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Jurisdiction	U.S.A.
Tribunal	U.S. District Court for the Southern District of New York
Date of the decision	26 March 2002
Case no./docket no.	00-Civ934 (SHS)
Case name	*St. Paul Guardian Ins. Comp. v. Neuromed Medical Sys. & Support GmbH*

Opinion & Order

Stein, District J.

Plaintiffs St. Paul Guardian Insurance Company and Travelers Property Casualty Insurance Company have brought this action as subrogrees of Shared Imaging, Inc., to recover $285,000 they paid to Shared Imaging for damage to a mobile magnetic resonance imaging system («MRI») purchased by Shared Imaging from defendant Neuromed Medical Systems & Support GmbH («Neuromed»). Neuromed has moved to dismiss the complaint on two grounds, namely that (1) the forum selection clause of the underlying contract requires the litigation to take place in Germany and (2) pursuant to Fed.R.Civ.P. 12(b)(6), the complaint fails to state a claim for relief. In an Order dated December 3, 2001, this Court first found that the contractual forum selection clause did not mandate that the action proceed in Germany and second, held the rest of the motion in abeyance pending submissions by the parties on German law, which, pursuant to the underlying contract, is the applicable law. The parties have now submitted affidavits from German legal experts. 1

The crux of Neuromed's argument is that it had no further obligations regarding the risk of loss once it delivered the MRI to the vessel at the port of shipment due to a «CIF» clause included in the underlying contract. Plaintiffs respond that (1) the generally understood definition of the «CIF» term as defined by the International Chamber of Commerce's publication, Incoterms 1990, is inapplicable here and (2) the «CIF» term was effectively superceded by other contract terms such that the risk of loss remained on Neuromed. 2

Pursuant to the applicable German law – the U.N. Convention on Contracts for the International Sale of Goods – the «CIF» term in the contract operated to pass the risk of loss to Shared Imaging at the port of shipment, at which time, the parties agree, the MRI was undamaged and in good working order. Accordingly, Neuromed's motion to dismiss the complaint should be granted and the complaint dismissed. 3

Background

Shared Imaging, an American corporation, and Neuromed, a German corporation, entered into a contract of sale for a Siemens Harmony 1.0 Tesla mobile MRI. Thereafter, both parties 4

engaged various entities to transport, insure and provide customs entry service for the MRI. Plaintiffs originally named those entities as defendants, but the action has been discontinued against them by agreement of the parties. (Stipulation of Discontinuance dated Oct. 2, 2001.) Neuromed is the sole remaining defendant.

According to the complaint, the MRI was loaded aboard the vessel «Atlantic Carrier» undamaged and in good working order. (Compl. ¶ 32.) When it reached its destination of Calmut City, Illinois, it had been damaged and was in need of extensive repair, which led plaintiffs to conclude that the MRI had been damaged in transit. (*Id*. ¶¶ 38, 39.) 5

The one page contract of sale contains nine headings, including: «Product;» «Delivery Terms;» «Payment Terms;» «Disclaimer;» and «Applicable Law.» (Feit Aff. Ex. 1.) Under «Product» the contract provides, the «system will be delivered cold and fully functional.» (*Id*.) Under «Delivery Terms» it provides, «CIF New York Seaport, the buyer will arrange and pay for customs clearance as well as transport to Calmut City.» (*Id*.) 6

Under «Payment Terms» it states, «By money transfer to one of our accounts, with following payment terms: US $ 93,000 – downpayment to secure the system; US $ 744,000 – prior to shipping; US $ 93,000 – upon acceptance by Siemens of the MRI system within 3 business days after arrival in Calmut City.» (*Id*.) In addition, under «Disclaimer» it states, «system including all accessories and options remain the property of Neuromed till complete payment has been received.» (*Id*.) Preceding this clause is a handwritten note, allegedly initialed by Raymond Stachowiak of Shared Imaging, stating, «Acceptance subject to Inspection.» (*Id*.; Stachowiak Aff. at 4.) 7

Discussion

Neuromed contends that because the delivery terms were «CIF New York Seaport,» its contractual obligation, with regard to risk of loss or damage, ended when it delivered the MRI to the vessel at the port of shipment and therefore the action must be dismissed because plaintiffs have failed to state a claim for which relief can be granted. Plaintiffs respond that the generally accepted definition of the «CIF» term as defined in Incoterms 1990, is inapplicable. Moreover, plaintiffs suggest that other provisions of the contract are inconsistent with the «CIF» term because Neuromed, pursuant to the contract, retained title subsequent to delivery to the vessel at the port of shipment and thus, Neuromed manifestly retained the risk of loss. 8

A. Legal Standards

In reviewing a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), a district court's role is to assess the legal feasibility of the complaint; it is not to weigh the evidence which might be offered at trial. See *Festa v. Local 3, Int'l Bhd. of Elec. Workers*, 905 F.2d 35, 37 (2d Cir. 1990); *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980); *Castellano v. City of New York*, 946 F.Supp. 249, 252 (S.D.N.Y. 1996). A motion to dismiss should not be granted unless «it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief.» *Staron v. McDonald's Corp.*, 51 F.3d 353, 355 (2d Cir. 1995) (quoting 9

Conley v. Gibson, 355 U.S. 41, 45–46 (1957)); *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992) (quoting *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991)).

B. Applicable Law

1. Rule 44.1

Pursuant to Fed.R.Civ.P. 44.1, determinations of foreign law are questions of law. The Court «may consider any relevant material or source» to determine foreign law, whether or not submitted by a party or admissible under the Federal Rules of Evidence.» Fed.R.Civ.P. 44.1. In short, under Rule 44.1, the court may «consider any material that is relevant to a foreign law issue, whether submitted by counsel or unearthed by the court's own research.» *Consorcio Rive, S.A. v. Briggs of Cancun, Inc.*, No. Civ. A. 99–2204, 2000 WL 1364243, at *2 (E.D. La. Sept. 20, 2000). 10

The parties have each submitted relevant opinions of German legal experts (Werkmeister Op.; Strube Op.; Werkmeister Reply Op.) and the Court has independently researched the applicable foreign law. On the basis of those submissions and analysis, the Court finds the expert opinion of Karl-Ulrich Werkmeister for the defendants to be an accurate statement of German law. 11

2. Applicable German Law

The parties concede that pursuant to German law, the U.N. Convention on Contracts for the International Sale of Goods («CISG») governs this transaction because (1) both the U.S. and Germany are Contracting States to that Convention, and (2) neither party chose, by express provision in the contract, to opt out of the application of the CISG. (Strube Op. at 2; Werkmeister Op. at 2.); See CISG, art. 1(1)(a), reprinted in 15 U.S.C.A. App.; see also *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052, 1998 WL 164824, at *4 (S.D.N.Y. Apr. 7, 1998); Larry A. DiMatteo, *The Law of International Contracting*, 206 (2000) (hereinafter Contracting). 12

The CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language. See Larry DiMatteo, 'The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings', *Yale J. Int'l L.* 111, 133 (1997). To that end, it is comprised of rules applicable to the conclusion of contracts of sale of international goods. See Annemieke Romein, *The Passing of Risk: A Comparison Between the Passing of Risk under the CISG and German Law* (Heidelberg, June 1999), at http://www.cisg.law.pace.edu/cisg/biblio/romein.html. In its application regard is to be paid to comity and interpretations grounded in its underlying principles rather than in specific national conventions. See CISG art. 7(1), (2); see also *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995). 13

Germany has been a Contracting State since 1991, and the CISG is an integral part of German law. See Romein, *supra*. Where parties, as here, designate a choice of law clause in their contract – selecting the law of a Contracting State without expressly excluding application of the CISG – German courts uphold application of the Convention as the law of the designated Con- 14

tracting state. See Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988–1994*, (citing OLG Koblenz 17 September 1993; OLG Köln 22 February 1994) at http://www.cisg.law.pace.edu/cisg/biblio/karollus.html; see also Werkmeister Op. at 2. To hold otherwise would undermine the objectives of the Convention which Germany has agreed to uphold.

C. CISG, INCOTERMS and «CIF»

«CIF,» which stands for «cost, insurance and freight,» is a commercial trade term that is defined in Incoterms 1990, published by the International Chamber of Commerce («ICC»). The aim of INCOTERMS, which stands for international commercial terms, is «to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade.» (Werkmeister Op. Ex. Incoterms 1990, at 106.) These «trade terms are used to allocate the costs of freight and insurance» in addition to designating the point in time when the risk of loss passes to the purchaser. DiMatteo, *supra*, *Contracting* at 188. INCOTERMS are incorporated into the CISG through Article 9(2) which provides that, **15**

> The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

CISG, art. 9(2), reprinted in 15 U.S.C.A. App.

At the time the contract was entered into, Incoterms 1990 was applicable. (Werkmeister Reply at 2). INCOTERMS define «CIF» (named port of destination) to mean the seller delivers when the goods pass «the ship's rail in the port of shipment.» (Werkmeister Op. Ex. Incoterms 1990 at 152.) The seller is responsible for paying the cost, freight and insurance coverage necessary to bring the goods to the named port of destination, but the risk of loss or damage to the goods passes from seller to buyer upon delivery to the port of shipment. (*Id*.) Further, «CIF» requires the seller to obtain insurance only on minimum cover. (*Id*. at 150.) **16**

Plaintiffs' legal expert contends that INCOTERMS are inapplicable here because the contract fails to specifically incorporate them. (Strube Op. at 9.) Nonetheless, he cites and acknowledges that the German Supreme Court (Bundesgerichtshof [BGH]) – the court of last resort in the Federal Republic of Germany for civil matters, see Karollus, *supra* – concluded that a clause «fob» without specific reference to INCOTERMS was to be interpreted according to INCOTERMS «simply because the [INCOTERMS] include a clause 'fob'.» (*Id*. at 8 (citing 18th June 1975, file Nr. VIII ZR 34/74, published in WM 1975 page 917).) **17**

Conceding that commercial practice attains the force of law under section 346 of the German Commercial Code (*Handelsgesetzbuch* [HGB]), plaintiffs' expert concludes that the opinion of the BGH «amounts to saying that the [INCOTERMS] definitions in Germany have the force of law as trade custom.» (*Id*. at 9.) As encapsulated by defendant's legal expert, «It is accepted under German law that in case a contract refers to CIF-delivery, the parties refer to the INCOTERMS rules....» (Werkmeister Op. at 7.) **18**

The use of the «CIF» term in the contract demonstrates that the parties «agreed to the detailed oriented [INCOTERMS] in order to enhance the Convention.» Neil Gary Oberman, 'Transfer of Risk From Seller to Buyer in International Commercial Contracts: A Comparative Analysis of Risk Allocation Under CISG, UCC and Incoterms', at http://www.cisg.law.pace.edu/cisg/thesis/Oberman.html. Thus, pursuant to CISG art. 9(2), INCOTERMS definitions should be applied to the contract despite the lack of an explicit INCOTERMS reference in the contract. 19

D. INCOTERMS, the CISG, and the Passage of Risk of Loss and Title

Plaintiffs argue that Neuromed's explicit retention of title in the contract to the MRI machine modified the «CIF» term, such that Neuromed retained title and assumed the risk of loss. INCOTERMS, however, only address passage of risk, not transfer of title. Charles Debattista, 'Incoterms and Documentary Practices', in *Incoterms 2000: A Forum of Experts* 63, 86 (2000). Under the CISG, the passage of risk is likewise independent of the transfer of title. See CISG art. 67(1). Plaintiffs' legal expert mistakenly asserts that the moment of «passing of risk» has not been defined in the CISG. (Strube Op. at 4.) Chapter IV of that Convention, entitled «Passing of Risk,» explicitly defines the time at which risk passes from seller to buyer pursuant to Article 67(1), 20

> If the contract of sale involves carriage of the goods and seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.

CISG, art. 67(1), reprinted in 15 U.S.C.A. App.

Pursuant to the CISG, «[t]he risk passes without taking into account who owns the goods. The passing of ownership is not regulated by the CISG according to art. 4(b).» Romein, *supra*. Article 4(b) provides that the Convention is not concerned with «the effect which the contract may have on the property in the goods sold.» CISG art. 4(b). Moreover, according to Article 67(1), the passage of risk and transfer of title need not occur at the same time, as the seller's retention of «documents controlling the disposition of the goods does not affect the passage of risk.» CISG art. 67(1). 21

Had the CISG been silent, as plaintiffs' expert claimed, the Court would have been required to turn to German law as a «gap filler.» (Werkmeister Op. at 2; Strube Op. at 4.) There again, plaintiffs' assertions falter. German law also recognizes passage of risk and transfer of title as two independent legal acts. (Werkmeister Reply Op. at 3.) In fact, it is standard «practice under German law to agree that the transfer of title will only occur upon payment of the entire purchase price, well after the date of passing of risk and after receipt of the goods by the buyer.» (*Id*. at 7.) Support for this proposition of German law is cited by both experts. They each refer to section 447 of the German Civil Code (*Bürgerliches Gesetzbuch* [BGB]), a provision dealing with long distance sales, providing in part – as translated by plaintiff's expert – that «the risk of loss passes to the buyer at the moment when the seller has handed the matter 22

to the forwarder, the carrier or to the otherwise determined person or institution for the transport.» (Strube Op. at 5; see also Werkmeister Op. at 7.)

Accordingly, pursuant to INCOTERMS, the CISG, and specific German law, Neuromed's retention of title did not thereby implicate retention of the risk of loss or damage. 23

E. The Contract Terms

Plaintiffs next contend that even if the «CIF» term did not mandate that title and risk of loss pass together, the other terms in the contract are evidence that the parties' intention to supercede and replace the «CIF» term such that Neuromed retained title and the risk of loss. That is incorrect. 24

1. «Delivery Terms»

Citing the «Delivery Terms» clause in the contract, plaintiffs posit that had the parties intended to abide by the strictures of INCOTERMS there would have been no need to define the buyer's obligations to pay customs and arrange further transport. (Strube Op. at 13 ¶ 2.23(a–b).) Plaintiffs' argument, however, is undermined by Incoterms 1990, which provides that «[i]t is normally desirable that customs clearance is arranged by the party domiciled in the country where such clearance should take place.» (See Werkmeister Op. Ex. Incoterms 1990 at 109.) The «CIF» term as defined by INCOTERMS only requires the seller to «clear the goods for export» and is silent as to which party bears the obligation to arrange for customs clearance. (*Id*. at 151.) The parties are therefore left to negotiate these obligations. As such, a clause defining the terms of customs clearance neither alters nor affects the «CIF» clause in the contract. 25

2. «Payment Terms»

Plaintiffs also cite to the «Payment Terms» clause of the contract, which specified that final payment was not to be made upon seller's delivery of the machine to the port of shipment, but rather, upon buyer's acceptance of the machine in Calumet City. These terms speak to the final disposition of the property, not to the risk for loss or damage. INCOTERMS do not mandate a payment structure, but rather simply establish that the buyer bears an obligation to «[p]ay the price as provided in the contract of sale.» (*Id*. at 151.) Inclusion of the terms of payment in the contract does not modify the «CIF» clause. 26

3. The Handwritten Note

Finally, plaintiffs emphasize the handwritten note, «Acceptance upon inspection.» (Feit Aff. Ex. 1.) Based upon its placement within the contract and express terms, the note must serve to qualify the final clauses of the «Payment Terms,» obliging buyer to effect final payment upon acceptance of the machine. (*Id*.) As defendant's expert correctly depicts, «A reasonable recipient, acting in good faith, would understand that the buyer wanted to make sure that receipt of the GOOD should not be construed as the acceptance of the buyer that the GOOD is free of defects of design or workmanship and that the GOOD is performing as specified. This addition does not relate to the place of delivery.» (Werkmeister Reply Op. at 3.) Accordingly, 27

despite plaintiffs' arguments to the contrary, the handwritten note does not modify the «CIF» clause; it instead serves to qualify the terms of the transfer of title.

The terms of the contract do not modify the «CIF» clause in the contract such that the risk of loss remained with Neuromed. The fact remains that the CISG, INCOTERMS, and German law all distinguish between the passage of the risk of loss and the transfer of title. Thus, because (1) Neuromed's risk of loss of, or damage to, the MRI machine under the contract passed to Shared Imaging upon delivery of the machine to the carrier at the port of shipment and (2) it is undisputed that the MRI machine was delivered to the carrier undamaged and in good working order, Neuromed's motion to dismiss for failure to state a claim is hereby granted. **28**

Conclusion

For the foregoing reasons, Neuromed's motion to dismiss for failure to state a claim is granted and the complaint is dismissed. **29**

SO ORDERED.