CISG-online 1716	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Karlsruhe (Court of Appeal Karlsruhe)
Date of the decision	12 June 2008
Case no./docket no.	19 U 5/08
Case name	*Remote display devices case*

Translation[*] by Daniel Nagel[**]

Judgement

The judgment of the District Court (Landgericht) Freiburg of 4 December 2007 is revoked. The [Seller]'s claim is dismissed.

The [Seller] has to bear the costs of the proceedings

The judgment is provisionally enforceable

Further appeal (Revision) is not allowed

Facts

The present dispute concerns the international jurisdiction in respect to claims for payment as regards the manufacturing and delivery of technical devices (remote indication devices).

The [Buyer] ordered two remote indication devices from the [Seller] on 23 March 2006 stating that «these should be delivered to our premises until on 18 April 2006.» The [Seller] sent an order confirmation on 28 March 2006 indicating that the delivery would be effected via DPD [Translator's note: DPD = German Parcel Service]. The remote indication devices were manufactured by the [Seller] in E. according to a prior order of the [Buyer] and were delivered to

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff-Appellee of Germany is referred to as [Seller] and the Defendant-Appellant of Austria 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]; EuGVO = 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»]; IPR = Internationales Privatrecht [Code of Private International Law / Conflict of Laws]; NJW = Neue Juristische Wochenschrift [German law journal]; ZPO = Zivilprozessordnung [German Code on Civil Procedure].

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the domicile of the [Buyer] in Austria on 20 April 2006. The [Buyer] accepted the delivery. Two logotypes for the remote indication devices, which had been ordered subsequently, were delivered to the [Buyer] by DPD. In respect to the factual basis, reference is made to the judgment of 4 December 2007 of the District Court of Freiburg, the Court of First Instance (§ 540 (1) No. 1 ZPO [*]).

Judgement of the Court of First Instance

The Court of First Instance assumed it had international jurisdiction in respect to the present case. It allowed the claim for payment of the purchase price, which was based on undisputed facts. It held that it was true that it could be doubted, whether there had been an effective agreement in respect to the place of jurisdiction. However, there was a specific jurisdiction according to Article 5 (1b) second hyphen EuGVO [*], which provided for the place where services are provided as the place of performance, as the main obligation under the contract would be the complex manufacturing of customized devices. The Court held that the set-off against claims for damages which had been brought forward by the [Buyer], had not been sufficiently substantiated.

Position of the Parties in the Appellate Proceedings

Position of the [Buyer]

The [Buyer] appeals against the judgment of the Court of First Instance. It alleges that the contract for the supply of goods to be manufactured or produced had to be qualified as a contract for the sale of goods according to Article 5 (1b) first hyphen EuGVO [*]. The interpretation of Article 5 (1b) EuGVO could be based on the Directive on certain aspects of the sale of consumer goods and associated guarantees 1999/44/EC as well as in particular on the CISG. The fact that the present contract had to be qualified as a contract for the sale of goods could be derived from Article 3 CISG, which would match Article 1 (4) of Directive 1999/44/EC.

The [Buyer] alleges that the Appellate Court was not correctly manned.

The [Buyer] requests, that the judgment of the District Court Freiburg of 4 December 2007 -- 8 O 109/07 -- be revoked and that the claim be dismissed.

Position of the [Seller]

The [Seller] requests the dismissal of the appeal.

It alleges that the contract could not be qualified as a contract for the sale of goods in the sense of the EuGVO [*]. The manufacturing process would represent the main obligation -- a provision of services in the broader European sense. Directive 1999/44/EC could not be used as a basis for the interpretation of Article 5 (1) EuGVO. Recourse to the CISG would only be possible after it had been ascertained that a contract for the sale of goods is present.

Reasoning

The [Buyer]'s appeal is admissible and justified.

However, the allegation that the Senate [Chamber of this Court] in question had not been correctly manned is not correct. This Senate is correctly manned due to the assignment according to the rotation as regards the organizational chart 2008 of the Appellate Court Karlsruhe.

The claim of the [Seller] has to be dismissed as inadmissible, as the District Court Freiburg has no jurisdiction over the present case. The case is governed by the Regulation 44/2001/ EC «Brussels I» (EuGVO). German courts have neither jurisdiction according to an effective agreement nor according to Article 5 (1) EuGVO [*].

There has not been any agreement in respect to the place of jurisdiction according to Article 23 (1) EuGVO.

An agreement as required by both Article 23 (1a) and Article 23 (1b) EuGVO, has not been ascertained as the Court of First Instance correctly held. The [Buyer] referred in its order to M in Austria as the place of jurisdiction as can be seen from the order form of 23 March 2006 at the bottom, whereas the [Seller] accepted the order according to its own standard terms of sale which provide for the domicile of the [Seller] as the place of jurisdiction. The tacit acceptance of the order confirmation by the [Buyer] cannot be interpreted as an agreement to the standard terms of sale of the [Seller]. Trade usages of the parties thus do not have to be considered.

Contrary to the assumption of the Court of First Instance, German courts do not have jurisdiction according to Article 5 (1b) second hyphen EuGVO. The contract of the present case has to be qualified as a contract for the sale of goods in the sense of Article 5 (1b) first hyphen and cannot be qualified as a contract for the provision of services in the sense of Article 5 (1b) second hyphen EuGVO [*].

Both the term «sale of (movable) goods» and the term «provision of services» according to Article 5 (1b) EuGVO [*] have to be assessed autonomously from a procedural point of view, i.e., according to the purpose and the system of the EuGVO [*] (OLG Köln, OLGR 2005, p. 380; OLG Hamm, OLGR 2006, p. 327; Kropholler, Europäisches Zivilprozessrecht, 8th ed. 2005, Article 5 margin number 38). Both terms have to be interpreted broadly (Auer, in Geimer/Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen, volume 1, part B Article 5 margin numbers 52 and 56).

Contracts for the sale of goods are contracts for exchange which require the seller to deliver the goods as well as to transfer the property in the goods and the buyer to pay the purchase price agreed on as well as to accept the goods. Article 5 (1b) comprises all contracts for the sale of movable goods, their subtypes and in general contracts for the sale of goods that are combined with the provision of services as well, in particular contracts for the supply of goods to be manufactured or produced. As a sole exception to this, contracts for the supply of goods to be manufactured or produced have to be qualified as contracts for the provision of services if the obligation to provide services is more important than the obligation arising out of the contract for the sale of goods and has hence to be interpreted as the characteristic perfor-

mance of the contract. (OLG Köln, OLGR 2005, p. 380; Kropholler, Europäisches Zivilprozessrecht, 8th ed. 2005, Article 5 margin number 8; Leible, in Rauscher, Europäisches Zivilprozessrecht, 2nd ed. 2006, Article 5 margin number 50).

This can in particular be derived from the fact that the Convention on Contracts for the International Sale of Goods (CISG) can be used as a basis for the interpretation of the term «sale of movable goods». It provides in Article 3 that contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. (Schlosser, EU Zivilprozessrecht, 2nd ed. 2003, Article 5 margin number 10a, 10b; Leible, in Rauscher, Europäisches Zivilprozessrecht, 2nd ed. 2006, Article 5 margin number 46; Auer, in Geimer/Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen, volume 1, part B Article 5 margin number 52).

In the present case, the contract is a typical contract for the supply of goods to be manufactured or produced, which requires the seller to produce the goods first and to deliver them and transfer property in the goods later. As the [Seller] had to manufacture the goods using its own material, a contract for the sale of goods can be assumed in the light of Article 3 CISG according to Article 5 (1b) first hyphen EuGVO[*].

The component in respect to a contract for the sale of goods, namely, the delivery of goods and the transfer of property in the goods against payment of the purchase price, is more important -- even on the basis of an evaluating scrutiny. Contrary to the typical contracts for the provision of services -- such as a consultancy contract, tan agency contract, or a contract for services -- the provision of services in the present case, namely, the manufacturing of a product, is second to the contract for the sale of goods -- even though this might be expensive and time consuming for the [Seller].

The case the Appellate Court Köln had to deal with (OLGR 2005, p. 380) is different as the subject matter of the contract in this case was the delivery of samples. Thus, the delivery was second to the development and manufacturing of the samples.

In the present case, the main interest of the [Buyer] is aimed at the delivery and the transfer of property in respect to the manufactured goods. In particular, as there have been various orders by the [Buyer], which provided for the manufacturing of comparable remote indication devices through the assembly of different components, prior to the present contract.

The fact that the remote indication devices are manufactured separately taking the requests of customers into account does not alter the focus on this as a contract for the sale of goods. That fact does not lead to the assumption that the delivery and the transfer of property are mere secondary obligations. In contrast, the obligation to deliver and the obligation to transfer property in the goods characterize the contract.

The place of performance of the present contract is L in Austria according to Article 5 (1b) first hyphen EuGVO [*].

According to Article 5 (1b) first hyphen EuGVO, the place of performance of the obligation in question shall be the place in a Member State where, under the contract, the goods were delivered or should have been delivered, unless otherwise agreed.

There is no agreement in respect to both a place of performance and a place of jurisdiction in the present case. The parties neither explicitly nor tacitly agreed on a specific place of performance which would be different from the place of performance according to the legal provisions.

Hence, the place of performance is the place where the goods have been delivered according to the contract. An autonomous interpretation of Article 5 (1b) first hyphen EuGVO [*] is necessary in this respect, namely, an interpretation in the light of the drafting history, the purposes and the system of this regulation (EuGH, judgment of 3 May 2007, in NJW 2007, p. 1800). A uniform place of jurisdiction in respect to any claims arising out of contracts for the sale of goods or contracts for the provision of services was intended by stipulating a place of performance in Article 5 (1b) EuGVO which should be assessed autonomously from a procedural point of view. The disadvantages of the preceding jurisdiction of the EuGH, which arise due to recourse to the IPR [*] of the respective Court, should thereby be prevented. In addition, uniformity of the provisions in respect to the place of jurisdictions should be attained in order to create the best possible forseeability. (Kropholler, Europäisches Zivilprozessrecht, 8th ed. 2005, Article 5 margin number 27).

Against the background of this pragmatic term of performance, L in Austria is the place, where the goods have been delivered according to the present contract. This can be seen from the fact that the goods have actually been delivered to L, and reached the sphere of control of the [Buyer] there. The two remote indication devices have been delivered personally by the [Seller] to the domicile of the [Buyer], as has been affirmed by the Appellate Court in the course of the oral hearings. A delivery via DPD, as stated in the order confirmation, has not been effected. The actual delivery to Austria -- without the conclusion of a new agreement in respect to the place of delivery -- in conjunction with the specification in respect to the time for the arrival of the goods at the [Buyer]'s domicile prove that the parties have agreed that the [Seller] fulfils its obligation to deliver by handing over the goods at the [Buyer]'s domicile. Whether the delivery should be effected by the [Seller] or a third party has obviously been subject to the choice of the [Seller]. This applies to both the remote indication devices and the respective logotypes, which have been delivered by DPD later on.

As the place of delivery can be ascertained on the basis of the specific agreements of the parties in the present case, the question on the place of delivery in respect to a distance selling contract in the sense of Article 5 (1b) first hyphen EuGVO [*] does not have to be answered as long as there are no clues in the contract (Kropholler, Europäisches Zivilprozessrecht, 8th ed. 2005, Article 5 margin number 49 with further references).

The decision on costs is based on § 91 ZPO [*]. The decision on provisional enforceability is based on §§ 708 No.10, 713 ZPO.

Further appeal is not admissible, as none of the reasons for admissibility according to § 543 (2) ZPO is present.

The dispute is not of fundamental importance. Neither the interpretation of law nor the safeguarding of a uniform jurisprudence leads to the need of a judgment of the Supreme Court. The criteria for the demarcation between a contract for the sale of goods and a contract for the provision of services in the sense of article 5 (1b) EuGVO [*] have been clarified. The classification has been effected on the basis of the individual circumstances in the present case. The identification of the place of performance has been effected on the basis of the actual performance of the contract in the present case. Neither this nor the aforementioned context gives rise to a fundamental question of law.