
BGH (D) 2 October 2002 – VIII ZR 163/01

Brussels Convention Sentence 2(b) of Article 17(1) – Agreement conferring Jurisdiction – Concluded in a form which accords with practices which the parties have established between themselves – Agreement conferring Jurisdiction habitually conveyed by one party as part of the general terms and conditions

If in the course of an ongoing commercial relationship, a transaction is concluded which is based on the general terms and conditions of one of the parties, which are printed on the rear of an invoice which is only received after the contract has been entered into and is not challenged by the other party to the contract, these provisions are held to be part of the content of the provisions regulating the parties' contractual relationship. This applies also to agreement of jurisdiction clauses contained in general terms and conditions.

Summary of the Decision

The German plaintiff is an undertaking dealing in agricultural products. Among others, it auctions vegetables from its domicile S in Germany. The defendant, who is domiciled in the Netherlands, also deals in vegetables and regularly purchased vegetables at such auctions over a longer period of time, within the continuation of an ongoing business relationship. The plaintiff is suing the defendant for the payment of the purchase price of a number of vegetables sales, in the German court with jurisdiction over its domicile. To found jurisdiction, the German courts relied on the fact that the plaintiff recurrently billed the defendant for the sold goods by means of an invoice. The general terms and conditions of the plaintiff were printed on the rear of this invoice, this having been the customary practice for many years. The place of delivery was given as the place of the plaintiff's domicile. These conditions also included a jurisdiction agreement clause, in which the court of the plaintiff's place of domicile was given jurisdiction

The Court of first instance refused to hear the claim, on the grounds that German courts lacked jurisdiction to hear the matter. The court of appeal however accepted that German courts did have international jurisdiction over the matter and referred it back to the court of first instance for a decision. On review the Bundesgerichtshof (D) – (BGH) – overruled the decision of the court of appeal and referred the matter back to that court for a renewed hearing.

2. The Court's Decision

The court of appeal derived the jurisdiction of the German courts from the contents of Article 5(1) of the Brussels Convention. The place of performance in terms of the contract, of the obligation to pay the purchase price, (as claimed for by plaintiff), is not determined by the rules of the CISG. This was the case, since Article 2(b) of the CISG is not applicable to sales by auction. The place of performance is in fact to be determined by German law which is applicable according to Article 28(2) of the German EGBGB, which conforms with Article 4(2) of the Rome Convention regarding contractual obligations. The court noted that at this auction, the goods were immediately handed over to the defendant at the place where the auction had been held. It could therefore be assumed that, this was the place of performance of all the contractual obligations to be carried out by both parties.

The BGH did not agree with this argument. It determined rather, that even in the case of the contractual relationship existing between the parties, according to the general rule of German law in the case of a monetary debt the place of performance is the domicile of the debtor. This is the domicile of the defendant which is in the Netherlands. The international jurisdiction of the German courts could therefore not be based on Article 5(1) of the Brussels Convention.

The BGH then investigated whether the plaintiff's general terms and conditions did in fact embody a valid agreement on the contractual place of performance as being the plaintiff's domicile in Germany. Since the court of appeal did not conclusively determine the answer to this question, the BGH overruled the court of appeal's decision and referred the matter back to that court for a renewed hearing. The judgement specified a number of points which the court of appeal was to take into account in its renewed hearing of the matter.

The BGH also referred to Sentence 2(b) of Article 17(1) of the Brussels Convention, according to which an agreement conferring jurisdiction can be concluded in a form which accords with practices which the parties have established between themselves. If, in the course of an ongoing commercial relationship, a transaction is concluded which is based on the general terms and conditions of one of the parties and these are printed on the rear of an invoice which is only received after the contract has been entered into, and where this clause is further not challenged by the other party to the contract, these provisions are held to be part of the content of the provisions regulating the parties' contractual relationship. This rule applied also to agreement of jurisdiction clauses contained in the terms and conditions.

In this particular case, the BGH did however have misgivings about whether the terms and conditions could in fact become part of the contents of the contract, as a result of the long established practice existing between the parties. On the face of the plaintiff's invoice formula, there was a rather vaguely formulated reference, which did not make it altogether clear whether the terms and conditions referred to were

those printed on the reverse. This was also to be conclusively determined by the court of appeal.

Thomas Simons

Extract from the decision: “(...)

2. Die internationale Zuständigkeit ergibt sich auf der Grundlage der bisherigen Feststellungen schließlich auch nicht aus einer Gerichtsstandsvereinbarung im Sinne des Art. 17 Abs. 1 EuGVÜ, was das Berufungsgericht gleichfalls ausdrücklich hat dahinstehen lassen. Nach Art. 17 Abs. 1 Satz 2 Buchst. b) EuGVÜ kommt eine Gerichtsstandsvereinbarung zustande, wenn sie in einer Form geschlossen wurde, welche den Gepflogenheiten entspricht, die zwischen den Parteien entstanden sind. Werden im kaufmännischen Verkehr im Rahmen laufender Geschäftsbeziehungen Geschäfte auf der Grundlage von Allgemeinen Geschäftsbedingungen, die auf der Rückseite von nach Vertragsschluss übermittelten Rechnungen abgedruckt sind, abgewickelt, ohne dass der Vertragspartner des Verwenders dem widerspricht, dann wird das Gesamtklauselwerk grundsätzlich Vertragsinhalt. Dies gilt auch für die in solchen Geschäftsbedingungen enthaltene Gerichtsstandsklausel (hier: § 12 Satz 3 der AGB der Klägerin). Angesichts der zumindest missverständlichen Formulierung des Hinweises auf der Vorderseite der Rechnungen der Klägerin und der fehlenden Feststellungen des Berufungsgerichts zur Einbeziehung ihrer Allgemeinen Geschäftsbedingungen auf sonstige Weise kann der Senat jedoch keine abschließende Aussage zu den zwischen den Parteien in dieser Hinsicht bestehenden Gepflogenheiten treffen. (...“