

# District Court (*Landgericht*) Gießen

17 December 2002

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## INTERLOCUTORY JUDGMENT

The District Court of Gießen has jurisdiction to decide the issue, internationally and locally.

### Facts of the case

[Buyer] claims avoidance of a sales contract and compensatory damages on the basis of the CISG.

[Buyer] ordered 500,000 warning triangles from [seller] on 2 December 1999 by fax. Answering with another fax on 6 December 1999, [seller] accepted the offer. Later on, both parties agreed to reduce the order to 86,060 units. The background of the order was Spain introduced an obligation to have two warning triangles in each vehicle.

The warning triangles were delivered until 7 July 2000. [Buyer] sold 10,460 units, but also gave notice of defects. [Buyer], [seller] and [seller's supplier] agreed upon a subsequent delivery of 40,000 units. Having received this additional supply of 40,000 units of warning triangles, on 4/5 August 2001 [buyer] learned about a decree of the Kraftfahrt-Bundesamt dated 17 May 2001, which prohibits selling and using warning triangles of that very type within the Federal Republic of Germany.

[Buyer] now seeks avoidance of the contract and compensation of storage costs in warehouse.

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\* All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Germany is referred to as [buyer] and the Defendant of Netherlands is referred to as [seller].

Translator's note on abbreviations: **BGH** = *Bundesgerichtshof* [Federal Court of Justice, the highest German Court in civil and criminal matters]; **BGHZ** = *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [Official Reporter of Decisions of the German Federal Supreme Court for Civil Matters]; **v. Caemmerer/Schlechtriem** = *Kommentar zum Einheitlichen UN-Kaufrecht - CISG* -, München 1990 [Commentary on the CISG, Munich 1990]; **EuGVVO** = *Verordnung Nr. 44/2001 des Rates vom 22.12.2000 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen* [Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters]; **Kraftfahrt-Bundesamt** = Federal Motor Transport Authority; **OLG** = *Oberlandesgericht* [Regional Court of Appeals]; **RIW** = *Recht der Internationalen Wirtschaft* [Legal Journal on the Law of International Commerce]; **Soergel, Staudinger** = [Commentaries on the German Civil Code (BGB), incorporating the CISG]; **Zöller** = [Commentary on the ZPO]; **ZPO** = *Zivilprozessordnung* [German Code on Civil Procedure].

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### **- [Buyer's position]**

[Buyer] alleges the posting to [seller] of an additional letter to confirm the order of 2 December 1999. [Buyer]'s standard purchasing conditions are printed on the reverse of this letter. They providing that, as far as the delivery is concerned, the place of performance for both parties shall be the place of receipt of the goods; when it comes to the payment, the place of performance shall be Linden [Germany]; Gießen shall be the legal venue. Buyer alleges what [seller] knew these standard terms due to the business connection which had existed since 1994, during which time orders had always been confirmed by mail.

Buyer alleges that, because of their defects and their deviation from the quality agreed upon in the contract, the warning triangles can neither be sold in Germany nor within the European Union.

[Buyer] seeks to have [seller] directed to pay [buyer] Euro 202,839.72 plus interest since 1 May 2000 contemporaneously with the retransfer of 69,600 units of warning triangles of the type [...].

### **- [Seller's position]**

[Seller] challenges [the court's] international jurisdiction, and subsidiarily submits that the case should be dismissed on the merits.

[Seller] takes the view that German courts are not competent to hear this case. [Seller] alleges lack of familiarity with [buyer]'s conditions of trade in this transaction and that [seller] was not familiar with them in former business contacts, which have only occurred occasionally and not as a regular course of business. There were only five commissions. [Seller] always carried out the deliveries under the understanding that its own standard terms and conditions applied. Furthermore, even if the order was confirmed by mail, this occurred after [seller] had already accepting the contract on 6 December 1999.

Moreover, regarding payment of the purchase price, the place of performance is the Netherlands, which results from Arts. 57, 58 CISG. This is also true when taking into consideration that a letter of credit has been arranged as a safeguarding, which provided for the documents to be presented in the Netherlands.

In addition, a fundamental breach of contract cannot be shown, since the warning triangles could have been sold in Spain.

For further details, the Court refers to the parties' written pleadings and their appendices.

### **Reasoning of the Court**

The District Court of Gießen, invoked by [buyer], is competent to decide the lawsuit internationally and locally.

Because the parties dispute both jurisdiction and the substantive issues, while the reasonable justification of the petition will probably require further clarification of the matter, for the time being it seems adequate to rule on the jurisdiction of the court in an interlocutory judgment (§ 303 ZPO). The fact that no separate court hearings concerning the jurisdiction of the court

(§ 280(1) ZPO) have been ordered does not hinder such a decision. This order is not a mandatory necessity (Zöller, *ZPO*, 23. ed., § 280 at margin note 3).

The international jurisdiction of the German courts and the local jurisdiction of the District Court of Gießen result from the place of performance of [seller]'s obligations – the performance of which is claimed now – being at the [buyer]'s place of business which is taken to be the place of the company's registration.

The EuGVVO is to be utilized, for the action has been filed after its entry into force on 1 March 2002 (Art. 76, Art. 66(1)). It is not contested that both parties reside in a member state of the European Union; and the CISG applies since a contract of sales is in dispute (Art. 1 CISG).

According to Art. 5(1)(a) EuGVVO, the legal venue of the place of performance shall prevail. That would be in Linden [Germany], so that [seller] can be sued for avoidance of the contract and compensation of storage costs in the Federal Republic of Germany before the District Court of Gießen.

Using Arts. 57 and 81 CISG, the place of performance is Linden in this case.

The Court joins the opinion commonly adapted nowadays that for place of performance of an obligation to repay the purchase price, an obligation not specifically regulated in the CISG, one may look to Art. 57(1)(a) CISG by way of analogy. That Article provides for payment of the purchase price at the obligee's place of business, where not otherwise specified in the contract. And where the contract or the CISG does not otherwise provide. Article 31(c) CISG provides that the obligor's delivery obligation is satisfied by placing the goods at the obligee's disposal at the obligor's place of business. The place of performance of primary obligations can be shifted (Staudinger, *CISG*, 1999, Art. 81 at margin note 19; Soergel, *CISG*, 13. ed., Art. 81 CISG at margin note 10; v. Caemmerer/Schlechtriem, *CISG*, 2nd ed., Art. 81 at margin note 18 with further references provided at each citation; see also OLG Düsseldorf [2 July 1995], *RIW* 1993, 845).

Under ULIS [the 1964 Hague Sales Convention antecedent to the CISG], the BGH (BGHZ 78, 257) has regarded the seller's place of business as the place of performance for a repayment of the purchase price. However, we hold that the contrary opinion commonly adapted nowadays should be preferred, since looking to the obligor's place of business as the place of performance does not seem logical in a post-avoidance situation.

When the obligee's place of business has to be regarded as the place of performance, this must also apply to a claim for compensatory damages (OLG Düsseldorf, *ibidem*).

We regard it as unnecessary to rule on whether, in addition, the parties may have validly stipulated the competence of the District Court of Gießen.