CISG-online 1906	
Jurisdiction	Germany
Tribunal	Oberlandesgericht Celle (Court of Appeal Celle)
Date of the decision	24 July 2009
Case no./docket no.	13 W 48/09
Case name	*Multimedia recorders case*

Translation[*] *by Veit Konrad*[**]

Reasons

I.

[Facts of the case:]

Defendant-Respondent [Buyer] is seated in W. [Austria]. Plaintiff-Appellant [Seller], a manufacturer of software and hardware products used in particular in electronic security systems, is seated in D. [Germany]. Per fax of 11 December 2006, [Buyer] ordered from [Seller] two WMR1 Broadcasters and one Broadcaster Logger Master Unit for the purchase price of 14,961.00 Euros in total. [Seller] confirmed this order by fax of the same day. 1

On page three of the fax was a note that [Seller]'s standard terms of business (Allgemeine Geschäftsbedingungen; AGB) shall apply in the form being displayed on [Seller]'s website and in [Seller]'s business facilities. [Seller]'s terms of business stipulated the following: 2

> «10.1. For the legal relations between the parties the law of the Federal Republic of Germany shall exclusively apply.
>
> [...]
>
> «10.3. The venue of jurisdiction for all present and future issues arising from the business relation, [...], shall be D. [Germany] Optionally [Seller] may bring a claim before the venue of its business partner's place of business.»

After [Buyer] had made an advance payment of 2,244.15 Euros to [Seller] on 15 January 2007 pursuant to their contract, the ordered items were delivered to [Buyer] in the beginning of February 2007. 3

---

[*] All translations should be verified by cross-checking against the original text. For the purposes of this translation, Claimant-Appellant of Germany is referred to as [Seller] and Respondent-Appellee of Austria is referred to as [Buyer].

[**] Veit Konrad studied law at Humboldt University (Berlin). During 2001–02, he spent a year at Queen Mary College, University of London, as an Erasmus student.

[Seller] argues that the District Court Verden's jurisdiction was established by effective and valid inclusion of its general terms of business, which define D. [Germany] as venue of jurisdiction and as the place of performance for the contract. 4

[Seller] submits that when the parties had concluded a previous sales contract in November 2004, [Seller] had handed over its standard terms of business to [Buyer] together with the confirmation of its order. As concerning [Buyer]'s claim for remedies for breach of contract, [Seller] pleads the statute of limitations.

[Buyer] argues that the [Seller]'s claim must be dismissed because the court lacks jurisdiction on the matter. [Seller]'s terms of business had not been incorporated into the sales contract between the parties. [Buyer] further submits that the items at issue belonged to a complex that mainly consisted of 48 WMR1 Broadcaster units that had been ordered and delivered in November 2004. Yet, those 48 units suffered from various defects for which [Buyer] – in eventu – brings a claim for damages. 5

After [Buyer] paid 12,716.85 Euros plus interest on 21 November 2008 as the remainder of the purchase price that had been the subject of [Seller]'s claim, both parties declared the dispute settled and claimed the burden of the cost of the proceedings to be laid upon the respective other party. 6

[Proceedings in the Court of First Instance:]

Per decision of 27 May 2009, the District Court (*Landgericht*; LG) Verden ruled that each party had to bear its own costs and expenses. The Court found that [Seller]'s claim might be well founded. However, the question of jurisdiction depended on evidence, which remained inconclusive. This decision was served upon [Seller]'s representative on 3 June 2009. On 5 June 2009 [Seller] appealed by way of an immediate appeal *(sofortige Beschwerde)*. [Seller] holds the opinion that no taking of evidence had been necessary for the court's decision, as [Buyer] did not deny [Seller]'s submission that by the effective inclusion of the jurisdictional clause of its standard terms of business, a venue had been validly agreed. 7

The District Court, however, did not follow this opinion and referred the matter to the Court of Appeal (*Oberlandesgericht*; OLG) Celle by order of 9 June 2009. 8

II.

[Court of Appeal's ruling on the German courts' jurisdiction over the dispute:]

[Seller]'s immediate appeal (sofortige Beschwerde) is admissible pursuant to § 91a(2) and § 567 et seq. of the German Code of Civil Procedure (*Zivilprozessordung*; ZPO), but it is without merit. With regard to the factual and legal situation of the dispute at the time, the District Court rightly held that after both parties had declared the dispute settled in the sense of § 91a of the German Code of Civil Procedure, each party had to bear its own procedural costs and expenses. 9

1. 10
Contrary to [Seller]'s legal opinion, the District Court Verden could not assume the competence of (international) jurisdiction by mere resort to [Seller]'s undisputed submission of facts, as stated in the Court record.

a) 11
According to Art. 2(1) and Art. 60(1) of the EU Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as Brussels I Regulation), a company that has its statutory seat within the territory of a Member State of the European Union shall be sued in the Courts of that Member State, subject to exceptions provided by the Brussels I Regulation. Hence, as a general rule, actions against a [Buyer] which is domiciled in Austria must be brought before Austrian courts.

[No forum selection agreement between the parties in accordance with Art. 23 Brussels I Regulation:]

b) 12
[Seller] cannot conclusively argue that, based on its undisputed submissions of facts, it had to be presumed that the parties had validly stipulated another venue of jurisdiction diverging from the provisions of the Brussels I Regulation. Art. 23(1), sentence 1, of the Brussels I Regulation provides for the conferring of jurisdiction by valid party agreement, which shall exclude the venue defined under Art. 2(1) of the Brussels I Regulation, and shall fully abrogate national law provisions (see: Court of Appeal Schleswig-Holstein, in: *OLG-Report Schleswig* (2009), pp. 309 *et seq.*, juris database para. 24). However, Section 10.3. of [Seller]'s standard terms of business does not meet the requirements of this provision.

[Necessary agreement under Art. 23 Brussels I Regulation:]

aa) 13
From the parties' submissions of facts – as far as they are undisputed – it cannot be concluded that the jurisdiction clause in section 10.3. of [Seller]'s standard terms of business had been effectively incorporated either by way of written agreement or by way of an oral agreement that had been confirmed in writing as required under Art. 23(1), sentence 3(a) of the Brussels I Regulation.

[No sufficient agreement under Art. 23 Brussels I Regulation in autonomous interpretation:]

(1) 14
With regard to all the possible consequences such jurisdiction conferring agreement may have for the parties, the requirements set out by Art. 23(1), sentence 3(a) of the Brussels I Regulation must be interpreted and adhered to in a strict sense. Under Art. 23(1), sentence 3(a) of the Brussels I Regulation, the adoption of a jurisdiction clause requires that both parties clearly and unambiguously express their consent to the conferring of jurisdiction. The Brussels I Regulation's provisions as to the form such agreement must have are to be construed autonomously – that means in accordance with the aims and the doctrines of the Brussels I Regula-

tion (see German Federal Supreme Court, 25 February 2004 – VIII ZR 119/03, in: *Neue Juristische Wochenschrift – Rechtsprechungs-Report* (2004), pp. 1292 et seq.; Geimer in *Zöller, ZPO* [Commentary on the German Code of Civil Procedure], 27th ed., Art. 23 EuGVVO para. 21 with further references, undecided: Court of Appeal Düsseldorf, in: *OLG-Report* (2004), pp. 208 *et seq.*, juris database para. 38). They shall guarantee that the parties by their statements have actually come to such mutual consent (see European Court of Justice (ECJ), in: *Neue Juristische Wochenschrift* (1977), p. 494 referring to Art. 17(1) of the 1968 Brussels Convention).

Mere reference to standard terms of business that entail a jurisdiction clause only satisfies these strict formal requirements if it is proven that the other party consented to the prorogation of jurisdiction away from the venue stipulated by general rules (European Court of Justice, *supra*; Court of Appeal Oldenburg, in: *OLG-Report* (2004), pp. 694, 696). Therefore, the mere explicit reference to its standard terms of business – which had not been attached to the document – together with the note that these standard terms of business were displayed at [Seller]'s place of business and on its website, as given in [Seller]'s order confirmation of 11 December 2006, are not sufficient to sustain that [Buyer] actually had expressed its consent to the conferring of jurisdiction as stated under section 10.3. of [Seller]'s standard terms (see Court of Appeal Oldenburg, *supra*). This would have required that [Seller]'s standard terms of business were transmitted when the contract was concluded. Contrary to [Seller]'s allegations, however, this cannot be inferred from the undisputed facts of the case, which include the e-mail of one of [Buyer]'s employees dated 5 January 2007, which [Seller] had submitted. In this e-mail [Buyer]'s employee merely confirmed that she had received the «AB» (i.e., the order confirmation). By no means did she indicate that [Seller] had transmitted its standard terms of business. **15**

[No sufficient agreement under law applicable to the merits (lex causae):]

(2) **16**
This conclusion holds true even if the Court construed Art. 23(1), sentence 3 of the Brussels I Regulation not autonomously, but rather interpreted it according to the regulations governing the main contract. In the latter case, a mere note that the standard terms were displayed at [Seller]'s place of business and on its website would not have sufficed, either.

Section 10.1. of [Seller]'s standard terms of business stipulates that the legal relations between the parties shall be exclusively governed by the law of the Federal Republic of Germany. According to Art. 31(1) of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*; EGBGB), the requirements for the effective adoption of a choice of law clause entailed in standard terms and conditions shall be governed by the law which is referred to in this choice of law clause (see German Federal Supreme Court, in: 123 *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, pp. 380, 383; German Federal Supreme Court, 25 January 2005 – XI ZR 78/04, in: *Neue Juristische Wochenschrift – Rechtsprechungs-Report* (2005), pp. 1071, 1072). For the case at hand, this means that German law applies. As a general rule, reference to German law implies the application of the United Nations Convention on Contacts for the International Sale of Goods (CISG; hereinafter referred to as the Convention), which by its adoption has become part of German national law, and which applies to international sales transactions as *lex specialis* abrogating German **17**

domestic sales law provisions (see German Federal Supreme Court, in 96 *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, pp. 313, 322 *et seq*.; German Federal Supreme Court, 25 November 1998 – VIII ZR 259/97, in: *Neue Juristische Wochenschrift* (1999), pp. 1259, 1260).

[Prerequisites for an incorporation of standard terms by reference under the CISG:]

Therefore the effective incorporation of standard terms and conditions into a contract, which – as in the case at hand – is governed by the CISG, is subject to the provisions regarding the formation of the contract (Art. 14 and Art. 18 CISG). According to Art. 8 CISG, the recipient of a contract offer, which is supposed to be based on standard terms and conditions, must have the possibility to become aware of them in a reasonable manner (German Federal Supreme Court, in: 149 *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, pp. 113, 116 *et seq*.). Within the scope of the Convention, the effective inclusion of standard terms and conditions requires not only that the offeror's intention that he wants to include his standard terms and conditions into the contract be apparent to the recipient. In addition, the CISG requires the user of standard terms and conditions to transmit the text or make it available in another way (see German Federal Supreme Court, in: *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, *supra*, with further references). **18**

German domestic sales law permits an effective inclusion of standard terms if the recipient only has the possibility to become aware of the content of the standard terms in a reasonable manner – without requiring the recipient's positive knowledge of that content – (see German Federal Supreme Court, in: 117 *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, pp. 190, 198; and in 149 *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, pp. 113, 118 with further references), However, these criteria do not equally apply to the international sale of goods (German Federal Supreme Court, in: 149 *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, pp. 113, 118). Considering the significant differences among the particular domestic standard terms regulations, as well as the missing differentiation between commercial and other traders within the scope of the Convention (Art. 1(3) CISG), it would violate the principle of good faith in international trade as stated under Art. 7(1) CISG and the parties' general duties of cooperation and information, if the recipient of standard terms and conditions was obliged to enquire about the content of the standard terms and conditions which had not been transmitted, thus laying upon him the risk and disadvantage of unknown standard terms being introduced by the other side (German Federal Supreme Court, in: 149 *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, pp. 113, 118 *et seq*.). **19**

[No sufficient agreement due to a practice between the parties, Art. 23 Brussels I Regulation:]

bb) **20**
Underlying the undisputed facts of the case, location D. [Germany] has not been stipulated as venue of jurisdiction by the established practices of the parties as according to Art. 23(1), sentence 3(b) of the Brussels I Regulation. This must be concluded irrespective of whether or not the parties had established an ongoing business relation by the previous sales contract of 2004 (for this question, see Geimer in *Zöller, ZPO*, 27th ed., Art. 23 EuGVVO note 30). Art. 23(1),

sentence 3(b) of the Brussels I Regulation only suspends from the requirement that a jurisdiction conferring agreement must be given in a written form. Yet, it is still required that both parties enter into a binding legal contract by their mutual statements of consent. As explained above, it cannot be drawn from the undisputed facts that this had been the case: The question whether for the previous sales contract the standard terms and conditions had been transmitted to the recipient – as legally required – is disputed between the parties.

[Form requirements of Art. 23 Brussels I Regulation not met:]

cc) **21**
[Seller] did not submit that a jurisdiction conferring agreement had been made in a form according to an internationally acknowledged usage of trade or commerce as provided for under Art. 23(1), sentence 3(c) of the Brussels I Regulation. In any event, nothing indicates that the offeror's reference to standard terms, which had not been transmitted to the recipient, would conform to such international usage of commerce or trade (see Court of Appeal Oldenburg, in: *OLG-Report Oldenburg* (2008), pp. 694, 697).

[No agreement on a place of performance in accordance with Art. 5 Brussels I Regulation:]

c) **22**
Art. 5 sentence 1(b), subsection 1, of the Brussels I Regulation does not establish the competence of jurisdiction for German courts, either. For contracts for the sale of goods, this regulation autonomously defines the place of performance for an obligation in question to be the place in a Member State where, under the contract, the goods were delivered or should have been delivered (see German Federal Supreme Court, 22 April 2008 – VIII ZR 156/07, in: juris database para. 17). It could not be sustained that, for [Buyer]'s orders, the place of characteristic performance under the contract should have been [Seller]'s place of business. To the contrary, it was [Buyer]'s place of business in W., Austria, where the goods had actually been delivered. Hence, this place must be considered the place of performance of the obligation in question (see also Court of Appeal Hamm, in: *OLG-Report* (2006), pp. 327, 329).

Section 10.3. of [Seller]'s standard terms of business, which stipulates D. [Germany] as the place of performance, does not constitute an agreement as provided for under Art. 5 sentence 1(b), subsection 1, of the Brussels I Regulation. The requirements for an effective and valid place of performance agreement are defined by the domestic law governing the main contract. Such agreement may affect the venue of jurisdiction, irrespective of whether the formal requirements of Art. 23(1), sentence 3 of the Brussels I Regulation have been observed (European Court of Justice, in: *Wertpapier-Mitteilungen* (1980), p. 720; Court of Appeal Düsseldorf, in: *OLG-Report* (2004), pp. 208, 213). However, in the case at hand, the respective clause in [Seller]'s standard terms of business cannot establish the District Court Verden's competence of jurisdiction because the undisputed facts of the case do not prove that the standard terms had been effectively incorporated (see above under 1. b) aa) (2)). **23**

[Conclusion: No jurisdiction of the District Court Verden over the dispute]

2. **24**
The District Court Verden can only be established as venue of jurisdiction by an effective and valid agreement in the sense provided for under Art. 23(1) sentence 3(b) of the Brussels I Regulation. This, however, would have required [Seller] to sustain that its standard terms had been transmitted at the conclusion of the previous contract between the parties in November 2004. If the parties adhered to such practice during their business relation, a party, who – all of a sudden – did not act in accordance with the established practice anymore, would have violated the principle of good faith (German Federal Supreme Court, 25 February 2004 – VIII ZR 119/03, in: *Neue Juristische Wochenschrift – Rechtsprechungs-Report* (2004), pp. 1292 *et seq*.). For the case at hand, this question needed to be sustained by evidence. The evidence provided, however, remained inconclusive.

[Decision on costs:]

III. **25**
The decision on the costs is based on § 97(1) of the German Code of Civil Procedure. The complaint does not meet the requirements to allow further appeal as stated under § 574 of the German Code of Civil Procedure.

[...] **26**