Neutral Citation Number: [2006] IEHC 60

THE HIGH COURT

[2003 No. 9072P]

BETWEEN

STRYKER CORPORATION TRADING AS STRYKER HOWMEDICA OSTEONICS

PLAINTIFF

AND

SULZER METCO AG

DEFENDANT

Judgment of O'Neill J. delivered the 7th day of March, 2006.

1. The defendants in this motion herein dated 3rd September, 2003, seek an order pursuant to the O. 12 r. 26 of the Rules of the Superior Courts or alternatively pursuant to the inherent jurisdiction of this court setting aside the service of these proceedings on the defendant on the grounds that the contract (if any) on which the plaintiff sues in these proceedings was the subject of a clause conferring sole and exclusive jurisdiction to hear disputes howsoever arising between the parties, on the courts of the canton of Aargau, in Switzerland and as a consequence this Court does not have a jurisdiction to hear and determine the plaintiffs claim against the defendant.

2. The plaintiffs statement of claim which was delivered on the 30th September, 2003, reveals that the plaintiffs claim that a machine purchased by the plaintiffs from the defendants and delivered in October, 2000, to the plaintiffs exploded and caught fire on the 4th July, 2001, when the machine was being cleaned and as a consequence of which the plaintiffs claim to have suffered very significant losses and damage which they say were caused by the breach of contract of the defendants and also the negligence, breach of duty and breach of statutory duty and negligence misrepresentation of the defendants.

3. The facts relevant to the issues that arise in this motion are to be found in the several affidavits sworn herein and are as follows.

4. The defendants are a limited liability company incorporated in Switzerland and are a subsidiary of another Swiss company known as Sulzer AG. The plaintiffs are a limited liability company incorporated in Ireland and engage in the business of manufacturing orthopaedic implants incorporating elements made from titanium. These proceedings concern the design, manufacture and the supply by the defendants to the plaintiff of a Titanium Arc Spray Coating System (the "machine") for use by the plaintiffs at its plant in Cork.

5. Negotiations between the plaintiffs and defendants commenced in January of 1999 when on the 4th January, a confidentiality agreement was entered into between these parties. Subsequent to this, the defendants submitted three quotations, the first being quotation No. S99013-HE, on the 19th January, 1999. A revised quotation No. SS99013A-He, was submitted by the defendants on the 30th March, 1999 and the final quotation bearing No. S 99013C-He, was submitted on the 6th July, 1999. All of these quotations stated that they were to be subject to the defendants general conditions of contract and these general conditions were enclosed with the latter two quotations. These general conditions of the defendants inter alia contained what may be described as an exclusive jurisdiction clause in the following terms:

> " *19.* ***Jurisdiction and Applicable Law***
>
> *19.1 The place of jurisdiction for both the customer and the supplier shall be at the registered office of the supplier.*
> *The supplier shall however be entitled to sue the customer at the latter's registered address.*
> *19.2 The contract shall be governed by Swiss substantive law."*

6. On the 29th September, 1999, the plaintiffs sent the defendants a "Letter of Intent" which is in the following terms:

> *"Letter of Intent*
>
> *Dear Valentin,*
>
> *This letter confirms our intention to place an order with you for an automatic inert gas arc wire coating system, generally in accordance with your offer S99013C-He of July 6th, 1999 and subsequent discussion.*
>
> *As the completion of the validation work and the preparation of the detailed purchase conditions will take some more time we would request that Sulzer Metco commence immediately with the detailed engineering work and the planning for the delivery of the system.*
>
> *In case the system for reasons which are not apparent at the moment, is not purchased by Stryker Ireland Limited, we will reimburse Sulzer Metco for the engineering and planning work carried out. The amount to be spent for such engineering and planning work is limited to CHF50,000.*
>
> *Additional expenses for material purchasing, capacity planning etc. are explicitly excluded from the scope of this letter of intent."*

7. On the 8th October, 1999, the defendants wrote to the plaintiffs seeking a formal purchase order so that works could commence in order to achieve the quoted delivery time of nine months. A further letter of the 5th November, was sent by the defendants to the plaintiffs again seeking the purchase order.

8. On the 11th November, 1999, the plaintiffs faxed to the defendants five sheets and here the controversy in the case begins. The first of these sheets was the fax enclosure sheet the second sheet or document was the purchase order being order No. 030155. This is dated the 10th November, 1999 and it orders one inert gas wire arc coating system as detailed in attachment 1 for the unit price of SFR1,347,320. On it is inscribed the following:

> "Delivery xworks, Wohlen on August, 10th, 2000."

9. The order is signed by P. Forrestal with the date of 10th November, 1999, added to the signature.

10. The third sheet in this fax communication is a letter dated 11th November, 1999, from Pat Forrestal, General Manager of the plaintiff to Valentin Vogt of the defendants, this letter reads as follows:

"Dear Valentin,

Attached herewith for your attention please find purchase order No. 0155 and attachment No.; 1.

If you have any queries please contact me.

Kindest regards,

Yours sincerely,

Pat Forrestal

General Manager."

11. The next two sheets in the fax communication are what has previously been described as "Attachment No. 1". As this document is of great importance to the case, I quote the textual part of it in extenso. It is as follows:

"Purchase Order No. 0155

Attachment No.:1

Sulzer Metco Purchase Order – Arc Deposition System

To design, supply, commission and validate an automatic inert gas wire coating system in accordance with the Sulzer Metco offer S99013C-HE unless varied below and subsequent discussions with Stryker representatives.

The system shall be constructed to safely and efficiently coat a range of Femoral Stems and Acetabular Cups as tabulated below, to meet the requirements of Stryker Specification IMS0133 for Arc Deposited Titanium Coating Composition and Thickness and all relevant appearance criteria advised by Stryker and illustrated by reference samples as provided to Sulzer Metco …..

The scope of supplies shall include all designs, machinery and equipment, fixtures, masking, specialist operational and maintenance tools, technical information and initial consumables necessary to provide Stryker with a fully validated and operational system.

The design and construction shall be carried out so as to minimise the noise level from the system during operation, consistent with the open plan manufacturing floor arrangement of the Cork facility.

Full design drawings (hard-copy and CAD format) and specifications, operational and maintenance manuals, in the English language shall be provided at a handover. Sample documentation shall be provided to Stryker for approval during the course of the project.

The system shall have the capacity to coat a minimum of 100 stems or 125 cups on a single shift, with two trained operators, including masking and defurring.

The system shall be fully commissioned and validated at the Wohlen works, and operated for a period of four weeks, two weeks of which shall be at full production, prior to shipment to Ireland. The system shall be commissioned in Ireland following which Sulzer Metco personnel shall supervise the operation of the system by Stryker staff for five working days of satisfactory performance.

Training of Stryker staff shall be provided by Sulzer Metco at Wohlen during the initial commissioning and operation of the system.

The Stryker scope of supply associated with the project shall comprise:

1. *Reimbursement of the shipping costs of the system from Wohlen to the Cork facility.*
2. *Off loading and positioning of the system components under Sulzer Metco supervision.*
3. *Provision of mechanical and electrical attendance during reassembly and re-commissioning.*
4. *Provision of utilities i.e. gas, electricity, compressed air, water and dust extractions.*
5. *Provision of test pieces as necessary to carry out validation and initial performance testing.*

The system shall be ready for shipment following production testing and disassembly at Wohlen, by August 10th, 2000. Shipment and reassembly at Cork shall be carried out in the most expeditious manner possible thereafter.

Detailed engineering design shall be subject to the approval of Stryker.

Total price for the system: SFR1,347,320.

Terms of payment:

10% after order acknowledgement.

20% following design approval.

60% at readiness for dispatch following successful production testing.

10% at final acceptance."

12. On the same day i.e. the 11th November, 1999, the plaintiffs posted to the defendants a hard copy of the letter of the 11th November, 1999, as quoted above, the purchase order as mentioned above, Attachment No. 1 as quoted above and also a copy of the plaintiffs Standard Conditions which were enclosed behind the purchase order.

13. The text of the letter of the 11th November, 1999, as posted and of the purchase order and Attachment no. 1 are identical to those as faxed on the same date. Thus the material difference between the posted communication and the fax communication is the inclusion of the plaintiff's Standard Conditions.

14.. The first term in these conditions is under the heading "Sellers Acceptance" and is as follows:

> *"The Sellers acknowledgment of this Order or commencement of work pursuant to this order, whichever occurs first, shall be deemed an acceptance of this order. Such acceptance is limited to the express terms and conditions herein. Any terms and conditions proposed by Seller in its acceptance that are different or additional to those herein are hereby objected to and rejected by Buyer. Any terms or conditions proposed by Seller different or additional to those set forth in this order relating to the description, quantity, price, or delivery schedule for the goods or services shall void this order. Any items or conditions proposed by Seller different or additional to those set forth in this Order, other than those enumerated above, shall constitute a material alteration, and this Order will be deemed accepted by Seller without such different or additional items or conditions."*

15. Upon receipt by the defendants of the fax communication, the defendants immediately initiated a check of the purchase order and attachment to ensure that it was in compliance with the quotation of the 6th July, 1999. It is averred and I would accept that this was completed very quickly and that work began immediately thereafter on the design and manufacture of the machine.

16. The posted communication arrived at the defendants premises but unfortunately the date of its arrival is not stamped on it or otherwise recorded. It would appear that this post communication in its entirety, was not drawn to the attention of Mr. Vogt but was simply filed. As a consequence I accept that the plaintiffs standard conditions enclosed in this communication were never seen by Mr. Vogt or any other person in a decision making capacity in the defendant company, that is of course until after these proceedings were commenced.

17. Thus the transaction was now blighted by two very significant mishaps, the first being the failure upon the part of the plaintiffs to have enclosed its standard conditions with the faxed communication and the second being the filing by the defendants of the posted communication without it being seen by Mr. Vogt.

18. The consequence of this chapter of accidents is that when the Order of confirmation was sent by the defendants on 25th November, 1999, the defendants believed that the transaction was proceeding on the basis that its general conditions, including the exclusive jurisdiction clause, had been accepted by the plaintiff and because of the absence of any reference in the confirmation order to the question of general or standard conditions and in particular to its standard conditions, the plaintiff believed on receipt of the confirmation order that its Standard Conditions had been accepted by the defendants.

19. Thereafter the contract appears to have progressed uneventfully and the machine was delivered on time and assembled and commissioned successfully at the plaintiffs premises in Cork.

20. The defendants case on this motion is that its general conditions governed the contract including the exclusive jurisdiction clause contained therein. In making that case the following submissions were made by Mr. Ian Finlay S.C.

21. Each of the three quotations given by the defendants to the plaintiff expressly incorporated the defendants general conditions and the second and third quotations and in particular the final one of the 6th July, upon which the agreement was based enclosed a copy of these general conditions.

22. At no stage during the course of protracted negotiations did the plaintiffs make any reference whatsoever to their standard conditions or give any intimation that they wished the agreement to be based on their standard conditions rather than the defendants.

23. The faxed communication of the 11th November, 1999, did not include the plaintiffs standard conditions nor was there any reference to them either in the purchase order, or the letter, or the Attachment no. 1. In fact there was no mention of the plaintiffs standard conditions whatsoever. On the contrary the first paragraph of Attachment no. 1 expressly contracts on the basis of the defendants final offer or quotation of the 6th July, unless that was varied below or subsequently, none of which happened.

24. Having received the fax communication the defendants had no reason to think that any posted communication or hard copy would at all vary from the fax communication, there being no reference whatsoever in the fax communication to any interest in the plaintiffs standard condition and thus when the posted communication arrived, it was, in accordance with normal administrative procedure, simply filed. In the meantime the defendants had commenced work on the project as was expected of them by the plaintiffs in order to meet a very ambitious delivery time. Finally when the work commenced and proceeded and when the confirmation order issued on 25th November, 1999, the transaction had proceeded in such a way as to leave no-one in any doubt but that there was agreement between the parties on the basis of the inclusion of the defendants general conditions.

25. In this regard the quotation of the 6th July, 1999, which was the basis of the contract contained an additional benefit attaching to clause 8.4 of the defendants general conditions. This benefit was never rejected by the plaintiffs and became part of the contract, thereby inextricable enmeshing the defendants general conditions into the contract.

26. Hence on the basis of the incorporation of general conditions in all of the quotations and the absence of any objection or counter-proposal of any description from the plaintiff the requirements for compliance with Article 17(1) of the Lugano Convention as set out in the case of *Salotti v. Ruwa Polstereinaschinen GmbH* [1976] ECR 1831 and the case of *Galerie Segourasprl v. Societe Rahin Bonakdarian* [1976] ECR 1851 were satisfied.

27. The defendant further submits that the initiation by the plaintiffs of a procedure in Switzerland to obtain payment on foot of the same claim made in these proceedings, although not creating a *Lis Alibi Pendens* was nonetheless a clear acknowledgment by the

plaintiffs that Switzerland was the jurisdiction in which the plaintiffs claim could only be litigated.

28. The defendants submitted that in order to succeed in this motion, they merely had to demonstrate a good arguable case. In this regard reliance was placed on the case of *Canada Trust Company v. Stolzenberg [No. 2]* [2002] 1 A.C. 1 at p. 13.

29. The plaintiffs resist this motion on the basis, that having regard to the events as they unfolded as set out above that the parties were never *ad idem* on the incorporation of the defendants general conditions including the exclusive jurisdiction clause. It was submitted by Mr. Hogan S.C. that the inclusion of the plaintiffs standard conditions with the posted communication of the 11th November, 1999, clearly indicated that the plaintiffs were not accepting the defendants general conditions and on the contrary were proposing to contract on the basis of their own Standard Conditions, and it was the belief of the plaintiffs that that in fact had happened when they received the confirmation order which made no reference to either set of conditions.

30. They submit that the events as they occurred establish that there was no agreement between the parties on general conditions and in particular that the defendants have failed to demonstrate or establish that there was an agreement on the inclusion of the defendants exclusive jurisdiction clause and they submit that this is the first and essential requirement for compliance with Article 17(1) of the Lugano Convention.

31. They further submit that the formal requirements as set out in Article 17(1) are for evidential purposes only; that the primary requirement is a demonstration of the existence of an actual agreement between the parties to the inclusion in their contract of an exclusive jurisdiction clause. In this respect they too rely upon the authority the above-mentioned cases.

32. They submit that the circumstances of this case distinguish it from the case of *Holfield Plastics Limited v. ISAP ONB Group Spa* (Unreported, High Court 19th March, 1999) in which case it was held by Geoghegan J. that the requirements of Article 17 were met in circumstances were one party had failed to read general conditions which had been submitted by the other party and to which there had been a clear reference on the face of the contract.

33. It was further submitted that the plaintiffs were entitled to sue in this jurisdiction placing reliance upon Article 5(1) of the Lugano Convention which entitled them to bring their suit in the jurisdiction of the place for the performance of the obligation. They accept or concede that the onus of establishing that the place of performance for the purposes of Article 5(1) in Ireland, rests upon the plaintiffs in this case.

34. The plaintiff submits that so far as Article 17 is concerned the onus of establishing that there was agreement on the defendants exclusive jurisdiction the clause rests upon the defendant and indeed that is accepted by the defendants.

35. The plaintiffs reject the submission by the defendant that in order to discharge the onus on them of establishing agreement as aforesaid, that they need only show a good arguable case. In this respect the plaintiffs contend that because the issue raised in the notice of motion must be finally determined by this court, that it must be determined on the basis of the normal standard of proof in civil matters.

36. As a starting point it is worthwhile to quote the relevant provisions of the Lugano Convention these are Articles 2, 5(1) and 17(1).

37. It is to be noted that the Lugano Convention enjoys the force of law in this State by virtue of s. 18 of the Jurisdiction of Courts and Enforcement of Judgments Act 1998.

> *"Article 2:*
>
> > *Subject the provisions of this convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State….."*

Article 5 which is in s. 2 of the Convention under the subheading of "*special jurisdiction*" is as follows;

> *"Article 5*
>
> *A person domiciled in a Contracting State may, in another Contracting State, be sued:*
>
> > *1. in matters relating to a contract, in the courts for the place of performance of the obligation in question…;*
> >
> > *3. in matters relating to tort, delict or quasi – delict, in the courts for the place where the harmful event occurred…".*

Article 17 which appears in s. 6 of the Convention under the subheading of Prorogation of Jurisdiction" is as follows:

> *"Article 17*
>
> *If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or a courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with the particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement confirming jurisdiction shall be either:*
>
> > *(a) in writing or evidenced in writing; or*
> >
> > *(b) in a form which accords with practices which the parties have established between themselves; or*
> >
> > *(c) in international trade or commerce, in a form which accords with the 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...".*

38. As can be seen from the above quoted passages from the Convention, Article 2 provides a general rule to the effect that persons are to be sued in the courts of the State where they are domiciled.

39. Article 5 is cast in permissive terms and it entitles a party suing to depart from the general rule in Article 2, to commence an action against a defendant in the State other than the state of domicile of the defendant, if the matter in issue relates to a contract, where the jurisdiction selected is the place of performance of the obligation in question.

40. Thus in relying upon Article 5 the onus clearly rests on the parties suing to establish that if the jurisdiction chosen is other than the domicile of the defendant, that it is the place where the obligation was to be performed.

41. Article 17 is cast in mandatory terms and where it applies the choice of jurisdiction made overrides any other potential place of jurisdiction which might arise from the other provisions of the Convention. Because of this overriding or overarching nature of Article 17, a consideration of which provision of the Convention applies so as to determine jurisdiction necessarily in my view starts with a consideration of whether Article 17 applies and in approaching the issues which arise on this motion, I propose first to consider whether Article 17 applies, as has been contended for by the plaintiffs.

42. Before embarking on such a consideration however I should deal with the appropriate standard of proof or the particular onus that rests on parties such as the defendant who asserts that there is an exclusive jurisdiction clause in existence which attracts the application of Article 17.

43. It was submitted by Mr. Finlay that the onus which was on him was merely to show a good arguable case. In that regard he was relying upon the following passage from the judgment of Lord Steyn in the case of *Canada Trust Company v. Stolzenberg No. 2* [2002] 1 A.C. 1 where the learned judge said the following at p. 13

> *"In a purely internal case, the test of a good arguable case has been laid down by the House of Lords as applicable also in respect of domicile as a ground of jurisdiction: See Scaconsor Far East Ltd. v. Bank Markazi Jombouri High Islami Iran [1994] 1 A.C.4 38.*
>
> *The question is whether in the context of Article 6 (of the Lugano Convention) the more stringent test of balance of probabilities should apply. Adoption of such a test would sometimes require the trial of an issue or at least cross-examination of deponents to affidavits. It would involve great expense and delay. While it is true that the jurisdictional issues under the conventions are very important they are generally to be decided with due dispatch and without oral evidence. In my view Waller L.J.'s judgment (1998) 1 W.L.R. 502, 553 – 559 correctly explained on sound principled and pragmatic grounds why the defendants argument is misconceived."*

44. At issue in that case was Article 6 of the Convention which could be said to present an issue capable of easier resolution than can arise under Articles 17 or 5(1). Article 6 provides that where a defendant is one of a number of defendants he may be sued in the courts of the place where any one of them is domiciled.

45. That apart however, I in the course of the hearing raised the question of what would happen when both sides, as in this case, in my view have what might fairly be described as a "good arguable case". To say that an applicant/respondent, on a motion such as this is entitled to the relief sought, if he simply demonstrates a good arguable case, would in my view, be to risk a grave injustice against a respondent/plaintiff who equally might be said to have a good arguable case. In that circumstance if the applicant were granted the relief simply on that basis there would in my view be an invidious discrimination against the respondent, contrary to Article 40.1 of the Constitution of Ireland which guarantees equality before the law.

46. I am unable to adopt the reasoning as set out in the above quoted passage in the judgment of Lord Steyn and am inclined to agree with the submission of Mr. Hogan which was to the effect that as the issue raised in the notice of motion must be determined finally by this court on this application, that the normal standard of proof in civil matters must apply that is to say, the party who carries the burden, in this case the defendant, in so far as the issue under Article 17 is concerned, must prove relevant facts on the balance of probability and so far as legal issues are concerned must satisfy the court of the correctness of any submissions made by them.

47. In order to succeed on this application the defendant must demonstrate that there was an agreement as to the inclusion of the defendants exclusive jurisdiction clause into the contract and that the formal requirements in Article 17 are met. Insofar as these former requirements are concerned, clearly it is the first of these namely that the agreement conferring jurisdiction is either in writing or evidenced in writing, that is the appropriate requirement requiring compliance.

48. I am satisfied on the evidence that there were no practices in existence between these parties prior to the contract the subject matter of these proceedings. I accept the averment in the third affidavit of Juerg Suter to the effect that contract the subject matter of these proceedings was the first such contract between the plaintiffs and the defendant company. There was no evidence at all to suggest that the agreement in this case accords with a usage which was widely known in their trade or commerce and regularly observed by parties to contracts of the type which was involved in this case.

49. Insofar as compliance with the requirement that the agreement be in writing or evidence in writing there is no difficulty with regard to this provision. It is quite clear that the exclusive jurisdiction clause was in writing in the defendants general conditions to which reference was made in the three quotations and those general conditions were supplied to the plaintiffs prior to contract being made.

50. The real issue here is whether or not there was any agreement in the first place, to the inclusion of the defendants exclusive jurisdiction clause.

51. The *Salotti* and *Sagura* cases establish in my view clearly the principle that where an agreement is relied upon to set up an exclusive jurisdiction clause, Article 17 requires that, in the first place, the agreement must be strictly construed and it must be established that the clause conferring jurisdiction was in fact the subject of a consensus between the parties which is clearly and precisely demonstrated and that the purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established. The reason for this approach is that where Article 17 applies, the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 are thereby excluded, which ordinarily would have very serious consequences for the position of the parties to the action.

52. The *Salotti* case however makes clear that the necessary agreement or consensus will be inferred where a clause conferring exclusive jurisdiction is included in general conditions of sale but only if the contract signed by both parties contains an express reference to those general conditions.

53. Mr. Finlay has submitted and I agree with him that in ascertaining whether or not there is agreement or consensus such as to comply with Article 17, issues as to the existence or otherwise of the agreement must be tested objectively, but by reference to the commercial context in which the agreement is alleged to have been made. It is clear in my view from the *Salotti* case that the necessary agreement may be inferred even in the absence of proof of actual agreement where the circumstances are such as to demonstrate that in the commercial context in which the agreement exists, the existence of that consensus or agreement is in those circumstances a probability rather than otherwise. Thus as was demonstrated in the *Holfield* case agreement was inferred even though it was contended that the general conditions had never been read and hence not agreed to but where these general conditions were expressly referred to on the face of the contract.

54. In my view therefore the assessment of the unusual set of facts in this case, these facts and the inferences to be drawn from them, must be approached on an objective basis in the context of the commercial environment in which this arrangement existed.

55. There is no doubt there was a contract between the plaintiffs and the defendants for the design manufacture, delivery, installation and commissioning of this complex piece of machinery. There is no doubt that the parties were entirely *ad idem* so far as the substantive parts of this agreement were concerned.

56. Can it be said however, looking at the matter objectively that there was consensus or agreement on the ancillary aspects i.e. the inclusion of the general conditions of the defendants and in particular the exclusive jurisdiction clause?

57. I am satisfied on the evidence that the plaintiffs did send the Standard Conditions with the posted communication which was sent on 11th November, 1999 and that this reached the defendants probably not later than a week after its posting. I am also satisfied from the evidence that when it reached the defendants it was simply filed and not given any consideration. It is idle to ascribe blame for this state of affairs. It was entirely understandable that this could have happened.

58. However the real question here is what significance objectively is to be attached to the sending by the plaintiffs of these standard conditions. In this context it is immaterial what the subjective intention of the plaintiffs was in sending their standard conditions. The question which should perhaps be asked is what would an objective bystander who was familiar with the commercial environment in which the plaintiff and defendant were working, have concluded as to the state of consensus between the plaintiff and defendant on the question of whether or not the defendants general conditions and in particular the exclusive jurisdiction clause were included in their contract.

59. I have come to the conclusion that viewed in this objective way, the conclusion must be that these parties were not ad idem on the inclusion of the exclusive jurisdiction clause. I have come to that conclusion because it would seem to me that viewed objectively, the sending by the plaintiffs of their standard conditions, was consistent only with the rejection by them of the defendants general conditions and with a desire to have their own standard conditions included in the contract. The fact that the effort to have their own standard conditions included was hopelessly ineffective having regard to the absence of any reference to them in the other documentation, is immaterial. What is inescapable in my view is the conclusion that the sending of the standard conditions by the plaintiff was consistent only with the rejection of the defendants general conditions including the exclusive jurisdiction clause.

60. That being so in my view notwithstanding the existence of written evidence of the exclusive jurisdiction clause as required formally by Article 17, more fundamentally, the defendant has failed to discharge the onus of demonstrating that there was consensus between the parties on the inclusion of the defendants exclusive jurisdiction clause. Hence in my view Article 17 does not apply in this case so as to confer exclusive jurisdiction on the courts of the canton of Aargau in Switzerland as is claimed by the defendant.

61. This brings me then to the next issue in the case and that is whether or not the plaintiff has discharged the onus resting on them of demonstrating that the place of the performance of the obligation is Ireland so as to entitle them, pursuant to Article 5(1) to pursue this action in this jurisdiction. In this regard I should say that it is quite clear that it is only Article 5.1 that can apply as having regard to the existence of the contract in this case Article 5.3 does not apply. Should the plaintiff fail to discharge this onus then Article 2 would prevail and as it is clear that the defendants are domiciled in Switzerland the claim in these proceedings would have to be brought in the appropriate Swiss jurisdiction which would appear to be the canton of Aargau.

62. The first question to be confronted here is what is the obligation in respect of which the claim is made. This question begs the further question namely, by reference to what law is this to be tested. I have already concluded that the defendants general conditions and in particular its jurisdiction clause was not included in the agreement and hence in my view this question does not fall to be determined by reference to Swiss law. I am satisfied that in the light of the foregoing that this preliminary question must be determined in accordance with the jurisprudence of the community as laid down by the European Court of Justice. In the case of *De Bloos Plr v. Bouyersa* [1976] E.C.R. 1497 the European Court of Justice held that the "*obligation*" in Article 5(1) was the contractual article which formed the basis of the legal proceedings.

63. In this case the plaintiffs in their statement of claim at paragraphs 4, 5, 6, 7 and 8 set out their case in contract against the defendant. These paragraphs therefore describe the obligation for the purposes of Article 5(1), being the contractual articles or provisions which form the basis of the legal proceedings in contract.

64. In approaching the question of the place of the performance of the obligation for the purposes of Article 5(1) it would seem to me that I am also bound by the decision of the Supreme Court in the case of *Handbridge Limited v. British Aerospace Communication Limited* [1993] 3 I.R. 342 in which Finlay C.J. said the following:

> *"I am satisfied that certain conclusions of principle arise. They are:*
>
> > *(1) The onus is on the plaintiff who seeks to have his claim tried in the jurisdiction of a contracting state other than the Contracting State in which the defendant is domiciled to establish that such claim unequivocally comes within the relevant exception.*
> >
> > *(2) In a case of a claim for breach of contract, therefore, what he must prove is that the obligation in question in that claim is, by virtue of the terms of the contract or by some generally applicable principle of Irish law, an obligation which must be performed in Ireland.*
> >
> > *(3) It would follow from this that where the evidence adduced by a plaintiff seeking to have a claim for breach of contract tried within the jurisdiction of a Contracting State other than the state of domicile of the defendant amounts to no greater standard of proof than establishing that the obligation which it is claimed was breached*

could have been performed in such state, he has failed to establish his entitlement to sue pursuant to Article 5(1), the necessary proof being that the obligation which it is claimed has been broken by the defendant according to the contract or according to some general principle of law, must be performed in the state concerned."

65. In adopting this principle, I must endeavour to ascertain where the obligation or obligations in question, *must be performed*.

66. It is clear from the contract that certain parts of the contractual obligations could only have been performed in Wohlen in Switzerland and certain other parts could only have been performed at the plaintiffs plant in Cork. Manifestly the design and manufacture and initial commissioning of the machine could only have been done at the defendants plant in Wohlen. Clearly also the reassembly and commissioning of the machine and the training of the plaintiffs staff could only have been done at the plaintiffs plant in Cork. These are the places where those particular aspects of the contractual obligations were required to be performed.

67. The allegations of breach of contract in the statement of claim appear to me to straddle both places of performance with perhaps a preponderance of these allegations relating to that part of the contract i.e. design and manufacture which had to be performed in Wohlen in Switzerland.

68. In resolving this question, it would seem to me that that there are two approaches open. The first of these, is as advocated by the defendants, which is to conclude that the obligation at issue in the proceedings is to deliver the machine for acceptance, testing and commissioning by the defendants at its plant in Wohlen Switzerland.

69. The problem with this approach is that it ignores the entirety of the obligation which was, that in addition to designing, manufacturing, and delivering commissioned plant at Wohlen by 10th August, 1999, also there was the obligation to disassemble the machine transport it to Ireland, reassemble it and commission it at the defendants plant in Ireland. As said already some of the allegations of breach of contract relate to that latter part of the obligation.

70. In particular paragraph 6(e) would appear to relate to that latter part of the obligation.

71. At this stage of the proceeding it is not possible to assess the weight which each of these allegations might have in causing a breach (if any) of the overall obligation.

72. That being so, the approach advocated by the defendants is unsatisfactory because it leaves open the choice between two places for the performance of the obligation at a stage in the proceedings when it is not possible to distinguish which should be given greater primacy or weight.

73. The other approach is that which is set out in the judgment of Chaddick L.J. in the case of *Viskase Limited v. Paul Kiefel GmbH* [1999] 3 All E.R. 362 where he says the following at p. 376:

"That leads to the question: in what place is that obligation (namely the contractual obligation in question to be performed? In the absence of authority I would take the view that there could be only one answer to that question. That obligation has to be performed at the time when the machine is supplied. There is no other opportunity to perform it. The seller has not undertaken an obligation to do whatever is necessary from time to time to ensure that the machine fulfils the purpose for which it has been purchased… A subsequent failure of the machine in the course of commercial production is evidence of the antecedent breach in supplying a machine which was not fit for such use. If the obligation has to be performed at the time when the machine is supplied, then the place at which it has to be performed is the place of delivery under the contract."

74. The attraction of this approach is that it identifies an overall obligation which in that case, as in this, is to supply a machine free from defects which would render it unfit for its intended purpose. In the overall context of the obligation the supply of the machine in this case was to be in Cork. The purpose for which the machine was required was in Cork and not in Wohlen and whilst there was an additional obligation to have the machine assembled and commissioned in Wohlen by the 10th August, 1999, in my view the overriding obligation under the contract was to supply that machine assembled and commissioned in Cork.

75. I would respectfully adopt the approach taken in that case and would follow it.

76. Thus I have come to the conclusion that the place for the performance of the obligation for the purposes of Article 5(1) is the plaintiffs plant in Cork and hence the plaintiffs are entitled under Article 5(1) to sue the defendants in respect of that obligation in Ireland.

77. This brings me to the question of whether or not the initiation by the plaintiffs of a debt collection procedure in Switzerland approximately one year prior to the commencement of these proceedings, has the effect of enhancing the defendants case either under Article 17 or under Article 5.1 to the extent that the court should conclude as is urged by the defendant, that the plaintiffs themselves acknowledged Switzerland as being the appropriate jurisdiction for the litigation of this claim.

78. I am satisfied from the expert evidence on affidavit as to the laws of Switzerland, that the debt collection procedure initiated by the plaintiffs had a very limited effect and did not amount to the initiation of substantive litigation. It would appear, and there is very little dispute between the experts about this, that the procedure initiated which is for the collection of a debt, if it is resisted, as was the case in this case, then the procedure becomes nugatory, save that it stops a Statute of imitations running for a certain period. If the debtor disputes the claimed debt the debt collection procedure can go no further and it is up to the creditor at that point to then initiate civil proceedings in the courts to litigate the claim. In this case the plaintiff additionally requested the defendant to enter into a waiver of the limitation provisions which they agreed to do and have repeated this. What this achieves is that from the point of view of a claimant the limitation period is kept at bay and from the point of view of a defendant they are not exposed to the potential embarrassment of the repeated presentation of the payment order which is the debt collection procedure, which could adversely affect their credit rating. These procedures are the sum total of what has been done in Switzerland.

79. It is quite clear from the evidence of the experts on affidavit that these procedures did not involve the initiation of litigation in Switzerland claiming a determination on the claims now made in these proceedings here in Ireland. All these procedures did was to simply keep the Swiss limitation period at bay so that, if desired, the plaintiff could still initiate litigation in Switzerland to pursue this claim.

80. In my view the action taken by the plaintiffs in this regard is to be seen as merely precautionary and cannot be viewed as amounting to an acknowledgment by the plaintiffs that the claims made in these proceedings ought properly to be litigated in

Switzerland.

81. For the reasons set out above I must refuse the relief claimed in the notice of motion.