

CISG-online 1644

Jurisdiction	Germany
Tribunal	Oberlandesgericht Oldenburg (Court of Appeal Oldenburg)
Date of the decision	20 December 2007
Case no./docket no.	8 U 138/07
Case name	<i>Industrial tools case</i>

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Privat- und Wirtschaftsrecht der Universität Heidelberg***

*Daniel Nagel, editor****

Appellate Court (Oberlandesgericht) Oldenburg

20 December 2007 [8 U 138/07]

[Judgement]

1. The appeal is dismissed.
2. The [Buyer] has to bear the costs of the proceedings.
3. The judgment is provisionally enforceable. The [Buyer] is entitled to prevent enforcement by depositing a security in the amount of 120 % of the amount to be enforced, as long as the [Seller] does not provide security in the same amount.

* All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of Germany is referred to as [Buyer] and Defendant of Spain is referred to as [Seller]. Amounts in the uniform European currency (*Euro*) are indicated as [EUR].

For reasons of clarity, headings in brackets have been added, these are not included in the original text.

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[Summary of facts and case history]

Plaintiff [Buyer] of Germany is engaged in the development and construction of motor vehicles. Defendant [Seller] of Spain is a producer of industrial tools, which are used for the construction of various types of motor vehicles.

On 11 May 2005, [Buyer] ordered from [Seller] a number of tools for the production of door frames and car wings. The corresponding orders stated that [Buyer]'s standard terms should become part of the contract, but the standard terms were not submitted with the orders. Para. 292 of [Buyer]'s standard terms contains a choice of law clause in favor of German law as well as an exclusion of any provisions of German private international law and the CISG. Para. 295 contains a choice of forum clause, establishing exclusive jurisdiction in Osnabrück, Germany. However, the clause provides that [Buyer] may sue the contracting partner at its seat, as well.

In the subsequent course of performance of their contract, there were a number of delays and disagreements between the parties on the conformity of the goods with the contract. The parties entered into additional agreements in order to resolve their conflict (agreement of 26 May 2005 concerning the car wings and agreement of 8 July 2005 concerning the door frames). However, this did not successfully remedy the existing disputes.

By letter of 3 August 2006, [Buyer] claimed damages from [Seller] in the amount of Euros EUR 1,985,440 on the basis of non-performance of [Seller]'s contractual obligations. Subsequently, [Buyer] brought an action against [Seller] before the District Court (*Landgericht*) Osnabrück and claimed the sum of EUR 2,019,440. In its judgment of 22 June 2007, the District Court approved its jurisdiction to consider the dispute, but dismissed [Buyer]'s action on the merits.

[Buyer] brought an appeal before the Appellate Court (*Oberlandesgericht*) Oldenburg, arguing that the District Court had made various errors in its legal assessment of the factual context and was therefore wrong in dismissing the action.

SUMMARY OF REASONING OF THE COURT

The Court concludes on appeal that the District Court (*Landgericht*) Osnabrück did not have international jurisdiction to adjudicate the present dispute. Consequently, [Buyer]'s action has to be dismissed as inadmissible from the outset. The Court emphasises that the question of international jurisdiction must be considered *ex officio* even on appeal.

According to Art. 2(1) and 60(1) Council Regulation (EC) No. 44/2000 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), the general rule is that a person having its seat in a Member State shall be sued in the courts of that Member State. Pursuant to this rule, [Buyer] would have to sue [Seller] at its seat in Spain.

The Court goes on to explain that the parties have also failed to conclude a valid choice of forum agreement pursuant to Art. 23(1)(1) Brussels I Regulation, which might have established international jurisdiction of the courts of a different state. The formal requirements contained in Art. 23(1) Brussels I Regulation are intended to ensure that the existence of a choice of forum agreement between the parties can be actually and unambiguously determined in deviation from the statutory rules on jurisdiction (ECJ NJW 1977, 494 concerning the identical provision of Art. 17(1) of the formerly applicable Brussels Convention). The crucial factor in the present case is that [Buyer]'s standard terms containing the choice of forum clause were not actually presented to [Seller] at the time of the conclusion of the contract. The order form merely contained a reference to the standard terms. In the opinion of the Court, this is not sufficient for an agreement under Art. 23(1)(1) Brussels I Regulation.

[Expert from case text followed by further summary of court's reasoning]

In the context of the above reasoning, the Court makes the following reference to existing jurisprudence of the German Federal Supreme Court (*Bundesgerichtshof*) on the question of when standard terms are validly included in contracts governed by the CISG:

"The BGH (in WM 2002, 442 (444)) has stated that in respect to contracts which are governed by the CISG, a valid inclusion of standard terms requires that the party introducing the standard terms transmit them without further request to the other party or make them available by other means.

"This jurisprudence also applies to the present case. The parties have concluded 'contracts of sale of goods' in terms of Art. 1(1) CISG. This follows from the fact that [Seller] has been obliged upon the orders placed by [Buyer] to produce the tools using its own resources and make delivery to the latter. Art. 3(1) CISG provides that such contracts for the supply of goods to be manufactured or produced are to be considered sales in the meaning of Art. 1(1) CISG (*cf. Schlechtriem/Schwenzer/Ferrari*, CISG, 4th ed., Art. 1 margin number 24 and Art. 3 margin number 6). There are no indications to the effect that the exclusion contained in Art. 3(2) CISG applied in this case and [Buyer], who bears the burden of proof (*cf. Schlechtriem/Schwenzer/Ferrari*, Art. 3 para. 20), has not brought any evidence in this respect. Insofar as [Seller] was obliged under items 2 and 3 of the contracts of 26 May and 8 July 2005 to send technicians to instruct [Buyer] in respect to the use of the tools, this merely amounts to an obligation ancillary to the construction and delivery of the tools.

"Moreover, the choice of law contained in para. 292 of [Buyer]'s standard terms may exclude an application of the CISG only if these standard terms have become part of the contract with [Seller] (*cf. Schlechtriem/Schwenzer/Ferrari*, Art. 6 para. 17). However, recourse must be taken to the CISG in order to assess whether the requirements for a valid introduction of standard terms are fulfilled."

As a conclusion to this, the Court assumes that [Buyer] may not rely on the choice of forum clause contained in its standard terms because these terms have not been actually presented to [Seller] at the time of the conclusion of the contract. A mere reference or possibility of the other party to obtain the standard terms does not suffice to fulfill the requirements for a valid choice of forum agreement under Art. 23(1) Brussels I Regulation.

The Court continues to reason that the parties have also failed to reach a valid choice of forum agreement on the basis of an international commercial usage according to Art. 23(1)(3)(c) Brussels I Regulation.

Moreover, German courts do not gain international jurisdiction under Art. 5 No. 1(b) Brussels I Regulation, as it has not been established that the place of performance of [Seller]'s main obligation was at [Buyer]'s seat in Germany in the present case. The Court states that the place of performance for the purposes Art. 5 No. 1(b) Brussels I Regulation is determined through a factual test which applies, *inter alia*, to those contracts which come within the scope of application of the CISG. In the light of the existing agreements between the parties and the actual conduct shown in the course of the mutual performances, the Court concludes that the relevant places of performance were at [Seller]'s seat in Spain. This is due to the fact that, in particular, the contract concerning the delivery of tools for the door frames involved carriage of the goods in terms of Art. 31(a) CISG. If – as in the case at hand – the CISG is generally applicable, this provision may determine the place of delivery with relevance for Art. 5 Brussels I Regulation (*cf. Kropholler, Europäisches Zivilprozessrecht, 8th ed., Art. 5 Brussels I Regulation, margin number 49 with further references*). Art. 31(a) CISG refers to the place where the goods are handed over to the first carrier. In the present case, it is undisputed that this has occurred at the seat of [Seller] in Spain. Therefore, Art. 5 No. 1 Brussels I Regulation, which establishes an international jurisdiction at the place of performance (which in turn is to be determined on the basis of the place of delivery) does not entitle German courts to consider the present case

In addition, the Court explains that [Buyer] has failed to demonstrate that Art. 5 No. 3 Brussels I Regulation confers international jurisdiction on German courts on the basis of tort.

Finally, there is no international jurisdiction of German courts pursuant to Art. 24(1) Brussels I Regulation on the basis of [Seller] having entered an appearance before them, given that it had primarily contested international jurisdiction before the District Court (*Landgericht*) Osnabrück and that it has only argued on the merits in the alternative. Consequently, the Court concludes that Spanish courts have international jurisdiction to consider the dispute.