

Federal Supreme Court of Austria (*Oberster Gerichtshof*)

18 December 2002 [3 Nd 509/02]

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Privat- und Wirtschaftsrecht der Universität Heidelberg*

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JUDGMENT

1. The decision of 22 March 2002, AZ 3 Nd 515/ 99 is repealed and the proceedings are resumed.
2. The request of the Plaintiff, to decide on the venue jurisdiction or in event to refer the case to the District Court Vienna (Chamber for Commercial Matters) or in event to the District Court Florisdorf, is dismissed.
3. The request of the Plaintiff in respect to a favorable decision on costs is dismissed.

BACKGROUND, POSITION OF PARTIES

The Plaintiff [Consumer Association] bases its claim on § 5j KSchG [*] and generally purports that a private consumer had ordered certain goods from Defendant [Seller]. Allegedly, the said consumer had simultaneously submitted a "request for a bonus". [Seller] had conveyed the impression that some cash in the amount of 49,700 Austrian schillings would be at her disposal. [Consumer Association] is an association under § 29 KSchG to which the consumer had assigned her initial claim.

[Consumer Association] submitted a "request for ordination" (*Ordinationsantrag*) on 7 December 1999 with the prompt to grant jurisdiction either to the District Court Vienna (Chamber for Commercial Matters) or, in the alternative, to the District Court Floridsdorf.

By decision of 22 March 2000, the Federal Supreme Court interrupted proceedings in order to await a preliminary decision of the European Court of Justice (ECJ) in the case AZ 5 Nd 522/99.

After having taken notice of the ECJ decision of 11 July 2002 in the case docket C-96/00 (= *ecolex* [*] 2002/226 ("Klanser") = WBI 2000/236), [Consumer Association] submitted an amended statement of claim and requested initiation of preliminary proceedings before the ECJ once again. It should be brought before the ECJ whether, according to the provisions of Council Regulation (EG) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), a request for determining the local jurisdiction according to § 28 JN ("request for ordination") would constitute an "action" in terms of Art. 66(1) Brussels I Regulation. [Consumer Association] argued that the said regulation was not yet applicable because the request for ordination dated 7 December 1999 was already to be considered as an action under Art. 66(1) Brussels I Regulation.

REASONING OF THE COURT

The Federal Supreme Court has decided as follows:

a) First, it must be held that proceedings concerning the request for ordination are to be resumed as, following the decision by the ECJ [*], (see above) there was no reason to maintain an interruption.

b) As concerns the question of the law applicable to the proceedings, [Consumer Association] rightfully argued that the Brussels I Regulation does not apply to the request submitted in 1999. In order to apply, it requires under Art. 66(1) that the action is brought only after the regulation has entered into force. It is true that it can be argued that an action is only brought as soon as it reaches the court which is granted jurisdiction by the Federal Supreme Court under § 26 JN. However, the

action was brought before court in terms of Art. 66(1) Brussels I Regulation already by having submitted the request for ordination. This view is particularly appropriate for a case as the present one, where the request was followed by a complete statement of claim, which was also signed by a competent attorney-at-law.

There is a tendency in literature in respect to the Brussels I Regulation according to which Art. 30, despite its restrictive introductory clause, can be employed in order to achieve an autonomous interpretation of the point of time of bringing an action under Art. 66 Brussels I Regulation. In this case, there would remain no doubts that the submission of the claim -- in conjunction with the request for ordination -- was to be considered as the very document commencing proceedings according to Art. 66 Brussels I Regulation, assumed that [Consumer Association] had complied with its obligation to effect service of the writ to [Seller]. To the understanding of the Court, the case leaves no room for any doubts on that point.

Consequently, the Brussels Convention of 1968 is to be applied both to the present request for ordination and the action.

In its judgment of 11 July 2002 (case docket C-96/00), the ECJ [*] did, for a similar case concerning the very [Seller], expressly not decide on the question whether Art. 5(1)(1) Brussels Convention would be applicable. However, it explicitly held that the claim for a bonus under § 5j KSchG [*] falls under Art. 13(1)(3) Brussels Convention and that there is an intrinsic tie between the confirmation on the bonus and the order of goods. This means that subject matters of the present proceedings are contractual claims as envisaged by Art. 5(1)(1) Brussels Convention.

c) Therefore, it only needs to be determined if the place of performance under that provision would be Austria. An ordination under § 28(1) JN [*] is only necessary in cases of foreign jurisdiction. To this effect, the law applicable to the present contract must be determined in order to find under that law if the place of performance is Austria (*cf.* 6 Ob 27/01s). As stated above, [Consumer Association] relies on the validity of a sales contract. As neither party had relied on an exclusion, the UN Sales Convention (CISG) is applicable to their contract. Application of the CISG bars recourse to private international law (4 Ob 299/97t = JBl [*] 1998, 379 = EvBl [*] 1998/57 = RZ [*] 1999/9 = ZfRV [*] 1998, 167 = *ecolex* [*] 1998, 312; most recently 6 Ob 27/01s). As is the case with claims for damages or refund (*cf.* Schlechtriem/Schwenzer/Hager, *Kommentar zum einheitlichen UN-Kaufrecht*, Art. 57 para. 25), the CISG does not contain rules with respect to the place of performance for contractual claims for a bonus as requested by [Consumer Association]. However, Art. 57(1)(a) CISG appoints the seller's place of business as place of performance of the obligation to pay the purchase price. By way of analogy, it appears justifiable to apply this principle to other contractual obligations on payment of money to the effect that place of performance is the creditor's place of business (likewise and appropriate Schlechtriem/Schwenzer/Hager, *l.c.*; Witz/Salger/Lorenz/Witz, *Internationales Einheitliches Kaufrecht*, Art. 57 CISG para. 4; for further references see Honsell/Schnyder/Straub, *Kommentar zum UN-Kaufrecht*, Art. 57 paras. 30, 31, who differ in opinion). According to a dissenting opinion, the place of payment should be derived from the specific obligation in question, respectively from the provision constituting the obligation to pay. There is, however, no evidence at all in the present case which might qualify the claim at hand as an obligation to be discharged at the debtor's domicile.

It follows for the present case that place of performance of the asserted claim for a bonus is the residence of [Seller]'s contracting partner, being the consumer who assigned the claim to [Consumer Association]. According to his statements, the consumer's residence is within Austria. As a consequence, the prerequisites for an ordination under § 28 JN [*] are not met. Thus, the request is to be dismissed.

The action brought by [Consumer Association] must be dealt with in civil proceedings (§ 28(4) JN). A referral under § 44 JN cannot be considered as this only applies to ex-dispute issues, enforcements, requests for enactment of interim injunctions and insolvency proceedings. There is no refunding of costs in a one-sided ordination which the defendant was not brought in (10 Nd

FOOTNOTES

* All translations should be verified by cross-checking against the original text. For purposes of this translation, Plaintiff of Austria is referred to as [Consumer Association] and Defendant of Germany is referred to as [Seller].

Translator's note on other abbreviations:

ecolex = *Fachzeitschrift für Wirtschaftsrecht* [Austrian Journal on Commercial Law]; **ECJ** = European Court of Justice; **EvBl** = *Evidenzblatt* [Austrian Law Journal]; **JBl** = *Juristische Blätter* [Austrian Law Journal]; **JN** = *Jurisdiktionsnorm* [Austrian Code on Court Organization]; **KSchG** = *Konsumentenschutzgesetz* [Austrian Law on Consumer Protection]; **RZ** = *Österreichische Richterzeitung* [Austrian Law Journal]; **WBl** = *Wirtschaftsrechtliche Blätter* [Austrian Journal on Commercial Law]; **ZfRV** = *Zeitschrift für Rechtsvergleichung* [Austrian Journal on Comparative Law].

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