CISG-online 627	
Jurisdiction	Switzerland
Tribunal	Bundesgericht/Tribunal fédéral (Swiss Federal Supreme Court)
Date of the decision	11 July 2000
Case no./docket no.	4C.100/2000
Case name	*Gutta-Werke AG v. Dörken-Gutta Pol. sp. z o.o.*

Translation[*] *by Ruth M. Janal*[**]

COURT COMPOSITION. Federal judges Walter (President), Corboz, Klett, Rottenberg, Liatowitsch, Nyffeler and clerk of the Supreme Court Huguenin,

PARTIES: COUNSEL. In the matter of Defendant-Appellant 1. Dörken-Gutta Pol. SP.Z.O.O., ul. Szeligowska 42, 01-320 Warsaw, Poland, [buyer]; and Defendant-Appellant 2. Ewald Dörken AG, Wetterstrasse 58, 58313 Herdecke, Germany, both represented by attorney Alfred Gilgen, Kreuzstrasse 54, 8032 Zürich, Switzerland, versus Plaintiff-Respondent Gutta-Werke AG (joint-stock corporation), Tobel, 8345 Adetswil, Switzerland, [seller], represented by attorney Dr. Martin Burkhardt, Bleicherweg 58, 8027 Zürich, Switzerland, regarding local and international jurisdiction.

Background information and facts of the case

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Defendant-Appellant 1. of Austria is referred to as [buyer] and Defendant-Appellant 2. of Germany is referred to as [buyer's parent company]; the Plaintiff-Respondent of Switzerland is referred to as [seller]. Also, monetary amounts in Swiss francs are indicated by [Sf].

Translator's note on other abbreviations: culpa in contrahendo = liability for negligence in the course of contracting (pre-contractual liability); BGE = Entscheidungen des Bundesgerichts [Official Reporter of Cases of the Swiss Supreme Court]; IPRG = Bundesgesetz über das Internationale Privatrecht [Swiss Code on the Conflict of Laws]; Lugano Convention = EC EFTA Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters - Lugano, 16 September 1988; OG = Bundesgesetz über die Organisation der Bundesrechtspflege [Swiss Federal Code on Court Organization].

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A. 1
On 31 August 1999, the [seller], which has its place of business in Bäretswil, [Switzerland], filed an action against [buyer], a Polish company with seat in Warsaw, and [buyer's parent company], which is seated in Herdecke [Germany]. The [seller] requests that the defendants be ordered to pay Sf [Swiss francs] 641,026.54 with 5% interest from 14 July 1999.

[Seller] submits that it repeatedly delivered building materials to the [buyer] in the second half of the year 1998 and in the beginning of 1999. Despite payment reminders, the respective invoices were not paid. [Seller] claims that the [buyer's parent company] is liable for culpa in contrahendo [*], i.e., for «raising trust regarding the group conduct of the parent company.» [Seller] brings forward an agreement dated 14/20 December 1994 between the Dutch Elda Holding B.V. - a business syndicate to which the [seller] belongs - and the [buyer's parent company]. According to that agreement, the [buyer's parent company] was under a duty to re-finance the [buyer]. This obligation was similar to a guarantee and was not honored by the [buyer's parent company]. 2

With submissions brief of 10 January 2000, the [buyer] and [buyer's parent company] raised the objection of lack of local jurisdiction; they submit that - contrary to the [seller]'s assertion - the [seller] and the [buyer] had not formed a valid forum selection clause. [Buyer] and [buyer's parent company] plead that it is also not true that the courts of the Canton of Zürich possess jurisdiction as the courts for the place of performance of the obligation in question. [Buyer] and [buyer's parent company] submit that the [seller]'s syndicate and the [buyer's parent company] orally formed a principle agreement on 4 March 1999 in Zürich. Following that agreement, the parties' co-operation in Poland would end and the [buyer's parent company] would take over 100% ownership of the [buyer]. [Translator's note: As is revealed by [buyer]'s name, the [seller]'s syndicate previously held a share in the [buyer]]. Additionally, the parties agreed that all pending claims between the various companies of the two groups, on the one hand, and the [buyer], on the other hand, would be compared as of the date of 30 June 1999. The claims were to be settled either by set-off or by reciprocal payment. The [buyer] and [buyer's parent company] submit that this agreement supersedes the different places of performance resulting from the various contracts and leads to only two places of performance: Amsterdam, for accounts receivable by the [seller]'s syndicate, and Herdecke, for debts payable to the [buyer]'s company group. 3

Finally, the [buyer] and [buyer's parent company] argue that the courts of the Canton of Zürich are not the competent forum, either as courts of the place of performance of the obligation in question, or as courts of the place where the breach occurred, even if one followed the [seller]'s assertion that the joint-venture contract of 14/20 December 1994 was decisive on this matter. 4

The decision of the Court of First Instance and the pleadings of parties

B. 5
On order of 22 February 2000 the Commercial Court of Zürich [Court of First Instance] dismissed the objection of lack of jurisdiction raised by the [buyer] and [buyer's parent company].

The [Court of First Instance] denied that a forum selection clause in the meaning of Art. 17(1)(c) of the Lugano Convention [*] had been formed between the [seller] and the [buyer]. Nonetheless, the [Court of First Instance] held that it possessed local and international jurisdiction regarding both the [buyer] and the [buyer's parent company] as the court of the place of performance of an obligation under a contract. The [buyer] and [buyer's parent company] appeal to the Supreme Court against this order of the [Court of First Instance]. Regarding the order that they reimburse the [seller] for the cost of the proceeding in the first instance, [buyer] and [buyer's parent company] raised an appeal at the Zürich Court of Cassation. That appeal is still pending. 6

C. 7
With their present appeal, the [buyer] and [buyer's parent company] request the Supreme Court to:

- Reverse the decision of the Court of First Instance of 22 February 2000 in its entirety,
- Declare that the Court of First Instance is incompetent, and
- Order the Court of First Instance to dismiss the [seller]'s claim.

In the alternative, the [buyer] and [buyer's parent company] request the Supreme Court to refer the matter back to the Court of First Instance to make further factual findings following the Supreme Court's considerations.

The [seller] requests that the appeal be dismissed. 8

The Supreme Court considers:

1. 9
The order of the Zürich Court of First Instance is an independent decision of the High Court of a Canton regarding its own jurisdiction. Following Art. 49(1) OG [*], an appeal against such a decision is possible if the appellant argues that federal law concerning the local or international jurisdiction has been violated. With their appeal, the [buyer] and [buyer's parent company] maintain their objection to the local and international jurisdiction of the Court of First Instance and claim that Court violated federal competence rules (Art. 113 IPRG [*], Art. 5 no. 1 and 3 and Art. 17 of the Lugano Convention [*]). As the sum in dispute exceeds the Sf 8,000.00 required by Art. 46 OG, the appeal is admissible.

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Regarding the relationship between the [seller] and the [buyer]:

3. 14
In contrast to Germany and Switzerland, Poland - where the [seller] has its place of business - is not a party to the Lugano Convention (The Lugano Convention entered into force in Switzerland on 1 January 1992 and in Germany on 1 March 1995). However, both Poland and Switzerland are Contracting States to the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG). The Convention entered into force in Switzerland on 1 March 1991 and in Poland on 1 June 1996.

According to CISG Art. 1(1), the Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. It is not in dispute that the cause for the deliveries of building material in the years 1998 and 1999 were sales contracts between the [seller], with place of business in Switzerland, and the [buyer], whose seat is in Poland. Since the requirements of CISG Art. 1(1)(a) are met, the Convention finds direct application, without recourse to the Swiss rules of private international law (cf. Ferrari in Schlechtriem (ed.), Kommentar zum Einheitlichen UN-Kaufrecht, 3d ed., Art. 1 n. 63; Siehr in Honsell (ed.), Kommentar zum UN-Kaufrecht, preamble n. 4 and Art. 1 n. 2; Staudinger/Magnus, Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht, Art. 1 n. 85; Neumayer/Ming, Convention de Vienne sur les contrars de vente internationale de marchandises, Commentaire, p. 42, Art. 1 n. 6; Witz/Salger/Lorenz, Internationales Einheitliches Kaufrecht, Art. 1 n. 11; Jean-Paul Vulliéty, Le transfert des risques dans la vente internationale, doctoral thesis, Geneva 1998, p. 47). The CISG provides the substantive sales law for contracts for the international sale of goods, insofar as it contains provisions settling such matters (CISG Art. 7(2)). The rules of the Convention supersede the national law (cf. Siehr, op. cit., Art. 1 n. 1; Keller/Siehr, Kaufrecht, 3d ed., p. 156 and p. 178; Ferrari, op. cit., before Arts. 1 - 6 n. 24; Witz/Salger/Lorenz, op. cit., Art. 1 n. 12). However, the Convention itself does not regulate procedural matters and, consequently, the CISG does not provide for jurisdiction (Karollus in Honsell (ed.), Kommentar zum UN-Kaufrecht, Art. 31 n. 49 and Schnyder/Straub, ibid, Art. 57 n. 26). The jurisdiction of the competent court is to be determined according to the rules of private international law of the forum State (Neumayer/Ming, op. cit., p. 250, Art. 31 n. 14). 15

Following Art. 4(1) of the Lugano Convention, the Swiss IPRG [*] applies in this case. According to IPRG Art. 113, a claim may be filed with the Swiss court of the place of performance of the obligation in question if the obligation is to be performed in Switzerland, even though the defendant has neither a place of residence, nor a place of business in Switzerland. Under CISG Art. 57(1)(a), if the buyer is not bound to pay the price at any other particular place, it must pay it to the seller at the seller's place of business. In the present case, payment was not to be made against the handing over of the goods or of documents (CISG Art. 57(1)(b), regarding this provision cf. BGE [*] 122 III 43 E. 3c, p. 46). The Court of First Instance, therefore, correctly held that [seller] was entitled to sue at the court of the [seller]'s place of business. **16**

Consequently, the Supreme Court does not need to ascertain whether the Court of First Instance would also be the competent court following a forum selection clause under Art. 17(1)(c) of the Lugano Convention, an argument that is still maintained by the [seller]. **17**

[The Supreme Court finds that the Court of First Instance also possesses jurisdiction under Art. 5 no. 1 of the Lugano Convention regarding the [seller]'s claim against the [buyer's parent company.]

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Order

5. **26**
For these reasons, the appeal is dismissed and the decision of the Court of First Instance is affirmed. […]