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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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Delivered: 16/10/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**QUEEN'S BENCH DIVISION
COMMERCIAL LIST**

Between:

JK FABRICATIONS LIMITED

Plaintiff

-and-

FASTFIX LIMITED

Defendant

-and-

TOBSTEEL GMBH

Third party

**Douglas Stevenson (instructed by Carson McDowell LLP Solicitors) for the
Applicant/Third Party
John Coyle (instructed by Campbell and Grant Solicitors) for the Respondent/Defendant**

LARKIN J

Introduction

[1] In the summons before me dated September 22 2020, Tobsteel GMBH, 'Tobsteel', a company domiciled in Öhringen, Germany seeks to set aside a third party notice served on it on the ground that this Court has no jurisdiction to determine the third party proceedings brought by Fastfix Limited, 'Fastfix', a company domiciled in Ireland. Fastfix Limited is the defendant in proceedings brought by JK Fabrications Limited, a company domiciled in Northern Ireland. In separate proceedings JK Fabrications Limited is sued by SMBJV an unincorporated joint venture in respect of a major sewerage project in London. Bolts are the common element in dispute in both cases; the bolts supplied by Tobsteel GMBH to Fastfix Limited who in turn supplied these bolts to JK Fabrications Limited.

[2] Tobsteel's argument on jurisdiction is founded on Article 25 of Regulation 1215/2012. This provides as follows:

"Prorogation of jurisdiction

Article 25

1. *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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (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 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.*

2. *Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.*

3. *The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.*

4. *Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.*

5. *An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid."

[3] By Article 25.1 of Regulation 1215/2012 if A and B, being two commercial entities, have agreed in writing that a court or the courts of a Member State of the European Union are to have jurisdiction over any disputes that have arisen or may arise between them, that court or those courts shall have jurisdiction. The jurisdiction of that court or those courts is exclusive of any other jurisdiction unless the parties have agreed that it shall not be. An agreement that satisfies the requirements of Article 25.1 of Regulation 1215/2012 displaces the general principle set out in Article 4 of Regulation 1215/2012 that the courts of the defendant's domicile have jurisdiction, as well as the special provisions on jurisdiction set out in Articles 7 to 9 of that Regulation: see *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA* [2018] 4 WLR 95 at [24]. That displacing effect results in a requirement that the requirements of Article 25 be "strictly interpreted" (*ibid.*).

[4] Tobsteel initially claimed, through an affidavit sworn by its sales director, Herr Alexander Gebert, that a document exhibited to that affidavit and described by him in its seventeenth paragraph as "A copy of the Third Party's general terms of business" contains, among other contractual obligations, provision that (to use Herr Gebert's words in paragraph 18 of his affidavit) "if the Defendant is to bring proceedings against the Third Party in respect of any dispute arising out of the supply of the stainless steel fasteners it must do so in Germany."

[5] The document exhibited to Herr Gebert's affidavit is headed *General Terms of Delivery and Payment D-74629 Pfedelbach*. In this document clause VIII is entitled 'Place of Performance, place of jurisdiction, applicable law'. It reads as follows:

"1. The place of performance and jurisdiction for any deliveries and payments (including actions on cheques and bills of exchange) and any disputes arising between us and the Purchaser from the sales contracts entered into between us and the Purchaser shall be Öhringen. However, we shall also be entitled to bring a claim before a court at the Purchaser's principal place of business or at our discretion before any other court being competent according to any national or international law.

2. The legal relationship between us and our customers or us and any third parties shall exclusively be governed by the laws of the Federal Republic of Germany. The application of the United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods (UN Sales Convention) shall be excluded unless the parties expressly agree on their applicability."

[6] This differs from the text set out at paragraph 17 of Herr Gebert's affidavit. That text is described as 'Clause X' and reads as follows:

"1. The place of fulfilment and jurisdiction for deliveries and payments (including protests of cheques and bills of exchange) as well as for all disputes which arise between us and the Purchaser due to the purchasing contracts concluded between us and Purchaser is Öhringen. However, we are also entitled to file suit against Purchaser at its place of residence or business.

2. The legal relationship between us and our customers or between us and third parties shall be governed exclusively by applicable law in the Federal Republic of Germany, excluding international uniform law, particularly the UN Convention for the International Sale of Goods."

[7] On this textual divergence being raised at the first hearing of this summons, I directed that the Third Party file an affidavit to explain it. Herr Gebert in his second affidavit has averred (paragraph 4 (b)) that, in his view, the relevant agreement was, in fact, to be found in neither of the texts quoted above but in what he there describes as general terms of business of June 2014.

[8] The document referred to in paragraph 4 (b) of Herr Gebert's second affidavit is entitled, "General Terms of Supply and Payment for TOBSTEEL GmbH". Clause VIII reads as follows:

"VIII. Place of performance, choice of forum, applicable legislation

1. The place of performance and choice of forum for deliveries and payments (including complaints regarding cheques or bills) and for all disputes arising between us and the purchaser from the purchase contracts concluded between us and him or her shall be Öhringen. However, we shall be entitled to file a complaint against the purchaser at his or her residence or registered business address.

2. The legal relationship between us and our customers or between us and third parties shall be governed exclusively by the legislation of the Federal Republic of Germany"

The Court's Task

[9] However interesting that might be, it is not the task of the court to determine the extent of the contractual relationship between the Defendant and the Third Party. The task is the more modest one, and one, moreover specifically enjoined by Article 25.5, of determining if there is an agreement in writing or evidenced in writing between the Defendant and the Third Party that the Courts of Germany or a

particular Court in Germany are, or is, to have jurisdiction over the present dispute between them.

[10] Mr Stevenson, for the Third Party, argues skilfully and forcefully that there is such an agreement; Mr Coyle for the Third Party argues skilfully and forcefully that there is not.

[11] There are three affidavits before the Court; two filed on behalf of the Third Party, one on behalf of the Defendant. There is now, helpfully, a reasonably clear picture of the course of dealing between the parties, and much common ground. None of the facts material to the determination of the issue before me are disputed. The party, here the Third Party, who argues that there is an agreement between the parties which satisfies the requirements of Article 25 of Regulation 1215/1212 must have the 'better argument'; not 'much the better argument' (see the discussion in the 6th edition of Briggs *Civil Jurisdiction and Judgments* at pp. 165-6).

[12] The words relied upon by Tobsteel to incorporate clause VIII.1 on which it now relies are "Subject to our general terms of business if requested a print can be provided." These words are found in the quotation of October 10 2017, the quotation of November 2 2017, the document described as confirmation of order dated November 14 2017, the quotation of March 28 2018, the document described as confirmation of order dated April 9 2018, and the confirmation of order dated April 24 2018. They are not found in the Pro-forma invoice of November 13 2017 nor are they found in the order confirmation email dated May 3 2018 from Herr Gebert to Fastfix.

[13] Mr Stevenson points to (1) an email from Mr Connolly of Fastfix of November 16 2017 bearing Order Confirmation Order No. A370240 and containing the words, "Alex, This is O.K." and (2) clause 1 (4) of the June 2004 text which provides "The General Terms and Conditions shall also apply to all future business dealings even if they are not explicitly agreed again." He argues that these have the effect of constituting an agreement between Tobsteel and Fastfix that satisfies the requirements of Article 25 of Regulation 1215/1212.

Consideration

[14] Plainly there were contractual relations between Tobsteel and Fastfix. Subject to the matter of substantive dispute between them in the main action, they entered into a contract for the supply of goods, and they agreed on prices. I have come to the conclusion that they did not enter into an agreement that satisfies the requirements of Article 25 of Regulation 1215/1212.

[15] That conclusion rests on two principal and independent bases.

[16] First, I do not consider that Tobsteel and Fastfix agreed clause VIII.1 of the June 2014 text. The instrument on which Tobsteel relies as the vehicle of agreement

is a combination of the words “Subject to our general terms of business if requested a print can be provided” and Mr Connolly’s email containing the words “Alex, this is O.K.”. This combination is too fragile to bear that weight.

[17] While it is often a commercially necessary fiction that a party has ‘agreed’ terms that he may not have seen in advance, far less read, based on his signature indicating his consent to be bound by such terms or some other manifestation of acceptance, it is observable that in those cases in which this commercially necessary fiction operates, it will be clear what the applicable terms are.

[18] Cases such as *Coys of Kensington Automobiles Ltd v Pugliese* [2011] 2 All ER (Comm) and *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] are instances either of a signature indicating consent to be bound (Coys) or that of an express reference to terms and conditions including a jurisdiction clause (7E). In these cases it was clear (1) which terms formed part of the contract between the parties and (2) that those terms included a clear clause providing for jurisdiction consistently with the requirements of Article 25 or its antecedents.

[19] If Tobsteel wished, as I find it did, to secure agreement on Clause VIII.1 with Fastfix it needed an adequate mechanism or instrument for obtaining that agreement. In the event, and taking the evidence for Tobsteel at its reasonable height, Tobsteel sought to bind Fastfix in the documents referred to above to Tobsteel’s “general terms of business”. Clause VIII.1 of June 2014 is not contained in a document entitled “general terms of business” but in a document entitled “General Terms of Supply and Payment for TOBSTEEL GmbH”. One might properly say, further, that in 2017 Herr Gebert, insofar as he thought specifically about the matter, *meant* to refer to the June 2004 text, but whether he meant to or not, he did not refer to it so as to permit the creation of an agreement between Tobsteel and Fastfix that Clause VIII.1 should apply.

[20] In none of the cases on Article 25 or its antecedents is there an example of a term incorporating X by reference being held to incorporate Y by reference and thus satisfy the requirements of that provision. Summarising the jurisprudence, Professor Briggs QC in the 6th edition of his *Civil Jurisdiction and Judgments* observes at p. 165 “The European Court has repeatedly stated that where the question arises, the requirements of what is now Article 25 must be ‘clearly and precisely demonstrated’.” This Tobsteel has failed to do.

[21] Second, even if I had concluded that Tobsteel and Fastfix had agreed that clause VIII.1 should apply, I would have concluded that Clause VIII.1 did not constitute an agreement (to quote the English version of Article 25 of Regulation 1215/1212) “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”. If I should, with diffidence, venture a drafting criticism of an English language text produced by a German company that bears testimony to the overall high competence of that company in our language, it would

be that Clause VIII.1 makes provision extraneous to Article 25 and fails to achieve what Article 25 insists on.

[22] Mr Stevenson powerfully urged on me with that passage in the 6th edition of Briggs's *Civil Jurisdiction and Judgments* at page 187 in which it is, rightly, said, "An agreement on jurisdiction may be found to have been made in very short form," The example quoted by Professor Briggs comes from *Nursaw v Dansk Jersey Eksport* [2009] ILPr 263 in which a court is designated by its postcode. Clause VIII.1 does not designate any court *at all*. During the course of argument I invited counsel to explore the substitution of 'Belfast' for 'Öhringen' by way of testing an argument that the designation of a town or city sufficed to satisfy agreement as to a court or courts. With characteristic versatility (and local *pietas*) Mr Coyle pointed out that, for example, an agreement on 'Derry Recorder's Court' would satisfy the requirement of Article 25 that a court be agreed but that an agreement on 'Derry' would not.

[23] While accepting that a choice of law clause (such as, here, Clause VIII.2) was conceptually distinct from an agreement that a named court or courts were to have jurisdiction, Mr Stevenson argued that Clause VIII.2 was an aid to the interpretation of Clause VIII.1. A choice of law condition may assist in the construction of a clause put forward by one party as providing for jurisdiction but there is a recent and powerful reminder in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 at [113] of the distinct natures of jurisdictional choice and choice of law. Even if I had concluded that both parts of Clause VIII had been the subject of agreement between Tobsteel and Fastfix (and, as appears above, that is not my conclusion) I would not have concluded that Clause VIII.1 complied with the requirements of Article 25.

[24] I am aware of no instance in which the CJEU has countenanced that the requirement to agree on a court or courts has been satisfied by an agreement that a place should have jurisdiction. An agreement on choice of law does not, even when applied to Clause VIII.1 satisfy me that it has been 'clearly and precisely demonstrated' that agreement was reached that German courts should have jurisdiction.

Disposition

[25] I dismiss the summons and declare that service was properly effected on Tobsteel and that, as there has been no agreement between the Fastfix and Tobsteel satisfying the requirements of Article 25 of Regulation 1215/1212 this Court has jurisdiction to determine the present action, including the third party proceedings.