
BGH (D) 25 February 2004 – VIII ZR 119/03

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 on jurisdiction as part of general terms and conditions, which applied only to a part of the transactions concluded between the parties

Whether an agreement conferring jurisdiction was concluded in the case of an oral contract, where the seller subsequently forwards a written sale contract, also intended to serve as an invoice that contains on its reverse a clause conferring jurisdiction, as part of the terms and conditions of sale. (Headnote of the court)

Summary of the Decision

1. Facts

The plaintiff, a company with seat in Germany and the defendant who is domiciled in France are cattle dealers. They had been doing business together on a permanent basis and had an ongoing business relationship. The plaintiff brought proceedings before the court in Germany that had jurisdiction over the plaintiff company's seat. The claim was for the payment of the remainder of the purchase price under a sales contract of cattle dated 8 November 1996. The question at issue is whether the parties concluded an agreement conferring jurisdiction on the German courts.

The written sales contract dated 8 November 1995 was only signed by the plaintiff and was also to serve as invoice. It contains a reference that delivery was to be according to the terms and conditions printed on the reverse of the page. The terms and conditions state that Germany is both the place of performance and the place of jurisdiction for both parties.

The parties had in the past, concluded a large number of sales contracts of cattle. All the contracts were concluded orally and confirmed by a handshake.

In those cases when the plaintiff that was the seller, it would confirm the sale by forwarding a written sales contract of cattle which also served as invoice. Each of these agreements referred to the terms and conditions printed on the reverse of the page where the clause conferring jurisdiction on German courts was contained.

The Bundesgerichtshof (D) – (BGH) – confirmed the decisions of the lower courts which had found that no agreement conferring jurisdiction on the German courts had been validly concluded.

2. The Court's Decision

The BGH stated that the place of performance of the obligation to pay the remainder of the purchase price, claimed by the plaintiff was in France where the seat of the defendant lies. According to the court of appeal the parties had agreed that the plaintiff was to perform its obligation to deliver where the defendant had its seat, i.e. in France. Pursuant to Article 57(1)(b) CISG the place of fulfilment of the obligation to pay the purchase price was therefore also the place of domicile of the defendant, i.e. France. As a result, the place with jurisdiction over the agreed place of performance (Article 5(1) Brussels Convention) was France.

In this case no jurisdiction has been founded according to an agreement conferring jurisdiction according to Article 17 Brussels Convention. Even the parties conceded that there had not been an expressed agreement conferring jurisdiction (Article 17(1) Sentence(2)(a) Brussels Convention) and that it could also not be based on a practices customary in international trade (Article 17(1) Sentence (2)(c) Brussels Convention).

The court held that an agreement to confer jurisdiction could after all not be construed from practices which had been established between the parties pursuant to Article 17(1) Sentence (2)(b) Brussels Convention.

Referring to the decision *MSG Mainschiffahrtsgenossenschaft eG*¹ by the ECJ, the BGH states that for an agreement conferring jurisdiction which was based on the practices developed between the parties, the prerequisite of a mutual consent regarding the conclusion of such an agreement had to be fulfilled. The object of Article 17 Brussels Convention was to ensure that there was a mutual declaration of intention regarding a certain place of jurisdiction. It did therefore not suffice for one party to print, on invoices and acknowledgement of order forms, a clause conferring jurisdiction. An agreement conferring jurisdiction may however be concluded orally between two parties in an ongoing business relationship. In addition, the agreement has to be made in the context of the business relationship and all aspects of this relationship have to be subject to existing general terms and conditions that include a clause conferring jurisdiction. Where the parties continuously conducted their business relationship in accordance with the practices they had developed, the party that acted outside of these practices, contravened the principles of good faith.

This did not apply in the present case. The appellate court could not, merely from the facts before it, conclude that the parties intended to apply the plaintiff's general terms and conditions to the deliveries of the cattle by the plaintiff, or to conduct the deliveries accordingly. However, the plaintiff, on the basis of a contract concluded on 8 November 1996, delivered the animals to the plaintiff in France and agreed, insofar diverting from its own terms and conditions of sale, to perform its obligation at the place of domicile of the defendant. The defendant therefore did not contravene the principle of

¹ ECJ 20 February 1997 – C-106/95 – *MSG Mainschiffahrtsgenossenschaft eG* [1997] ECR I-911.

good faith when claiming in the present case that an agreement conferring jurisdiction had not been concluded, despite having been sent on many occasions the acknowledge of order form including the plaintiff's term and conditions of sale.

Thomas Simons

Extract from the decision: “(...)

Entgegen der Ansicht der Revision ist aber auch eine Vereinbarung, durch welche die internationale Zuständigkeit des von der Klägerin angerufenen Gerichts begründet worden wäre, nicht in einer Form geschlossen worden, „welche den Gepflogenheiten entspricht, die zwischen den Parteien entstanden sind“ (Art. 17 Abs. 1 Satz 2 lit. b EuGVÜ).

a) Wie das Berufungsgericht zutreffend ausführt, setzt auch diese Alternative voraus, dass eine Willensübereinstimmung hinsichtlich der Gerichtsstandsvereinbarung vorliegt, da Art. 17 EuGVÜ nach wie vor sicherstellen soll, dass eine Willenseinigung der Parteien tatsächlich gegeben ist.² Der laufende Abdruck von Gerichtsstandsklauseln auf Rechnungen oder Auftragsbestätigungen genügt daher nicht.³ Eine Einigung ist aber erzielt, wenn ein Vertrag im Rahmen laufender Geschäftsbeziehungen zwischen den Parteien mündlich geschlossen wurde und feststeht, dass diese Beziehungen in ihrer Gesamtheit bestehenden Allgemeinen Geschäftsbedingungen unterliegen, die eine Gerichtsstandsklausel enthalten.⁴ Haben die Parteien ihre Geschäftsbeziehungen immer in Übereinstimmung mit diesen Gepflogenheiten abgewickelt, verstieße diejenige Partei gegen Treu und Glauben, die sich auf einmal nicht mehr an die Gepflogenheiten gebunden fühlte.⁵

b) Im Streitfall haben die Parteien zwar in der Vergangenheit in großem Umfang wechselseitig Viehkaufverträge geschlossen, wobei der Vertragsschluss jeweils mündlich erfolgte und durch Handschlag bekräftigt wurde. Die Verkäufe der Klägerin wurden sodann von dieser durch Übersendung eines schriftlichen Viehkaufvertrages, der zugleich als Rechnung gelten sollte, bestätigt, wobei auf die auf der Rückseite abgedruckten Verkaufsbedingungen, die die Vereinbarung des Gerichtsstands G. enthielten, Bezug genommen wurde. Dass aber die Parteien die Lieferbeziehungen aus den Viehverkäufen der Klägerin deren Allgemeinen Geschäftsbedingungen unterstellen wollten und nach diesen abgewickelt haben, hat das Berufungsgericht nicht feststellen können. Hiergegen spricht im übrigen auch die Tatsache, dass die Klägerin die aufgrund des Vertrages vom 8. November 1996 verkauften Tiere an den Beklagten nach Frankreich geliefert hat und nach den nicht angegriffenen Feststellungen des Berufungsgerichts dabei die Lieferverpflichtung der Klägerin – abweichend von deren Verkaufsbedingungen – als Bringschuld vereinbart worden war. Demgemäß war auch die Zahlungspflicht am Wohnsitz des Be-

klagten zu erfüllen (Art. 57 Abs. 1 lit. b CISG), so dass sich eine besondere Zuständigkeit aus Art. 5 Nr. 1 EuGVÜ zugunsten der Klägerin nicht ergibt.

Der Beklagte verstößt damit nicht gegen Treu und Glauben, wenn er sich trotz vielfacher vorangegangener Übersendung der Vertragsbestätigungen der Klägerin einschließlich deren Verkaufsbedingungen im vorliegenden Fall auf das Fehlen einer Gerichtsstandsvereinbarung beruft. (...)

² Vgl. EuGH, NJW 1997, 1431 unter Nr. 17 zur Gerichtsstandsvereinbarung kraft Handelsbrauchs.

³ Schlosser, EuGVÜ, 1996, Art. 17 Rn. 23; Münch-Komm.ZPO/Gottwald, 2. Aufl., Art. 17 EuGVÜ Rn. 36.

⁴ Senatsurteil vom 9. März 1994 – VIII ZR 185/92, WM 1994, 1088 = NJW 1994, 2699 unter I 2 [2] b unter Bezugnahme auf EuGH, NJW 1977, 495 zu § 17 EuGVÜ in der Fassung des 1. Beitrittsübereinkommens vom 9. Oktober 1978, BGBl. II 1983 S. 802; Schlosser aaO.

⁵ EuGH aaO; Baumbach/Lauterbach/Albers, ZPO, 61. Aufl., AnerkvollstrAbk § 17 Rn. 9.