

Unseen Jurisdiction Clause Upheld by the Court of Appeal

The judgment in *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] EWCA Civ 140 was handed down on Monday. The OUT-LAW team at international law firm Pinsent Masons have written an excellent summary of the case, and have kindly given us permission to reproduce it here:

A German company can fight an English customer in the German courts because its terms and conditions said that German jurisdiction applied – albeit those conditions were never sent to the English firm, the Court of Appeal ruled this week.

Vertex Antennentechnik makes and sells satellite antennae and related equipment. 7E Communications is a telecoms engineering consultancy based in Surrey. 7E agreed to buy some equipment from Vertex which it then declared faulty. Before that dispute could be settled the two parties had to decide in which jurisdiction it could be fought.

When Vertex faxed 7E an offer to sell the equipment its quotation said that the sale was offered “according to our general terms and conditions”. No copy of those Ts&Cs was supplied.

An executive with 7E replied by fax with a new document, a purchase order, which referenced the sale offer quotation by name and reference number. Both parties agreed that the contract between them was concluded when that fax was sent to and received by Vertex, but the terms of that contract were disputed.

*Vertex claimed that the relevant jurisdiction should be Germany for any disputes arising from the contract, and that it should be exclusively Germany. It pointed to a law known as the **Brussels-I Regulation** (23-page / 212KB PDF), properly called the “Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters”.*

“If the parties, one or more of whom is domiciled in a Member State, 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,” says article 23 of the Regulation. “Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be in writing or evidenced in writing.”

The dispute concerned, then, whether or not the reference to terms and conditions constituted an agreement in writing under the Regulation.

Presiding judge Sir Anthony Clarke MR distinguished 7E’s circumstances from those in a landmark European Court of Justice (ECJ) case on jurisdiction clauses. That ruling was given in 1976 in a dispute over a German company’s sale of upholstering machines to Italian firm Salotti. The signed contract made no reference to the terms and conditions which were on the back. The ECJ said the jurisdiction clause in those terms did not form part of the contract.

“Where the contract signed by both parties expressly refers to general conditions which include a clause conferring jurisdiction, article 17 (now 23) is satisfied,” wrote Sir Anthony. “They do not suggest that the general conditions have themselves to form part of the contractual document. An express reference to the general conditions in the contract is enough. There is no suggestion in those paragraphs that in such circumstances there must be an express reference, not only to the general conditions which contain the jurisdiction clause, but also to the jurisdiction clause itself.”

7E also argued that authorities cited by Vertex could not apply because there were two signed documents, not one.

“The question is therefore whether the fact that the parties did not sign one but two documents is a critical distinction,” wrote Sir Anthony. “We have reached the clear conclusion that it is not. If both parties had signed the original quotation as evidencing the contract between them, there can be no doubt that the principles stated above would apply and that the quotation would be, in the words of the Court of Justice, ‘a writing’ evidencing a contract on the terms of the defendant’s terms and conditions, including the German jurisdiction clause, and that both parties including the claimant would be bound by the clause, just as Mr Mossler was bound by the clause in [a previous case involving] Credit Suisse, even though he had not seen and did not have a copy either of the

relevant terms or of the jurisdiction clause.”

“In our judgment, no distinction in principle is to be drawn between a case in which a contract is contained in one document signed by both parties and a case in which a contract is contained in or evidenced by two documents, one of which is signed by one party and one by the other,” said Clarke.

Jon Fell, a partner with Pinsent Masons, the law firm behind OUT-LAW.COM, described the ruling as pragmatic. “The court recognised that most people don’t read the small print but it’s saying that this is no excuse for a company that was told that small print existed. 7E should have asked to see the small print.”

Fell added that if a dispute between a company and a consumer would likely see a different outcome. “A court would probably bend over backwards to support a consumer’s argument that unseen conditions should not form part of a contract,” he said.

You can find out more about the excellent OUT-LAW website **here**. The judgment can be found in full **here**.