



WORKING GROUP 3

STAYING OF PROCEEDINGS

The registered office of MSIE is in Sibiu, Romania. For several years it sold children's clothing to MISAT, of Rome, Italy.

On 19 April 2016 MISAT brought proceedings against MSIE before the Tribunale Civile e Penale (Civil and Criminal District Court) di Roma seeking a ruling that the contract between them had terminated *ipso jure* or, in the alternative, that the contract had been terminated following a disagreement between the two companies. MISAT also asked the court to find that it had not failed to perform the contract and to order MSIE to pay it damages for failure to fulfil the obligations of fairness, diligence and good faith and to reimburse certain costs.

On 4 December 2016 MSIE brought an action against MISAT before the Tribunalul Sibiu, Romania, to obtain payment of outstanding invoices. In support of the jurisdiction of that court, the claimant submitted that it was not only the court for the place of performance of the contract, but was also the court designated by a choice-of-court clause which had appeared on all invoices sent by MSIE to MISAT, without the latter having raised any objection in that regard. According to MSIE, that showed that, in accordance with their practice and the usage prevailing in trade between Romania and Italy, the parties had concluded an agreement conferring jurisdiction.

MISAT contended that the Tribunalul Sibiu had no jurisdiction, on the ground that the court of competent jurisdiction was the court for the place where it was established. It also contested the very existence of an agreement conferring jurisdiction and stated that, before the action was brought by MSIE before the Tribunalul Sibiu, it had commenced proceedings before the Tribunale Civile e Penale di Roma in respect of the same business relationship.



LEGAL ASSESSMENT

1. The case above mentioned has to be decided:

- a) in accordance with Regulation 44/2001;
- b) in accordance with national civil procedural law of both Member States and, in case of conflict of jurisdiction in accordance with Regulation 1215/2012;
- c) in accordance with Regulation 1215/2012;

2. In the above mentioned case study:

- a) Tribunalul Sibiu, whose jurisdiction has been claimed under an agreement conferring jurisdiction, as the court second seised, must nevertheless stay proceedings until Tribunale Civile e Penale (Civil and Criminal District Court) di Roma, the court first seised has declared that it has no jurisdiction;
- b) Tribunalul Sibiu, whose jurisdiction has been claimed under an agreement conferring jurisdiction, as the court second seised, must nevertheless stay proceedings until Tribunale Civile e Penale (Civil and Criminal District Court) di Roma, the court first seised has declared that it has no jurisdiction, but only if the duration of proceedings before this court is not excessively long;
- c) Tribunale Civile e Penale (Civil and Criminal District Court) di Roma shall stay the proceedings until such time as Tribunalul Sibiu, as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Fill in the gaps with the appropriate words with respect to the above mentioned case:

If Tribunalul Sibiu jurisdiction in accordance with the agreement, Tribunale Civile e Penale (Civil and Criminal District Court) di Roma shall jurisdiction in favour of Tribunalul Sibiu.

In this situation, Regulation 1215/2012 provides for an exception to the general rule in order to deal satisfactorily, in order to the effectiveness of exclusive agreements and to avoid abusive litigation tactics.



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This is to ensure that, in such a situation, the court has priority to decide on the of the agreement and on the extent to which the agreement applies to the dispute before it.

This exception should not cover situations where the parties have entered into exclusive choice-of- court agreements.



I. Read the following judgment. While reading it, provide the correct words missing.

JUDGMENT OF THE COURT (Full Court)

In Case C-116/02,

REFERENCE to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Oberlandesgericht Innsbruck (Austria) for a preliminary ruling in the proceedings pending before that court between

Erich Gasser GmbH

and

MISAT Srl,

on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and - amended text - p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1),



THE COURT (Full Court),

gives the following

Judgment

By judgment of 25 March 2002, received at the Court on 2 April 2002, the Oberlandesgericht (Higher Regional Court) Innsbruck referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Protocol), a number of questions on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and - amended text - p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) (the Brussels Convention or ‘the Convention’).

Those questions were raised in proceedings between Erich Gasser GmbH (‘Gasser’), a company incorporated under Austrian law, and MISAT Srl (‘MISAT’), a company incorporated under Italian law, following a (1) in their business relations.

- (1) a) breakup b) breakdown c) breakthrough d) breakin



The main proceedings and the questions referred to the Court

The registered office of Gasser is in Dornbirn, Austria. For several years it sold children's clothing to MISAT, of Rome, Italy.

On 19 April 2000 MISAT brought (2) against Gasser before the Tribunale Civile e Penale (Civil and Criminal District Court) di Roma seeking a ruling that the contract between them had terminated *ipso jure* or, in the alternative, that the contract had been terminated following a disagreement between the two companies. MISAT also asked the court to find that it had not failed to (3) the contract and to order Gasser to pay it (4) for failure to fulfil the obligations of fairness, diligence and (5) and to (6) certain costs.

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|------------------|---------------|----------------|----------------|
| (2) a) procedure | b) procedures | c) proceeds | d) proceedings |
| (3) a) fulfill | b) realize | c) carry out | d) perform |
| (4) a) damages | b) damage | c) restitution | d) relief |
| (5) a) good will | b) will | c) good faith | d) faith |
| (6) a) grant | b) reimburse | c) give | d) give back |

On 4 December 2000 Gasser brought an action against MISAT (7) the Landesgericht (Regional Court) Feldkirch, Austria, to obtain payment of outstanding invoices. In support (8) the jurisdiction of that court, the claimant (9) that it was not only the court for the place of (10) of the contract, within the meaning of Article 5(1) of the Convention but was also the court designated by a choice-of-court clause which had appeared on all invoices sent by Gasser to MISAT, without the (11) having raised any objection in that regard. According to Gasser, that showed that, in accordance (12) their practice and the usage prevailing in trade between Austria and Italy, the parties had concluded an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

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|------------------|--------------|-----------|----------------|
| (7) a) to | b) at | c) before | d) in front of |
| (8) a) for | b) of | c) to | d) in |
| (9) a) submitted | b) suggested | c) said | d) claimed |



- (10) a) occurrence b) performance c) realization d) achievement
(11) a) last b) late c) latest d) latter
(12) a) to b) with c) of d) for

MISAT contended that the Landesgericht Feldkirch had no jurisdiction, on the ground that the court of competent jurisdiction was the court for the place where it was established, under the general rule laid down in Article 2 of the Brussels Convention. It also (13) the very existence of an agreement conferring jurisdiction and stated that, before the action was brought by Gasser before the Landesgericht Feldkirch, it had commenced proceedings before the Tribunale Civile e Penale di Roma in respect of the same business relationship.

- (13) a) denied b) refused c) contested d) appealed

On 21 December 2001, the Landesgericht Feldkirch decided of its own motion to stay proceedings, pursuant (14) Article 21 of the Brussels Convention, until the jurisdiction of the Tribunale Civile e Penale di Roma had been established. It confirmed its own jurisdiction as the court for the place of performance of the contract, but did not rule (15) the existence or otherwise of an agreement conferring jurisdiction, observing that although the invoices issued by the claimant systematically included a reference to the courts of Dornbirn under the heading ‘Competent Courts’, the orders, on the other hand, did not record any choice of court.

- (14) a) from b) with c) to d) through
(15) a) for b) against c) about d) on

Gasser appealed against that decision to the Oberlandesgericht Innsbruck, contending that the Landesgericht Feldkirch should be declared to have jurisdiction and that proceedings should not be stayed.

The national court considers, first, that this is a case of *lis pendens* since the parties are the same and the claims made before the Austrian and Italian courts have the same cause of action within the meaning of Article 21 of the Brussels Convention, as interpreted by the Court of Justice (see, to that effect, Case 144/86 *Gubisch Maschinenfabrik* [1987] ECR 4861).



After noting that the Landesgericht Feldkirch had not ruled as to the existence of an agreement conferring jurisdiction, the national court raises the question whether the fact that one of the parties repeatedly and without objection settled invoices sent by the other even though those invoices contained a jurisdiction clause can be seen as acceptance of that clause, in accordance with Article 17(1)(c) of the Brussels Convention. The national court states that such conduct by the parties reflects a usage in international trade and commerce which is applicable to the parties and of which they are aware or are deemed to be aware. In the event of the existence of an agreement conferring jurisdiction being established, then, according to the national court, the Landesgericht Feldkirch alone has jurisdiction to deal with the dispute under Article 17 of the Convention. In those circumstances, the question arises whether the obligation to stay proceedings, provided for in Article 21 of the Convention, should nevertheless apply.

In addition, the national court asks to what extent the excessive and generalised slowness of legal proceedings in the Contracting State where the court first seised is established is liable to affect the application of Article 21 of the Brussels Convention.

It was in those circumstances that the Oberlandesgericht Innsbruck stayed proceedings and referred the following questions to the Court for a preliminary ruling:

‘1. May a court which refers questions to the Court of Justice for a preliminary ruling do so purely on the basis of a party's (unrefuted) submissions, whether they have been contested or not contested (on good grounds), or is it first required to clarify those questions as regards the facts by the taking of appropriate evidence (and if so, to what extent)?

2. May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [“the Brussels Convention”], review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels



Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?

3. Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?

THE COURT (Full Court),

in answer to the questions referred to it by the Oberlandesgericht Innsbruck by judgment of 25 March 2002, hereby rules:

1. A national court may, under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the Court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the Convention and to



explain why it considers that a reply to its questions is necessary to enable it to give judgment.

2. Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

3. Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

II. Explain the following words and phrases or provide synonyms for them.

- (1) seeking a ruling that the contract between them had terminated *ipso jure*
- (2) the usage prevailing in trade between Austria and Italy
- (3) the party commenced proceedings before the Italian court
- (4) the court decided to stay the proceedings
- (5) a party's (unrefuted) submissions
- (6) material detriment may be caused to one party

III. Answer the following questions:

- (1) What legal aspects are involved in this judgment?
- (2) Does the length of the proceedings influence the determination of jurisdiction?

Account for your answer.