

Supreme Court of Austria (*Oberster Gerichtshof*)

3 April 2008 [1 Ob205/07i]

Translation [*] by Institut für ausländisches und internationales
Privat- und Wirtschaftsrecht der Universität Heidelberg
Daniel Nagel [**]

DECISION

1. The extraordinary appeal (*außerordentlicher Revisionsrekurs*) is dismissed.
2. The [Seller] has to reimburse the [Buyer] for the costs of these proceedings in the amount of EUR 3,384.60 (including EUR 564.10 turnover tax) within fourteen days.

FACTS

The [Seller] claimed for the payment of the purchase price of 32 violins.

The [Seller] alleged that it had delivered 32 violins to Germany to the [Buyer]. The [Buyer] had accepted the instruments in order to resell them on its own behalf and for its own account. The agreed purchase price had been due in partial payments dependent on the progress of the resale. The [Buyer] had failed to pay. The [Seller] claimed that the Court would have jurisdiction according to Article 57 CISG in conjunction with Article 5 EuGVVO [*].

The [Buyer] alleged inter alia that the Court would not have jurisdiction over the case.

The Court of First Instance dismissed the claim as inadmissible on the basis that an Austrian court would not have jurisdiction over the case. According to Article 2(1) EuGVVO a person, who is domiciled in a foreign country has to be sued there. Furthermore, the place of performance in the sense of Article 5 No 1b EuGVVO would be Germany, as the [Seller] had handed over the violins to the [Buyer] in Germany according to the statements of the [Seller] itself.

The Appellate Court affirmed the decision of the Court of First Instance and did not allow further appeal. It held that according to Article 5 No 1b EuGVVO the place of performance was to be assessed according to the place where the goods have been delivered to or should have been delivered to. In case the delivery had already been effected, the actual destination of the delivery would be decisive as long as the buyer accepted this delivery as being in conformity with the contract. The question on whether the CISG or the EuGVVO prevailed in respect to the court jurisdiction as regards the place of performance would not arise as Article 57 CISG would solely affect the legal place of performance in respect to payment of the purchase price, while the provision of Article 5 No 1b EuGVVO would not be based on this place of performance. At best, it could be discussed whether an (explicit) agreement on the place of performance in respect to payment of the purchase price remained effective notwithstanding the provision of Article 5 No 1b EuGVVO in respect to a claim for payment. However, the [Seller] would not have alleged the conclusion of such an agreement.

REASONING

The further appeal of the [Seller] is admissible but not justified. The [Seller] bases the admissibility of its extraordinary legal remedy on the fact that there was no preceding jurisdiction in respect to the international jurisdiction as regards claims for payment of the seller in respect to the relationship between Article 5 No 1b EuGVVO and Article 57(1) CISG.

It is true that the Supreme Court has not explicitly commented on this relationship, wherefore the further appeal had to be admitted.

The [Seller] alleges that an Austrian exporter would be allowed to claim for the payment of the purchase price in an Austrian court lacking any contrary agreements according to Article 57(1) CISG. The Convention on Contracts for the International Sale of Goods would represent a uniform substantive law which prevailed in respect to solely procedural provisions.

This allegation has to be commented as follows:

The Supreme Court stated in its judgment 1 Ob 94/04m -- which also dealt with facts that had to be assessed according to the CISG -- that the very place, where the characteristic performance of a contract has to be effected or should have been effected, is to be considered as being the place of performance from a procedural point of view.

The place where the performance has actually been effected was the decisive criteria for the international (choice of) jurisprudence. It was of particular importance, that the place of performance could be assessed pragmatically according to actual criteria, namely autonomously, and thus not according to legal criteria.

The contrary opinion of some scholars -- in particular as far as reference is made to the unclear wording of article 5 No 1b EuGVVO -- cannot be affirmed, as such an interpretation would constitute a blatant contrast to the intention of the legislator, namely to regulate the place of performance that is decisive in respect to jurisdiction autonomously, i.e. without any reference to substantive national law (compare 4 Ob 147/03a; 7 Ob 112/07g).

There is no reason to deviate from this preceding jurisdiction. The Supreme Court will not comment on recent critical remarks of scholars in respect to distance selling contracts (such as Ferrari, in: *ecolex* 2007, p. 303), in particular, as the present case does not involve a distance selling contract.

If goods are delivered to the domicile of the buyer according to the contract, a *forum actoris* arises. This applies as well if the case is regulated by the CISG (Geimer/Schütze, *Europäisches Zivilverfahrensrecht* 2, Article 5 EuGVVO margin number 87). Article 57(1) CISG cannot be applied in the case of a claim for payment of the purchase price, as the place of delivery is decisive in respect to all obligations under the contract as long as Article 5 No 1b EuGVVO is applied (Kropholler, *Europäisches Zivilverfahrensrecht* 8, Article 5 EuGVVO margin number 49).

As a conclusion to this, the extraordinary appeal of the [Seller] is not justified.

The decision on costs is based on §§ 50, 41 ZPO [*].

FOOTNOTES

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

Translator's note on other abbreviations: **EUGVVO** = Regulation Brussels I on court jurisdiction (Regulation (EC) No. 44/01); **ZPO** = *Zivilprozessordnung* [Austrian Code on Civil Procedure].

** Ph.D. candidate Daniel Nagel has studied law at the University of Heidelberg and at the University of Leeds.