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Germany: Use of Incoterms Clause "DDP" May Establish International Jurisdiction

In international commercial transactions, Incoterms are widely used to define the tasks, costs and risks associated with the delivery of goods. However, under new case law by the German Federal Supreme Court, the use of Incoterms may also establish international jurisdiction – even if the parties using the Incoterms are not aware of this consequence. This demonstrates the need to use legally secure forum selection clauses.

In a recent ruling dated 07 November 2012 (file no.: VIII ZR 108/12), the German Federal Civil Court (*Bundesgerichtshof* or BGH) had to decide on a commonplace fact pattern but rendered a surprising result highly relevant for companies doing business in Germany.

Facts of the case

The facts of the case are straightforward: The plaintiff, a German company, purchased glass fiber from the defendant, a South Korean company, which the plaintiff processed to cables. Customers of the plaintiff asserted warranty claims for defective cables. The Plaintiff claimed that these defects were due to inferior quality of the glass fiber and sued for damages against its South Korean supplier before a German court. Despite that the parties had not agreed on a specific forum selection clause providing for international jurisdiction in Germany, the BGH confirmed the competence of German courts.

Relevance of the place of performance

According to the main principle that the general venue of a person is determined by its place of residence, German law provides that the general – but not exclusive – venue for lawsuits against a company is at its registered seat (Sec. 17 German Code of Civil Procedure, *Zivilprozessordnung* or ZPO). This takes into consideration that a person who has to face a court claim against its will shall be facilitated its defense and not be forced to litigate before a foreign court. This principle is set aside where there is a deviant link to the subject matter of the dispute. Therefore, a special regulation provides that for any disputes arising from a contractual relationship, the court of the location where the obligation at issue is to be performed shall have jurisdiction (Sec. 29 ZPO). The rationale is that a locally close court may have better access to clarification of facts, e. g. to take evidence on the defects in dispute. Of course, business partners are free to reach an explicit agreement on the place of jurisdiction for any disputes arising out

of their contractual relationship, but the parties had not made use of this opportunity in the case at hand.

Determination of place of performance

Since the registered seat of the South Korean defendant was obviously not in Germany, the BGH examined the location where the specific contractual obligation which the claim was based on, i. e. the obligation of the South Korean company to deliver glass fibers free of defects, was to be performed. This was to be determined under the United Nations Convention on Contracts for the International Sale of Goods (CISG) as the applicable material law in that case. According to Art. 31 (a) CISG, as a rule of interpretation, the place of performance would have been the place where the Korean Supplier handed over the glass fiber to the first carrier for transmission to the German company. Therefore, in applying the CISG, the legal place of performance would have been an (air)port in South Korea – obviously not a place inside Germany. However, according to Art. 31 CISG, this principle only applies, if the seller is not bound to deliver the goods at any other particular place. A deviating agreement relocating the place of performance may be established by a commercial clause or an individual and explicit agreement.

Relevance of Incoterms clause "DDP" for place of performance

The BGH held that the agreement on the Incoterms clause "DDP" constitutes such a deviating agreement. The Incoterms rules are an internationally recognized standard and used worldwide in international and domestic contracts for the sale of goods. First published in 1936, Incoterms rules provide internationally accepted definitions and rules of interpretation for most common commercial terms. The rules have been developed and maintained by experts and practitioners brought together by International Chamber of Commerce, Paris (ICC) and have become the standard in international business rules setting. They aim to help traders avoid costly misunderstandings by clarifying the tasks, costs and risks involved in the delivery of goods from sellers to buyers.

In their contract or order papers, the parties had agreed on "DDP Cologne". "DDP" stands for "Delivered Duty Paid" and means that the seller delivers the goods cleared for import, and not unloaded from any means of transport at the named place of destination. The seller has to bear all the costs and risks involved in bringing the goods there, including any duty for import. However, the Court held that the meaning of the clause is not limited to the allocation of transport costs and the transfer of the risk, but that it constitutes an agreement about the place of performance also for procedural purposes. The BGH found that this clause is generally understood in such way that the seller must place the goods at the disposal of the buyer at the named place of destination, and therefore also establishes a place of performance in the legal sense.

The court emphasized that it is irrelevant whether the parties were aware that the use of the Incoterms clause "DDP" would not only result in an agreement on the place of performance, but also on the place of jurisdiction. The court held that it did not matter whether the parties had discussed the question of jurisdiction, place of performance and applicable material law at all, because the jurisdiction is automatically established by operation of German law. The court also held that a specific reference in the contract or order papers to the "ICC Incoterms 2010" was not required for interpretation of the clause "DDP" in accordance with these principles because such understanding is world wide practice. The BGH therefore confirmed the international jurisdiction of German courts.

Key aspects

In international commercial transactions, the venue for a potential dispute may be a decisive factor in deciding whether to pursue a claim. Therefore, you should always keep an eye on the forum having jurisdiction for a potential dispute with your business partner. The applicable forum is not always evident or easy to identify. If the place of performance is within Germany, this may also be the venue for any court disputes. The use of an Incoterms clause may make a significant difference. The safest way to deal with this issue is to use a forum selection clause that provides for an exclusive place of international jurisdiction at the location of choice. On the other hand, German courts are fast, cost-effective and the German judiciary provides an excellent framework for doing business, so that finding yourself before a German court may be a surprising but not necessarily a bad experience after all.

How we can help?

Please contact Kai Graf v. der Recke at HAVER & MAILÄNDER who can help you with any queries on this topic.

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