

**THE ACTUAL APPLICATION OF THE NEW RULE – CHOICE OF FORUM AGREEMENTS IN
GENERAL CONDITIONS OF SALE**

A case study to start with....

Bernhard, Buyer, is based in Dortmund (Germany). He places an order with Spencer, Seller, who is based in Birmingham (UK) for the delivery of 10 metric tons of stainless steel plates. It is the first time that both companies do business together.

After a couple of additional e-mails aiming at fine-tuning the parameters of the operation, Spencer confirms to Bernhard that the delivery will take place during week 10, at Güterbahnhof Dortmund.

Two months after the delivery, Bernhard discovers that some of the steel plates are heavily defective. Despite a timely notice of non-conformity to Spencer, no remedial action is taken by the seller.

Bernhard decides to initiate legal proceedings against Spencer.

His Counsel draws then his attention to Clause 15 of the seller's General Conditions of sale, which were printed on the back of the commercial invoice which was sent together with the goods. These General Conditions were never discussed between the parties, and their first communication to Bernhard was on the back of the invoice. Clause 15 gives exclusive jurisdiction to the ordinary courts in Birmingham, and under Clause 16, the law applicable to the contract shall be English law. Buyer paid the invoice without reacting.

However, on the basis of the general principles of German law, Bernhard considers that the communication of the General Conditions took place after the conclusion of the contract, so that they cannot be binding on the parties. He decides to take legal action against Spencer before the Courts of Dortmund [art. 7 (1) (a) and (b) Brussels Ia]. Spencer relies on Clause 15 and objects to the jurisdiction of the German courts.

Quid iuris ?

Art. 31 (2) Brussels Ia:

(...) where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seized, any court of another Member State shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement.

The Courts in Dortmund should stay the proceedings....

Spontaneously....? For how long....?

Preamble (22) Brussels Ia

*“...In such a case, the court first seized **should be required to stay its proceedings as soon as the designated court has been seized and until** such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement”*

Parallel reading of Preamble and Art. 31 (2) seems to leave some grey zones.... However:

- The German court (i.e. the Court first seized) should be required (probably by the Seller) to stay the proceedings;
 - The order to stay will seemingly depend on the seizure of the Courts in Birmingham (i.e. the designated Court);
 - How and by whom are the Courts in Birmingham going to be seized?
 - o The seller ?
 - what relief would he seek ? positive confirmation that the Birmingham Courts shall have jurisdiction or negative confirmation that the Dortmund Courts do not have jurisdiction ?
 - o The buyer?
 - what relief ? negative confirmation that the Birmingham Courts do not have jurisdiction ?
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How are the Birmingham Courts going to handle the matter ?

Art. 25 (1) Brussels Ia:

*“If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity **under the law of that Member State**”*

Preamble (20):

*“Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with **the law of the Member State of the court or courts designated in the agreement, including the conflict-of laws rules of that Member State**”*

In other words:

The Courts in Birmingham will assess the (substantive) validity of Clause 15 under the laws of the UK, including the English PIL rules.

Do the English PIL rules include the Rome I Regulation, in particular its Art. 3 and 10 ff. ?

Rome I does basically not apply to choice of jurisdiction clauses [Art. 1 (2) (e)].

However there seems to be a certain trend/certain academic voices advocating today in favour of applying Rome I art. 3 ff. and 10 ff. by analogy to jurisdiction clauses, in order to implement a certain level of uniformity and unity between Brussels Ia and Rome I and within the European legislation.

Should this trend be confirmed:

Would the UK Courts apply UK law (i.e. Clause 16 of the General Conditions of sale) through Art. 10 (1) and 3 (1) of Rome I?

- Art. 10 (1): *The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.*
- Art. 3 (1): *A contract shall be governed by the law chosen by the parties.*

What would be the solution of English law as to how the General Conditions of Sale were actually “included” here ?

- If inclusion is admitted, jurisdiction clause is valid.
 - If not, jurisdiction clause would be disregarded.
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Should this trend be denied:

Would the UK Courts refer to principles of German law, on the basis of Art. 10 (2) of Rome I?

- Art. 10 (2): *Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.*

What would be the solution of German law as to how the General Conditions of Sale were “included” here ?

- If inclusion is denied, jurisdiction clause is invalid.
 - If not, jurisdiction clause would be admitted.
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What if Rome I should basically not apply (even by analogy) ?

Could the UK Courts rule that the parties in the present matter are deemed to have consented to the jurisdiction clause in Art. 15 in a form which, in international trade or commerce, accords with a usage of which the parties are or ought to have been aware and which in such

trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned ?

In this respect, we should bear in mind that there seems to be decisions of the CJEC ruling that a jurisdiction clause shall be regarded as validly agreed on when

- usages of international trade admit that the clause is to be found in a document unilaterally prepared and addressed by one of the parties to the other, in particular on a bill or invoice, and
- the behaviour of the other party, in particular its silence, absence of reaction or objection to a document which it has received, can be regarded as a consent to the clause or a tacit acceptance thereof (CJEC, 16 March 1999, C 159/97).

Battle of forms (1)

Let us modify the initial case study:

Buyer is no longer German but Dutch, and is based in Amsterdam. He sends his order along with his General Conditions of purchase: they provide inter alia for jurisdiction in Amsterdam, with Dutch law being applicable with the exclusion of the CISG.

Seller sends an e-mail to the Buyer, to confirm the operation, along with his own General Conditions of sale, with a jurisdiction clause in favour of the courts in Birmingham and English law applicable.

He then dispatches the goods to the Buyer 10 days later.

No other changes. Buyer sues Seller in front of the Dutch courts in Amsterdam. Seller objects to the jurisdiction of the Dutch Courts.

How is the Amsterdam court going to handle the case ?

Are we in an exceptional situation captured by Art. 31 (2) Brussels Ia ?

Preamble (22)

The exception of Art. 31 (2) “*should not cover situations where the parties have entered into conflicting exclusive choice-of court agreements (...). In such cases, the general lis pendens rule of this Regulation [i.e. Art. 29 Brussels Ia] should apply*”

To decide whether to apply Art. 29 or 31 (2), the Dutch court has thus first to identify whether we are in a case where the parties have entered into conflicting exclusive choice-of court agreements.

In the absence of any other specific European instrument/rule, Dutch Court will probably have no other choice but to check *lege fori* the validity and effectiveness of the choice of court clauses in both General Conditions [see also Art. 25 (1) Brussels Ia and Preamble (20), which refer to “*the law of the Member State of the court or courts designated in the agreement, including the conflict-of laws rules of that Member State*”]

In case of diverging General Conditions, the general contract law of the Netherlands applies the *first shot rule* - Art. 6:225 (3) of the Dutch Civil Code. The Standard Forms which are referred to first shall prevail.

Are the Dutch Courts going to apply here a *first shot rule* ?

If so, the Dutch court would probably consider that they have jurisdiction on the basis of the jurisdiction clause contained in the Buyer’s General Conditions of purchase, provided the formal requirements in Art. 25 (1) (a) to (c) Brussels Ia are met, as well as any other possible requirement of Dutch law as to how standard contract terms can be imposed.

What would happen if the Seller initiates then legal action before the Courts in Birmingham to get a negative confirmation that the Dutch Courts have no jurisdiction?

It seems that these UK Courts would have to decline jurisdiction on the basis of Art. 31 (1) Brussels Ia. If the Seller’s action is brought in parallel to the Buyer’s Dutch proceedings, the UK Courts would first have to stay their proceedings [Art. 29 (1) Brussels Ia] and then to decline jurisdiction under Art. 31 (3) Brussels Ia.

Battle of forms (2)

Let us modify once again the case study:

Buyer is again German, and is based in Dortmund. He sends his order along with his General Conditions of purchase: they provide inter alia for jurisdiction in Dortmund, with German law being applicable.

Seller sends an e-mail to the Buyer, to confirm the operation, along with his own General Conditions of sale, with a jurisdiction clause in favour of the courts in Birmingham and English law applicable.

He then dispatches the goods to the Buyer 10 days later.

No other changes. Buyer sues Seller in front of the German Courts in Dortmund. Seller objects to the jurisdiction of the German Courts.

Start is the same as before.

German Court will check *lege fori* the validity and effectiveness of the choice of court clauses in both General Conditions [Art. 25 (1) Brussels Ia].

In case of diverging General Conditions, the general contract law of Germany applies the *knock-out rule*, i.e. no standard terms shall prevail, and the contract is deemed to have been

entered into under the terms of both General Conditions which are not in conflict with each other. All conflicting clauses are knocked-out/disregarded.

However, we have here an international sales agreement and the German Court is therefore basically treaty-bound to also analyse from a German PIL perspective whether the CISG should apply, bearing in mind that the CISG is sometimes seen as a *last-shot rule* mechanism in some (especially Common law) jurisdictions, sometimes as a *knock-out rule* scheme (especially on the European continent).

Art. 25 (5) Brussels Ia: “*an agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement **independent** of the other terms of the contract*”.

Could this independence of the jurisdiction agreement imply that the CISG does not apply to it (there are some voices [including a recent German court decision] advocating [wrongly] that CISG would only apply to sales agreements – there is however no support to this in the text of the CISG).

Lege fori, let's assume that the German Court would very probably apply its own *knock-out rule*, or a *CISG knock-out rule*, with the result that only the non-diverging provisions of both General Conditions shall remain in force and be binding on both parties. As far as jurisdiction is concerned, the standard terms in presence here are conflicting with each other, so that both jurisdiction clauses in both standard terms would probably be knocked-out/disregarded.

The German Court would then resort to the general jurisdiction rules of Brussels Ia, i.e. Art. 7 (1) (a) and (b).

With the result that the German Courts at the place of the delivery of the goods (i.e. Dortmund) shall have jurisdiction.

Any parallel legal action of the Seller in front of other/English Courts would be stayed and then dismissed [Art. 29 (1) and Art. 31 (3) Brussels Ia]
