CISG-online 1703	
Jurisdiction	Germany
Tribunal	Landgericht Landshut (District Court Landshut)
Date of the decision	12 June 2008
Case no./docket no.	43 O 1748/07
Case name	*Material for metal covers case*

Translation[*] *by Daniel Nagel*[**]

Judgement

The [Seller]'s claim is dismissed.

The [Seller] bears the costs of the proceedings.

The judgment is provisionally enforceable by the [Buyer] against provision of a security deposit in the amount of 110% of the amount to be enforced.

Facts

The present dispute concerns claims arising out of a contract for the delivery of metallic slabs. 1

The [Seller] manufactures floor systems, ceiling systems and partition wall systems: The [Buyer] is the owner of an individual enterprise for interior fitting.

The [Seller] delivered various metallic slabs to the [Buyer]. The [Seller] issued order confirmations for the delivered material in dispute on 14 July 2006, on 31 May 2006 and on 22 August 2006 (exhibit K3 and K5) that contained the following clause in English: 2

«Place of delivery is A... place of jurisdiction is the Amtsgericht or the Landgericht in charge for the principal office of ... [...]»

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

Translator's note on other abbreviations: BGB = Bürgerliches Gesetzbuch [German Civil Code]; EGBGB = Einführungsgesetz zum Bürgerlichen Gesetzbuche [German Code on the Conflict of Laws]; EuGVVO = Verordnung 44/2001/EG über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung ausländischer Entscheidungen in Zivil- und Handelssachen vom 22.12.2000 [Regulation 44/2001/ EC «Brussels I»]; NJW = Neue Juristische Wochenschrift [German law journal]; ZPO = Zivilprozessordnung [German Code on Civil Procedure].

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None of these order confirmations has been signed by the [Seller]. In the course of negotiations between the parties in 2005, both the [Buyer] and Witness N signed a written document drafted in Italian on 14 June 2005 (exhibit A 1). This document had the following content: 3

«Offerta per sola fornitura di controsoffitti presso vostro cantiere, ..., dopo esecuzione campionatura approvata. [....]

GENERALE

[...] Tutte le quotazioni sonso comunque assoggettate alle nostre condizioni commerciali maggio 2004. (spedizione a richiesta).

PREZZI

I prezzi soni intesi franco cantiere di T... [...]

distinti saluti N. [...]»

This document had the signature of Witness N on every page and on the last page as well. Witness N acted as a representative of the [Seller] in the course of the contractual negotiations in spring 2005 and paid visits together with the [Buyer]. 4

Position of the Parties

Position of the [Seller]

The [Seller] alleges that the contracts had been concluded on the basis of the order confirmations and had thus included the clause in respect to the place of performance and the place of jurisdiction. These order confirmations had been signed by the [Buyer]. There had not been a contract prior to these in 2005. The offer of 14 June 2005 (B1) would not amount to a binding contract. The [Seller] had signed the contract prior to the modifications made by the [Buyer]. Witness N had not been authorized to accept a modified contract even if he had countersigned the contract subsequently. The place of performance had actually been in A, as the [Seller] had to organize the whole planning in A. 5

[…] 6

The [Seller] requests that the [Buyer] be held liable to pay EUR 30,642.64 plus 8% interest above the base interest rate. The interest should be due in respect to EUR 10,403.60 since 11 December 2006, in respect to 7,546.08 since 22 December 2006 and in respect to EUR 12,692.96 since 19 February 2007. 7

The [Seller] additionally requests the Court to hold that the [Buyer] is not entitled to any claims based on lack of conformity and that the [Buyer] is in particular not entitled to avoid the contract or to rescind the contract or to claim a reduction of the purchase price in respect to the effected delivery of metallic slabs.

Furthermore, the [Seller] requests the Court to hold that the [Buyer] is not entitled to any claims based on non-performance, breach of contract or delay, and that the [Buyer] is in particular not entitled to claim damages instead of performance or based on frustrated expenses in respect to an alleged contract for the delivery of further metallic slabs.

Position of the [Buyer]

The [Buyer] requests the dismissal of the [Seller]'s claim on the grounds of lack of international jurisdiction of the District Court Landshut.

The [Buyer] raised a counterclaim in the alternative in its written submission of 29 October 2007 (p. 24/34 of the appendix) in case the international jurisdiction of the District Court Landshut was accepted and modified its claim in its written submission of 31 January 2008. [Translator's note: this paragraph is mentioned prior to the [Seller]'s first request in the original text.] 8

In the alternative, the [Buyer] counterclaims that the [Seller] be held liable to pay EUR 13,818.38 plus 8% interest above the base interest rate in case the District Court Landshut had international jurisdiction since receipt of the claim.

In addition, the [Buyer] requests that in case the [Seller]'s claim was allowed that the [Seller] be held liable to pay a further EUR 30,642.64 to the [Buyer].

The [Buyer] alleges that the District Court Landshut would not have international jurisdiction. It purports that a contract had already been concluded between the parties on 14 June 2005 (appendix B 1). This contract had been drafted in Italian and had been the basis for the deliveries of the [Seller]. It was true that the contract contained a reference to the standard terms of the [Seller]; this clause, however, would be void. The standard terms of the [Seller] had additionally not been included in the order confirmations. These confirmations had not been drafted in Italian, which had been fixed by the parties as the contract language in their contract of 14 June 2005. This contract had contained an agreement in respect to the place of performance, which stipulated that the place of performance would be the building site of the [Buyer].

[Seller]'s response to [Buyer]'s counterclaim

The [Seller] requests the dismissal of the [Buyer]'s counterclaim [Translator's note: this paragraph is mentioned subsequently to the [Buyer]'s second request in the original text]

Reference is made to the protocol of 15 May 2008 (p.108/110) in respect to the results of the oral proceedings. Furthermore, reference is made to the written submissions of the parties in respect to their respective allegations.

Reasoning of the Court

The [Seller]'s claim is not admissible.

The District Court Landshut does not have international jurisdiction, as there is no German jurisdiction according to the applicable Regulation 44/2001/EC on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 20 December 2000 (EuGVVO [*]).

The subject matter (Article 1 EuGVVO), personal (Article 2 EuGVVO) and temporal (Article 66 EuGVVO) scope of application of the regulation are met. The present dispute on the payment for the delivery of goods can be qualified as a civil matter in the sense of Article 1 EuGVVO. An exception in the sense of Article 1 (2) EuGVVO is not present. The [Buyer] and the [Seller] are domiciled in different Member States of the European Community. The temporal scope of application is met according to Articles 66, 76 EuGVVO as the claim had been initiated in 2007. 9

The place of general jurisdiction of the [Buyer] is Italy according to Article 2 EuGVVO, as the [Buyer] is domiciled in Italy. International jurisdiction of German courts cannot be derived thereof. 10

The [Seller] is not able to base its claim in respect to the international jurisdiction of German courts on an effective agreement conferring jurisdiction according to Article 23 EuGVVO [*]. The agreement conferring jurisdiction which is included in the standard terms of the [Seller] does not meet the requirements of Article 23 EuGVVO. 11

The inclusion of a clause conferring jurisdiction in a contract by way of standard terms has to be determined autonomously according to Article 23 EuGVVO (cf. EuGH 9 December 2003 - 116/02; Gasser, margin number 51; Kropholler, Europäisches Zivilprozessrecht, 8th edition 2005, Article 23 EuGVVO, margin number 23 et seq.). Questions as to form and the intentions of the parties cannot be clearly separated within Article 23 EuGVVO in this respect (cf. Kropholler, loco citato, margin number 27). However, the requirements of the alternative contained in Article 23 EuGVVO have not been met. 12

There is no effective agreement in respect to the clause conferring jurisdiction according to Article 23(a) 1st alternative EuGVVO. 13

The reference to the standard terms of the [Seller] in the contract of 14 June 2006 does not amount to an effective agreement conferring jurisdiction, in particular, as neither party has stated the content of these standard terms. An effective inclusion of these standard terms into the contract would have required that these standard terms had been made available to the [Buyer] at the time of the conclusion of the contract (OLG Düsseldorf, WM 2000, 2193). However, this has undisputedly not been the case. 14

The requirement of a written agreement has additionally not been met by the fact that the standard terms had been printed on the order confirmations of 14 July 2006, 31 May 2006 and 22 August 2006 that have been submitted as appendix K 3 and K 5. 15

Contrary to the allegations of the [Seller], neither the order confirmation of 22 August 2006 nor the second part of appendix K 3, the order confirmation of 31 May 2006, has been signed by the [Buyer]. A written agreement has not been reached in this respect as the [Buyer] has not given its written consent to the standard terms. 16

Even the signed part of appendix K 3 does not meet the requirements of Article 23(a) 1st alternative EuGVVO [*]. It is true that the [Buyer] signed the order confirmation, which has been submitted as appendix K 3, and sent it to the [Seller]. However, a signature of the [Seller] cannot be found on this order confirmation. According to preceding jurisprudence of the Federal Supreme Court (BGH, NJW-RR 2005,150 in respect to the similar Article 17(1)(a) 1st alternative LuGÜ) a written agreement has not been reached if the party, which is put at a disadvantage by the agreement, signs the document and sends it back to the other party. Such an interpretation does not conform to the purpose and the sense of the requirement of a written form (BGH, loco citato). This is due to the fact that such an interpretation would lead to the fact that a written agreement conferring jurisdiction had to be accepted as soon as such a clause was sent to a contractual partner without having signed it first and then signed and sent back by the latter. This, however, is contrary to the interpretation of written form in general legal relations. In addition, it is contrary to the narrow interpretation of Article 23(1)(a) 1st alternative EuGVVO [*] as favored by the jurisprudence (cf. BGH, loco citato). 17

Even if the sending of the order confirmation was to be interpreted as an offer to modify the contract or as a new contractual offer including the clause conferring jurisdiction, which does not have to be decided in the present case, the document would not contain an effective written declaration of the [Seller], as required by preceding jurisprudence of the Federal Supreme Court. (cf. BGH, loco citato, juris, margin number 15). 18

Furthermore, there has not been an effective oral agreement in conjunction with a written confirmation in respect to the clause conferring jurisdiction according to Article 23(a) 2nd alternative EuGVVO [*]. The so-called «evidenced in writing» requires a prior oral conclusion of a contract by the parties including an agreement in respect to the place of jurisdiction obvious to both parties and thus the exchange of the respective legal declarations (cf. Kroppholler, loco citato, margin number 42). The [Seller] has failed to substantiate such an oral agreement in respect to the clause conferring jurisdiction. Moreover, the standard terms of the [Seller] have not been agreed upon in the contract of 14 June 2005 (see above) which could have been confirmed orally, as can already be seen from the fact that the reference to the standard terms of the [Seller] does not specify what clauses these standard terms do contain. 19

There has not been an effective agreement conferring jurisdiction according to Article 23(b) and (c) EuGVVO [*]. 20

Usages between the parties in the sense of Article 23(b) EuGVVO [*] have not been present according to the view of the Court. The requirements as set out by preceding jurisprudence of the Federal Supreme Court have not been met in this respect. According to the jurisprudence, usages can solely replace the requirement as to form but not the requirement to agree (cf. BGH, loco citato, juris, margin number 18). The continuous printing of a clause conferring jurisdiction onto order confirmation cannot replace such an agreement (Kropholler, loco citato, margin number 50; BGH, loco citato, juris margin number 18). The «order confirmations» that have been submitted by the [Seller] as appendix K3 and K5 can be qualified as such order confirmations. The term «order confirmation» already shows that there must have been a previous order. The [Buyer] named the contractual basis for the orders and the respective order confirmations as being the contract of 14 June 2005. 21

The Court is convinced that the contract of 14 June 2005 forms the basis for the subsequent orders and order confirmations. The validity and the conclusion of the contract have to be assessed according to the United Nation Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG). 22

The United Nation Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG) has to be applied to the contract of 14 June 2005. The law applicable to the main contract has to be assessed according to Article 28 EGBGB [*] as the parties have not chosen the applicability of a specific law. However, it is insofar irrelevant whether German or Italian law had to be applied. Due to the fact that the parties have not excluded the CISG, which is applicable in both states, and due to the fact that the Articles 27 et seq. EGBGB exclusively contain references to substantive law due to Article 35 EGBGB, the CISG has to be applied. Both Italy and Germany are Contracting States to the Convention (Article 1 CISG). The CISG has been applicable in Italy since 1991. An exclusion of the CISG in the sense of Article 2 CISG is not present. 23

The present contract represents at least a contract for the sale of goods to be manufactured or produced, namely metallic slabs for the building site of the [Buyer], in the sense of Article 3(1) CISG. The requirements of Article 3(2) CISG have not been met. The preponderant part of the obligation of the [Seller] is not to supply labor or other services, but to deliver the said metallic slabs. 24

The Court is convinced that the contract has effectively been concluded, and that, in particular, the [Seller] has been effectively represented by Witness N. 25

The contract of 14 June 2005 contains modifications in handwriting that have been signed by the [Buyer] on the last page. In addition, the last page contains a signature which has been present prior to the modifications according to the allegations of the [Seller]. Furthermore, the respective handwritten modifications have been signed. It has not been contested that the signatures on the document can be attributed to Witness N, who negotiated on behalf of the [Seller]. 26

The Court is convinced that Witness N has been effectively authorized to conclude the contract. 27

The CISG does not provide for the transfer of authority. In addition, there are no general principles for the interpretation of the CISG in this respect. 28

Hence, the transfer of authority has to be assessed according to German international private law, being the lex fori, according to Article 7(2) CISG. According to preceding jurisprudence, the place where the authority is used and, in respect to the apparent authority, the place where the apparent authority arises is decisive as regards the interpretation of the authority. (Kropholler, Internationales Privatrecht, 6th edition 2006, § 41(1) with further references; jurisprudence potentially also applies the place where the authority is used to the apparent authority, which, however, is irrelevant in the present case, as the respective places do not differ). The place where the authority which was transferred to Witness N by the [Seller] was used is Italy, wherefore Italian law has to be applied to interpret the transfer of authority. The 29

negotiations in respect to the contract of 14 June 2005 have been conducted in Italy. Thus, a reference to substantive law is present (Kropholler, loco citato, § 41(1) 4).

Witness N acted on behalf of the [Seller] at least with implied authority. 30

Italian law provides for the possibility of apparent authority as well. However, it thereby governs cases which are considered as a case of implied authority according to German law (cf. paper of Herbert Asam, Italienisches Handelsvertreterrecht vor deutschen Gerichten, <http://www.blume-asam.de/deutsch/info/Aufsatz_1_dt(Website).pdf>, in addition, footnote 71 with references to Italian jurisdiction). An implied authority is present in the present case. The [Seller] sent Witness N as a representative to conduct the negotiations. It is undisputed that Witness N has acted as a representative of the [Seller] prior to the conclusion of the contract in 2005. 31

The initial offer had been signed with «distinti saluti N... ». It has been impossible for the [Buyer] to know that Witness N has not been authorized to modify the contract, if this allegation was true, as the initial offer had already been compiled and signed by Witness N. 32

The standard terms have not effectively been included in the contract of 14 June 2005, wherefore this cannot be seen as a basis for the inclusion of the standard terms via the order confirmations. The inclusion of standard terms has to be assessed according to Article 14 CISG. It is hence not possible to refer to the national international private law (cf. Staudinger/Magnus, Neubearbeitung 2005, Article 14 CISG, margin number 40). Such an inclusion, however, requires that the addressee reasonably could have taken notice of these standard terms, which requires the addressor to send these standard terms or to make them available via any other means according to preceding jurisdiction (Staudinger/Magnus, loco citato, margin number 41 with further references). 33

This has not been the case. The contract merely referred to the standard terms. A transmission of these standard terms was only to be effected upon request. 34

Therefore, there has not been an effective inclusion of the standard terms on the basis of the contract of 14 June 2005 in conjunction with the order confirmations due to usages of the parties. It is undisputed that the parties have not had any prior contact. 35

The [Seller] failed to sufficiently substantiate a trade usage. The general submission cannot be seen as sufficient. This applies to both the inclusion of standard terms on the basis of trade usages and the acceptance of the principles on silence in respect to a commercial order confirmation in the course of the business of the parties between Germany and Italy. The [Seller] would have had to substantiate that there is a specific trade usage in respect to the sale of metallic slabs between Germany and Italy, which contained the conferral of jurisdiction to the place where the supplier is domiciled or the acceptance of the principles on silence in respect to a commercial order confirmation. Such a trade usage has neither been alleged nor is it apparent. 36

The international jurisprudence of the District Court Landshut can additionally not be based on the place of performance. In accordance with Article 5 No 1 EuGVVO [*],T has effectively been agreed on as the place of performance. 37

An agreement in respect to the place of performance takes precedence according to Article 5 No 1 EuGVVO, as can be seen form the phrase in Article 5 No 1b EuGVVO «unless otherwise agreed». The strict requirements of Article 23 EuGVVO only have to be applied in respect to an agreement on the place of performance in the sense of Article 5 No 1 EuGVVO, if this agreement is designed to avoid the requirements of Article 23 EuGVVO (cf. Kropholler, loco citato, Article 5 EuGVVO, margin number 35 et seq. with further references). 38

The law applicable to the main contract has to be assessed according to Article 28 EGBGB [*] as the parties did not agree on the application of a specific law. It does not have to be decided in this respect whether Italian or German law has to be applied. Due to the fact that the parties have not excluded the application of the CISG, which is applicable in both states, and due to the fact that the Articles 27 et seq. EGBGB solely contain references to substantive law, according to Article 35 EGBGB, the CISG has to be applied to the present case. (see above) 39

The parties agreed on the building site in T as the place of performance in the contract of 2005. This can be seen from an interpretation of the contract. At the very beginning of the contract the following phrase is mentioned: 40

«offerta per sola fornitura di controsoffitti presso vostro cantiere [...] -- dopo esecuzione campionatura approvata» [offer solely relates to the delivery of metallic slabs for your building site -- after execution of the authorized sampling].

On the last page of the contract the phrase «I prezzi sons intesi franco cantiere di T» [the prices include franco building site T] is mentioned in the section on PREZZI [prices]. 41

The interpretation of these stipulations leads to the assumption that T has been agreed on as the place of performance. 42

This place of performance could not be changed by the [Seller] by way of printing its standard terms onto the order confirmations. 43

The agreement in respect to a place of performance on the order confirmation has to be qualified as a standard term. The [Seller] prints this clause on every order confirmation. Thus the clause is designed to be used several times. The [Buyer] could not reasonably have anticipated the use of this clause (unexpected clause).

The test in respect to the inclusion of standard terms has to be generally assessed according to Article 14 et seq. CISG. The test in respect to the content of standard terms has to be assessed according to national law. 44

The question on which test has to be applied to an unexpected clause is disputed (cf. Staudinger/Magnus, Article 4 CISG, margin number 4 with further references; Münchner Kom- 45

mentar/Gruber, 5th edition 2008, Article 14, margin number 35). The qualification as a requirement in respect to the inclusion or as a question in respect to content has to be effected autonomously according to the Convention (cf. Staudinger/Magnus, loco citato). The Court agrees with the view that the assessment of an «unexpected clause» has to be effected on the basis of the test in respect to the inclusion of standard terms, as this represents a question of the exterior inclusion and not of the inner effectiveness.

The element of surprise can result from the circumstances of the inclusion, e.g., a «hidden» position in the contract (cf. Palandt/Heinrichs, §§ 305 c BGB [*], margin number 4 et seq. in respect to national German law) or the inclusion of a clause that is unexpected on the basis of the contractual negotiations, even though this clause might be typical in such contracts. **46**

The inclusion of the agreement in respect to a place of performance is barred by the fact that the clause is unexpected. **47**

According to Article 8 CISG in conjunction with the principle of good faith, it has to be considered in this respect, whether the clause differs from the expectation of the contractual partner to such an extent that the latter cannot reasonably be expected to have anticipated that such a clause might be included. (cf. Schelchtriem, Kommentar zum einheitlichen UN-Kaufrecht, 3rd edition 2000, Article 14 CISG, margin number 16 with footnote 104). The parties agreed on T as the place of performance in their contract of 14 June 2005. The agreement on A as the place of performance is completely contrary to this initial agreement. The [Buyer] cannot reasonably be expected to have anticipated that such a different clause would be included into the order confirmations. **48**

In addition, the clause had been printed in small type at the end of the page in conjunction with the postal address of the [Seller]. **49**

As the condition has not been met, the Court does not have to decide on the counter-claim, which has been raised in the alternative. **50**

The decision on costs is based on § 91(1) ZPO [*]. **51**

The decision on the provisional enforceability is based on § 709 ZPO.