Case 71/83, cited in footnote 9. The Advocate General did not consider the theories put forward by the Commission (the 'theory of assignment', the 'theory of implied agreement' and the 'theory of the clause for the benefit of third parties', p. 2427) in any further detail.

25 — See the judgment in Case 71/83, cited in footnote 9, paragraph 24 et seq.

the shipper's rights and obligations is not automatically bound by the jurisdiction clause.

holder of a bill of lading has succeeded to the shipper's rights and obligations must be decided according to the law of the port of discharge.

64. Nor can the long-standing business relationship between Coreck and Handelsveem in the present case affect the situation here. As already mentioned, in the *Castelletti* case the Court found that awareness of a trade usage must be assessed by reference to the original parties since the validity of the clause under Article 17 must be assessed by reference to the relationship between those parties.²⁶ It would be going too far to infer implicit consent to the jurisdiction clause in the bill of lading from the long-standing business relationship between the third-party holder of the bill of lading and one of the parties. This would be to treat subjective criteria as objective criteria.

66. In the defendants' opinion, the fourth question does not fall to be answered by the Court of Justice. The issue of which law governs whether the third-party holder of the bill of lading succeeded to the shipper's rights and obligations must be determined by the court before which the matter is brought on the basis of its own private international law rules. Although the reply to this question may affect the application of Article 17 of the Brussels Convention, it is not a question on the interpretation of the Convention.

4. *The fourth question*

The parties' submissions

65. The plaintiff considers that, if Question 3(a) is determined by reference to national law, the question whether the third-party

67. On the second sub-question, the defendants contend that, according to the *Tilly Russ* judgment, the question of succession must be determined by reference to the applicable national law. If that law provides no answer, it is not possible to determine whether the third-party holder has succeeded to the shipper's rights and obligations. It is therefore impossible to determine whether the third-party holder is bound by the jurisdiction clause by virtue of Article 17. According to the *Tilly Russ* judgment, the third-party holder of the bill of lading will exceptionally, subject to certain conditions, be bound by the jurisdiction clause. The defendant adds that if it is not clear whether this is an exceptional case of that kind, the general principle must

²⁶ — See the judgment in Case C-159/97, cited in footnote 15, paragraph 42.

apply and no exception will be allowed. This conclusion is also compatible with the consideration that the risk of ambiguity as to the court with competence under the jurisdiction clause should be borne by the party responsible for the issue of the bill of lading.

68. The Netherlands Government considers that, in view of its reply to the third question, the fourth does not fall to be answered.

69. The Italian Government contends that it is for the national court before which the matter is brought to determine the extent to which the third-party holder has succeeded to the shipper's rights and obligations on the basis of the rules of private international law which it must apply under its own legal system.

70. The Government of the United Kingdom submits that the national law which must be applied in the present case is the proper law of the bill of lading, which must be determined by the national court in accordance with the terms of the bill of lading and, where these are silent, in accordance with the 1980 Rome Convention on the Law Applicable to Contractual Obligations.²⁷ The question is not one to be determined under the Brussels Convention.

71. With regard to the second part of the question, the United Kingdom considers that it is not for the Court to fill lacunae in the substantive law of Contracting States, particularly as the question is hypothetical in nature.

72. The Commission considers that this question goes beyond interpretation of the Brussels Convention. It does not relate directly or indirectly to the determination of jurisdiction. The replies to the first three questions enable the national court to decide whether the jurisdiction clause is valid. If it is, it applies to the contracting parties and to third parties succeeding to their rights and obligations. Determining the contracting parties and third parties succeeding to their rights and obligations has no connection at all with the interpretation of Article 17 of the Brussels Convention.

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73. The *Tilly Russ* judgment shows that the question whether the third-party holder succeeds to the shipper's rights and obligations when he acquires the bill of lading is governed by the applicable national law. Consequently this question must be determined by the national court, not the Court of Justice. This applies also to the question as to which national law must be applied here.

²⁷ — OJ 1998 C 27, p. 34 (consolidated version).

74. The question as to what the position would be if neither the legislation nor the case law of the national legal system concerned provide an answer to the question whether the third party succeeds to the shipper's rights and obligations is purely hypothetical. Furthermore, it relates to the situation where there is a lacuna in national law. It is not for the Court of Justice to determine how that lacuna might or should be filled because the question has no direct connection with interpretation of the Brussels Convention.

VI — Costs

75. The costs of the Netherlands and Italian Governments, the Government of the United Kingdom and the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

VII — Conclusion

76. I therefore propose that the following replies be given to the questions from the national court:

- (1) The first paragraph of Article 17 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels Convention') must be interpreted as meaning that, for an agreement conferring jurisdiction to be valid, it is not necessary to be able to identify by name, from the wording of the agreement alone, the court designated as having jurisdiction. On the contrary, it is sufficient if not only the parties, but also third parties and the court before which the matter is brought, can determine the matter on the basis of objective criteria laid down in the jurisdiction clause.

- (2) The requirements of Article 17 of the Brussels Convention are fulfilled if at least one of the original parties to the agreement conferring jurisdiction has its place of business in a Contracting State. In this connection it is for the national court to ascertain who are the original parties to the agreement and where their place of business is situated. In this context it is not necessary for the principal place of business of the undertaking to be situated in a Contracting State.

However, if the parties agreed that the competent court was to be that for the principal place of business and it is not situated in a Contracting State, the second condition of Article 17, namely that a court of a Contracting State is to have jurisdiction to settle disputes, is not fulfilled.

- (3) A third-party holder of a bill of lading is bound by the jurisdiction clause in a bill of lading if the clause is valid and if the third party, by virtue of the relevant national law, has succeeded to the shipper's rights and obligations.

If he has not succeeded to the shipper's rights and obligations, the jurisdiction clause cannot be relied on against him unless he consented to it. Special knowledge or long-standing business relations with the carrier are not sufficient to assume that there was implied consent.

- (4) It is for the national court to decide which national law is to be applied in order to determine whether the third-party holder of a bill of lading has succeeded to the shipper's rights and obligations. The same is true of the question as to which law is applicable where national law does not resolve the question whether the third-party holder has succeeded to the shipper's rights and obligations.