

**THE HIGH COURT
COMMERCIAL**

[2004 No.395S]

BETWEEN**GENERAL MONITORS IRELAND LIMITED****PLAINTIFF****AND****SES-ASA PROTECTION S.p.A****DEFENDANT****Judgment of Ms. Justice Finlay Geoghegan delivered on the 28th day of June 2005.**

1. The proceedings herein were commenced by summary summons issued on the 1st April, 2004. The plaintiff's claim therein is for the sums of €345,224.38 and \$1,115,948.22, being amounts alleged to be due and owing by the defendant to the plaintiff in respect of goods sold and delivered by the plaintiff to the defendant at the request of the defendant within the last six years.

2. The plaintiff is a company incorporated in Ireland and carrying on a manufacturing business in Galway. The defendant is a company incorporated in Italy and carries on business from Italy.

3. The plaintiff contends that the Irish courts have jurisdiction to hear and determine the present proceedings under article 5(1) Council Regulation E.C./44/2001 of 22 December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J.L012/1 16.1.2001 ("Regulation 44/2001").

4. The defendant has entered an appearance for the purpose of contesting the jurisdiction of the Irish courts. It has also brought a motion seeking an order pursuant to O.12, r.26 of the Rules of the Superior Courts, 1986 setting aside the service of the Summary Summons on the defendant on the grounds that the Irish Court does not have jurisdiction to hear and determine the proceedings.

5. The issue to be determined in this judgment is whether the Irish courts have jurisdiction to hear and determine the summary proceedings pursuant to article 5(1) of the Regulation 44/2001.

Background to present claim

6. The plaintiff is the manufacturer of high-technology instruments used for the detection of combustible and/or toxic gas and flame. It is a subsidiary of General Monitors Inc. The defendant appears to have commenced its relationship with the General Monitors Group in 1982. It was then appointed exclusive representative and distributor for General Monitors products in Italy. As part of these arrangements it was under an obligation to pay "destination credit" in respect of all sales made in territories outside of Italy. In 1999 an agreement was reached between General Monitors and the defendant that its status would be changed from an exclusive representative to a Value Added Reseller (VAR) for General Monitors. The agreed terms were set out in a letter dated 29th September, 1999, from General Monitors to the defendant as follows:

"Below are listed the primary guidelines for the new VAR status as agreed to at our meeting:

1. SES will purchase product from General Monitors at our list price (either dollars or euros) less 20%. There will be no deductions made to your discount for destination credit to other reps for sales outside of Italy.
2. General Monitors will not appoint a representative in Italy, so your long time relationship with many customers would not be impacted by another agent in the territory.
3. General Monitors will not aggressively solicit direct orders from Italian customers. However, when requested by the customer, we will sell direct to customers in Italy and SES will not be paid a commission for these purchases. The exception to this will be for spare parts orders for systems previously supplied by SES for which we will refer the customer to SES.
4. SES will continue to use and promote General Monitors products exclusively worldwide, such as displaying only General Monitors products at exhibitions, trade shows, etc. However, when dictated by a customer requirement or specification that can not be changed, SES will be able to substitute competitive products for specific projects."

7. The agreement reached in 1999 is referred to in this judgment as the VAR Agreement.

8. The defendant thereafter purchased goods from the plaintiff in accordance with the provisions of para.1 above. At the date of institution of the summary proceedings the plaintiff claims that the defendant had purchased from it goods totalling €345,224.38 and \$1,115,948.22 pursuant to a series of individual contracts for the purchase and sale of goods identified by reference to invoice number and invoice date and individual amount in the schedule to the summary summons.

9. The plaintiff does not dispute that it is bound by the 1999 VAR Agreement with the defendant. The submissions of both parties were based upon the fact that the plaintiff and the defendant were parties to the VAR Agreement and to the alleged individual contracts for the purchase and sale of goods in 2003.

Regulation 44/2001

10. Regulation 44/2001 replaces the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 17 September 1968, as amended. Regulation 44/2001 entered into force on the 1st March 2002 and applies to all proceedings commenced after that date. As with the Brussels Convention the general rule is that persons shall be sued in the courts of the member state in which they are domiciled. Article 5 is an exception to that general rule. Article 5(1) provides:

"A person domiciled in a Member State may, in another Member State, be sued:

- 1.(a) In matters relating to a contract, in the courts for the place of performance of the obligation in question;
- (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in

question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered, or should have been delivered,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

(c) if subparagraph (b) does not apply then subparagraph (a) applies; Notwithstanding that the present application before the court is brought by the defendant, as the plaintiff is relying upon what is an exception to the general rule of jurisdiction, the onus is on the plaintiff to satisfy the court that the claim may be brought in Ireland pursuant to article 5(1).

11. The first necessary proof under article 5(1) is that the claim in the proceedings is a matter "relating to a contract". This was not disputed. The claim is a claim for the sums due by the defendant to the plaintiff for goods delivered pursuant to a contract between the plaintiff and the defendant.

12. In accordance with article 5(1)(a), as the claim herein relates to a contract the defendant may be sued "in the courts for the place of performance of the obligation in question". Article 5(1) of the Brussels Convention contained a similar provision.

13. A new provision in article 5(1) of Regulation 44/2001 is the deeming provision for the place of performance of the obligation in question in certain circumstances in article 5(1)(b). Its proper meaning and its application to the facts at issue herein are the subject of the primary dispute between the parties.

14. Article 5(1) of the Brussels Convention was the subject of much litigation before the Court of Justice. The amendment made by the addition of para. 1(b) in article 5 of Regulation 44/2001 must be construed in the context of that caselaw. In accordance with such caselaw the terms used in article 5 of the Brussels Convention are to have an autonomous meaning. The same principle must apply to Article 5(1) of Regulation 44/2001.

15. With the exception of employment contracts, in accordance with the caselaw of the Court of Justice the "obligation in question" when used in article 5(1) of the Brussels Convention is "the contractual obligation forming the basis of the legal proceedings" or "that which corresponds to the contractual right on which the claimants action is based". See *Ets. A. Bloos, S.P.R.L. v. Société en Commandite par actions Bouyer* (Case 14/76) [1976] E.C.R. 1497 and *Hassan Shenavai v. Klaus Kreischer* (Case 266/85) [1987] E.C.R. 239. The amendment made does not alter this definition which will continue to apply to article 5(1) of Regulation 44/2001.

16. Determination of the place of performance of the obligation in question under article 5(1) of the Brussels Convention is in accordance with the law governing the contract according to the national rules of private international law of the court seised, *Industrie Tessili Italiana Como v. Dunlop AG* (Case 12/76) [1976] E.C.R. 1473.

17. In *Leathertex Divisione Sintetici SpA v. Bodetex BVBA* (Case C-420/97) [1999] E.C.R. I-6747 the Court of Justice considered the issue of multiple obligations of equal rank arising under or in connection with the same contract. It concluded at para. 40 of its judgment:

"The same court does not therefore have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where the court is situated, one of those obligations is to be performed in that State and the other in another Contracting State".

18. In the same judgment the court recognised the disadvantages of this approach.

19. The reason offered by the Commission for the amendment to article 5(1) of the Brussels Convention to what is now article 5(1)(b) for Regulation 44/2001 in its Explanatory Memorandum of the proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM/99/0348 final, O.J.C 376 E, 28th December 1999 was:

"Article 5

The Brussels Convention rule regarding contractual obligations is maintained. But to remedy the shortcomings of applying the rules of private international law in the State whose courts are seised [9] the second subparagraph of Article 5(1) gives an autonomous definition of the place for enforcement of "the obligation in question" in two specific situations. For the sale of goods, it will be the place where, under the contract, the goods were or should have been delivered. In the case of the provision of services, it will be the place where, still under the contract, the services were or should have been provided. This pragmatic determination of the place of enforcement applies regardless of the obligation in question, even where this obligation is the payment of the financial consideration for the contract. It also applies where the claim relates to several obligations. The rule may, however, be "displaced" by an explicit agreement on the place of performance.

[9] Case 12/76 *Tessili* [1976] ECR 1473 (judgment given on 6 October 1976)."

20. It is to be noted that in article 5(1)(a) of Regulation 44/2001 the Council has continued to rely upon the place of the "obligation in question" as being the matter which determines jurisdiction. Insofar as article 5(1)(b) introduces a deeming provision it is only in relation to the place of performance of that obligation. It therefore appears that the obligation in question must be linked to the circumstances in which article 5(1)(b) applies, which on the facts herein is potentially "in the case of the sale of goods".

21. The difficult question is what is intended to be covered by the phrase "in the case of the sale of goods". The obligation in question must be "in the case of the sale of goods". Even where there is only one obligation in question in the proceedings (or multiple obligations of the same nature) it may be intended to include:

i. claims where the obligation in question relates to a transaction which is the sale of goods irrespective of the characterisation of the contract between the parties

or

ii. claims when the obligation in question arises under a contract which is a contract for the sale of goods between the parties.

22. In claims with multiple obligations in question of a different nature there are possibly further questions as to how the relevant contract should be characterised. However this does not arise on the facts herein.

23. It is unnecessary for the purposes of these proceedings to determine which of the above is the proper approach to its construction as I have concluded on the facts of this case that on either basis, article 5(1)(b) applies. My reasons for so concluding are as follows.

24. On the facts, I have concluded that there are multiple individual obligations in question in these proceedings. They are the obligations to pay the agreed price for goods sold by the plaintiff to the defendant. Hence the obligations in question relate to transactions which are the sales of goods if the first interpretation suggested applies.

25. If, on the contrary, the court should look at the relevant contract between the parties, then it appears the question to be considered is what is the contract between the parties of which the obligation in question forms part. In these proceedings there are 22 separate obligations in question, namely, the obligation to pay the individual amount due on each of 22 invoices set out in the schedule to the summary summons. Each obligation in question is of the same nature to pay for goods sold by the plaintiff to the defendant at its request and specified in such invoice. The invoices record the terms of the agreements reached by the orders and acceptance of orders.

26. The defendant submitted that the VAR Agreement of 1999 was the relevant contract between the parties and that this was not a contract for the sale of goods but rather a contract for the supply of services. The VAR Agreement as appears from the terms set out above does not include any agreement to purchase specified goods or even a minimum quantity of identified goods. The VAR Agreement does not impose on the defendant the obligation to pay any of the sums claimed in the summary summons. It cannot therefore be considered that any of the obligations in question at issue in these proceedings arise under a contract which consists exclusively of the VAR Agreement. The obligation on the defendant to pay to the plaintiff any of the amounts claimed in the proceedings did not arise until after the conclusion between the parties of an agreement that the plaintiff would sell to the defendant goods specified in an order from the defendant. The individual contracts for the purchase and sale of specified goods were entered into by the parties pursuant to the VAR Agreement. The price to be paid under the individual contracts was fixed by the terms of the VAR Agreement. Even assuming that certain terms of the VAR Agreement may be implied in the individual contracts for purchase and sale (and I am not so finding) that fact does not alter the conclusion that the obligations in question in these proceedings only came into existence as part of a contract for the purchase and sale of individual goods specified in an order and subsequently, in the relevant invoice. Further, the obligation to pay the sums now claimed came into existence at different times as different contracts to purchase and sell specified goods were concluded between the parties.

27. Accordingly, I have concluded on the facts of this case that the obligations in question in the proceedings arise under or form part of individual contracts for the sale of the goods specified in the relevant invoices. Applying, as I must do an autonomous meaning to a contract for the sale of goods in article (5)(1)(b) of Regulation 44/2001, I am satisfied that the individual contracts for the sale of the goods specified in the invoices come with that meaning. The subject matter of each contract was the sale and purchase of goods.

28. The final issue is therefore where the goods were delivered or should have been delivered under the terms of each contract for the sale of goods. Mr. Connolly in the affidavit sworn on the 5th October, 2004, on behalf of the plaintiff states that the goods were delivered by the plaintiff to the defendant in Galway by delivering them to the defendant's forwarding agent. He states that the defendant has arranged and paid for shipments of goods from the plaintiff's factory in Galway for over fifteen years. Further, that in December, 2001 the defendant nominated ICS as its new forwarding agent and that the plaintiff notified ICS that when goods were ready for collection on behalf of the defendant. Lastly, it is stated that the plaintiff has no contractual relationship with ICS whose services were for the account of the defendant.

29. Mr. Connolly exhibits invoices which confirm that dispatches were "via ICS ex-works". He also exhibits an order acknowledgment which, as does the invoice, contains an instruction to "deliver to" the defendant at its address in Milan. Mr. Connolly explains this is to specify the ultimate destination of the goods in Italy.

30. None of these facts are disputed in the subsequent affidavits sworn by Mr. Bardoni on behalf of the defendant. I have concluded on these facts that the delivery of the goods under the contracts for the sale of same took place in Ireland. Hence in accordance with article 5 (1)(b) of Regulation 44/2001 the place of performance of the obligations in question in these proceedings is Ireland and accordingly under article 5(1)(a) the defendant may be sued in the courts of Ireland. There will be an order dismissing the defendant's application to set aside the service of the proceedings herein.