OBERLANDESGERICHT MÜNCHEN, 3 DECEMBER 1999

Case Note by Ulrich G. Schroeter*

[This decision by the Oberlandesgericht München, a German Court of Appeals, was handed down by the 23rd Civil Senate of the court on 3 December 1999 under the Docket No. 23 U 4446/99.[1] It reversed a first-instance judgment of the Landgericht Passau of 1 July 1999 (1 HKO 1200/98) and remitted the case back to the Landgericht for further findings.[2]

In the present decision, the Oberlandesgericht interprets Articles 3(1), (2) and 31 of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[3]]

FACTS OF THE CASE:

The Claimant [buyer] is a manufacturer of windows in S. near Passau, Germany, and claims by way of a partial complaint from the Defendant as legal successor of S. S.p.A. [seller], both with place of business in Rimini, Italy, damages in the amount of 100,000 DM based on the non-delivery of a window production plant.

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1 The original text of the decision (in German) has been published in *Recht der Internationalen Wirtschaft* 2000, 712-714; *OLG-Report München* 2000, 299-300; *Internationales Handelsrecht* 2001, 25-26.

2 Note on the general jurisdiction of the courts mentioned in this decision: The Oberlandesgericht (OLG) is a German Court of Appeals and exercises jurisdiction over appeals against first-instance decisions by the Landgericht; the Landgericht (LG) is a German Regional Court and has jurisdiction over disputes involving a value exceeding DM 10,000 at first instance as well as over appeals against decisions by the Amtsgericht (German Local Court); the Tribunale (Trib.) is an Italian Regional Court exercising jurisdiction over disputes involving a value exceeding ITL (Italian Lira) 20,000,000 at first instance as well as over appeals against decisions by the Giudice di Pace (Italian Justice of Peace) and the Pretore/Pretura (Italian District Court).

3 Abbreviations used in the decision: BGB = Bürgerliches Gesetzbuch [German Civil Code]; Brussels Convention = Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; DM = Deutschmarks; NJW = Neue Juristische Wochenschrift [weekly German law review]; ZIP = Zeitschrift für Wirtschaftsrecht [German law review]; ZPO = Zivilprozessordnung [German Code of Civil Procedure].

On the basis of an offer by the legal predecessor of the Defendant [seller] dated 24 November 1994 and some modifications [added by the buyer], the [buyer] by letter dated 29 March 1995 ordered a window production plant of the standard model "System 5 S". The [seller] confirmed this order in writing on 11 April 1995. The parties agreed on a total net price of DM 1,245,000.00. According to the "Conditions of Sale", this was a "price quotation ex works Rimini/Italy" and the goods were to be delivered by end of February 1996, whereas "all technical specifications resp. final drawings of the types of windows to be produced" were to be supplied by the [buyer] before end of May 1995. An acceptance test was to take place at the [seller]'s factory in Rimini, the tools which were to be supplied by the [buyer] should arrive "in Rimini at least 20 days before the acceptance test", and under the heading "Putting into Operation" "the plant's assembly and putting into operation at [the buyer]'s place of business by [seller]'s mechanics for the period of six weeks inclusive" was agreed upon.

By telefax of 20 December 1995 the [seller] informed the [buyer] that production of the plant was "now scheduled for October/November 1996". The [buyer] objected and, by legal counsel's letter dated 4 April 1996, fixed an additional period of time for the delivery of the plant until 30 April 1996. Eventually, through letter of 23 September 1996, he declared the contract avioded.

The [seller] in turn brought action against the [buyer] before the Tribunale di Rimini. In the statement of claim, which was served to the [buyer] on 17 December 1997, the [seller] seeks declaration that the contract has been avoided. Additionally, he claims damages from the [buyer] alleging that the [buyer] neither supplied the drawings of the types of windows to be produced by the plant nor the tools in time. Furthermore the [buyer] in March 1996 allegedly called the payment guarantees and revoked the advance payments of DM 124,500.00 and DM 249,000.00. The Tribunale di Rimini has up to date not ruled on its jurisdiction over the dispute.

The [buyer] claims to have suffered loss of profit in the amount of DM 886,150.00. Furthermore he allegedly had to purchase a replacement plant, the price for which exceeded the price for the [seller]'s qualitative better plant by DM 355,000.00.

The [seller] contests the international jurisdiction of the Landgericht in Passau where the [buyer] has commenced his proceedings. [Seller] alleges that the requirements for its special jurisdiction under Article 5 No. 1 of the Brussels Convention are not fulfilled. The place of performance of the contractual obligation according to Article 31 CISG is Rimini. Additionally, [seller] alleges that the proceedings pending before the Tribunale di Rimini bar the jurisdiction of the German court.

The Landgericht Passau reached the same conclusion as the [seller] with respect to its jurisdiction and dismissed the claim on 1 July 1999. Based on the contractual clause "price quotation ex works Rimini/Italy", the [seller] did not have the obligation to deliver the plant to S. Furthermore a transfer of the dispute to the court in Rimini was impossible.

By way of his appeal the [buyer] pursues his claim further.

Reference is made to the facts outlined in the first-instance judgment, to the parties' memoranda and to the protocol on the oral hearing before the court on 12 November 1999.

GROUNDS FOR THE DECISION

The [buyer]'s appeal is successful. The Landgericht Passau has international jurisdiction over the present dispute.

1. Article 2(1) and (2), Article 3 and Article 5 No. 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) as amended by the Third Accession Convention of 26 May 1989, which entered into force in Italy on 1 May 1992 and in the Federal Republic of Germany on 1 December 1994 – the Fourth Accession Convention only entered into force in Italy on 1 June 1999 – allow the [buyer] to make use of the Landgericht Passau's

special jurisdiction for the place of performance, as the [seller]'s obligation to deliver the window production plant was be performed in S.

a) According to Article 5 No. 1 of the Brussels Convention a person domiciled in a Contracting State may be sued in another Contracting State, in matters relating to a contract, in the courts for the place where the obligation was performed or should have been performed. In case of a legal person like the [seller], the seat of the company shall according to Article 53(1) of the Brussels Convention be treated as its domicile.

The decisive place for the determination of this special basis of jurisdiction is according to the case law of the European Court of Justice (Case 14/76 – *De Bloos,* in *NJW* 1977, 490, 491; Case C-420/97 – *Leathertex* v. *Bodetex,* in *ZIP* 1999, 1773, 1776 – nos. 31 and 32 –) the place where the disputed obligation was performed or, like here, should have been performed. The relevant obligation is the one on which the Claimant bases his claim; as far as a claim for damages is concerned, the obligation which the Defendant allegedly has failed to perform is decisive.

Where this obligation should have been performed must, according to the European Court of Justice (Case 12/76 – *Tessili,* in *NJW* 1977, 491 et seq.; Case C-288/92 – *Custom Made Commercial,* in *NJW* 1995, 183, 184 – no. 26 –; Case C-420/97 – *Leathertex* v. *Bodetex,* in *ZIP* 1999, 1773, 1776 – no. 33 –), be determined in accordance with the law governing the obligation at issue, according to the rules of conflict of the jurisdiction in which the action was brought. The governing law can also be a uniform law, as the European Court of Justice has held with respect to the Hague Convention of 1 July 1964 relating to a Uniform Law on the International Sale of Goods (*NJW* 1995, 183, 184 – no. 27 –).

b) Consequently, the relevant obligation in the present case is the obligation to deliver the window production plant, which is governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG).

This Convention is according to its Article 1(1)(a) applicable to contracts of sale between parties who have their places of business in different states, if these states are Contracting States. This is the case for Italy and the Federal Republic of Germany. In Italy the Convention has been in force since 1 January 1988, in the Federal Republic of Germany since 1 January 1991.

Contracts for the supply of goods to be manufactured or produced are according to Article 3(1) CISG to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. Accordingly, the Convention is also applicable to the contract calling for the delivery of a window production plant concluded between the [buyer] and the [seller] according to Articles 14, 15(1), 18 and 23 CISG. The few tools which were to be supplied by the [buyer] are neither with respect to their value nor their function essential ones – the French text of the Convention speaks of *"part essentielle"* – nor *"substantial parts"* – as stated in the English text – of the plant to be delivered (compare Herber in v. Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht,* note 4 on Art. 3 CISG). This is particularly true as the plant ordered is, as has been argued by both parties, a standard model.

The supply agreement between the [buyer] and the [seller] is furthermore not excluded from the scope of the Convention by virtue of Article 3(2) CISG. The [seller]'s "inclusive" obligation to assemble the plant and put it into operation at the [buyer]'s place of business does not constitute the preponderant part of the [seller]'s obligations under the contract. Whether certain obligations constitute the preponderant part of obligations depends primarily on the relative value of each element. Additionally, the particular interest that the purchasing party places on an obligation, i.e., the characteristic obligation can be decisive (Herber, *ibid.,* note 5 on Art. 3 CISG; Staudinger/Magnus, *BGB,* 13th ed., note 21 on Art. 3 CISG). An approximately identical value of the different obligations is sufficient to render the Convention applicable (Staudinger/Magnus, *ibid.,* note 22). In the present case, the value of the agreed services of several mechanics for the period of six weeks merely constitutes a small part of the total costs for the plant of DM 1,245,000.00. Additionally, the characteristic obligation to manufacture the plant does not carry less weight than its assembly and putting into operation.

c) The place of performance for the obligation to deliver the window production plant is the [buyer]'s place of business in S.

The place of performance for the obligation to deliver the goods is governed by Article 31 CISG. According to this provision the contractual agreement prevails. In the present case, the [seller] had, according to the "Conditions of Sale", to assemble the plant and to put it into operation at the [buyer]'s place of business in S. This means that the [seller] was only able to perform his contractual obligations in S.

Contrary to the trial court's opinion, the fact that S. is the place of performance is not affected by the contractual clause "price calculated ex works Rimini". This clause only means that the [buyer] was to bear the costs for the transport from Rimini to S. The meaning of this clause is, in turn, limited by the express stipulation that the assembly and putting into operation at the [buyer]'s place of business is "inclusive".

2. As the trial court in the decision under appeal only had to decide on parts of the jurisdictional issues, the case is remitted to the court of first instance according to § 538(1) No. 2 ZPO. The Senate considered a decision on further issues by the Oberlandesgericht itself to be inappropriate (§ 540 ZPO).

Before a judgment on the merits it will be necessary to decide on the continuation of the proceedings according to the principle of strict priority under Article 21 of the Brussels Convention or according to Article 22 of the Brussels Convention. In this context, it will be particularly decisive whether the Tribunale di Rimini, in the oral hearing scheduled for 28 January 2000, will rule on its jurisdiction over the dispute pending before that court.

3. […] *[The concluding section of the decision deals with the interpretation of Article 21 of the Brussels Convention and is not translated here.]*