

Hamburg Local Court

Ref. No. 7BC 13/03

JUDGEMENT

In the name of the people

In the case of

██████████ gemeinnütziger Verein e.v., ██████████
██████████ Hamburg, represented by the Managing Director ██████████
- Plaintiff -

Counsel:

██████████ Lawyer, ██████████
Hamburg, Ref. No.: (unleserlich)

versus

NovaChannel AG, Landenbergstr. 36, 6002 Lucerne, Switzerland,
represented by the Managing Director Michael Röwe
- Defendant -

Counsel:

Michael Toffert, Lawyer, Eilenau 31, 22089 Hamburg,
Ref. No.: 2 04 635 -

Hamburg Local Court, Department 7B, finds as follows through
the judge at the Local Court, Dr. Wiese, on the basis of the hearing
concluded on 16.4.2004:

Announcement
Announced on
14.5.2004

Holtz

Court employee as clerk of the
court's office
Certificate of indefeasibility
This judgement became
final and absolute upon the
expiry of/on

Certificate of absence of
appeal from

Hmb.,

as clerk of the court's office

Notification statement
Notification of the judgement
to the Plaintiff

on

Notification of the judgement
to the Defendant

on

Hmb.,

Facts of the case:

With the action the Plaintiff requests the declaration that the Defendant is not entitled to any claims arising from an invoice dated 6 May 2003.

The Defendant sent the Plaintiff the form letter contained in Exhibit K 2. This letter contains the following sentence after the salutation: "Please return this form with your updated data even if you do not place an order. Also check your particulars below and enclose your brochure." The paragraph at the bottom of the letter, which consists of capital letters in small print, then contains a text concerning the placement of an order and the agreement of the application of Swiss law and of the legal venue of the publisher. The text block cannot be identified as the subject of a declaration by making a cross (as in the other sections of the letter). Owing to the content of the letter and the printed presentation reference is made to Exhibit K 2.

The Managing Director of the Plaintiff, Mr. [REDACTED] made a cross against "Theatre" as the business sector and inserted a telephone number and fax number and the legal form of the Plaintiff. He finally signed the letter on 21.3.2003.

With the invoice dated 6 May 2003 (Exhibit K 3) the Plaintiff was requested to pay € 1,087.00. Further correspondence followed according to Exhibits K 5 to K 12, to which reference is made.

The Plaintiff pleads that Mr. [REDACTED] did not expect to have placed an order subject to payment when signing the letter.

The Plaintiff is of the opinion that German international jurisdiction arises from Art. 5, Clause 3 (tort) and/or Art. 16 of the Ordinance Governing a Court's Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (EuGVVO). It also believes that a negative declaratory action may be brought before the court responsible for the action to enforce a claim

The Plaintiff pleads for

a declaration that an alleged request by the Defendant pursuant to the invoice dated 6 May 2003 (Number 314003.01) for payment of € 1,162.68 does not apply against the Plaintiff.

The Defendant pleads for

the action to be dismissed.

For further details of the allegations of the parties please refer to the submitted contents of the exchanged written statements of the case in addition to exhibits.

Reasons for the judgement:

The action is inadmissible.

German jurisdiction does not apply. The international jurisdiction of German courts does not ensue from EuGVVO. In general, according to Art. 2, Section 1 of this convention, an action must be brought before the courts of the country in which a sued party has its place of domicile. According to this, the action would have to have been brought in Switzerland.

The exceptional provision of Art. 5, Section 3 EuGVVO, according to which a person can be sued in a country other than its state of residence if tort forms the subject of the proceedings, does not apply. It must be taken into account whether the Plaintiff conclusively alleged such tort (judgements of the Federal Supreme Court in Civil Matters (BGHZ) 124, 241). It is not sufficient that the party bringing the action alleges tort, but that the submission to this effect is conclusive. This doubly relevant requirement must be checked within the context of the verification of admissibility.

Tort by the Defendant within the meaning of a planned tortious line of action with the intention of deception has not taken place. The layout of the letter pursuant to Exhibit K 2 cannot be seen as a fraudulent act. The recipient is not led to believe that it would only convey its business particulars and any other data through its signature. This can be deduced from the fact that it expressly states in the introductory sentence that the form should also be sent back if an order is not placed, and so the

"active" placement of an order is not possible by making a cross by a corresponding text field. Instead the order text block would have to be crossed out or the form would have to not be returned in order to not place an order. This can however not be interpreted as conscious deception. The type size of the text block in question is incidentally no smaller than the various business sectors. It is also not located in a concealed place. In fact it is not possible to overlook the text block in question when perusing the form letter as a whole.

Article 16 EuGVVO does not apply. This regulation allows a consumer to bring legal action before the courts of its state of domicile. The Plaintiff is not a consumer within the meaning of this regulation.

The Plaintiff correctly pleads that a negative declaratory action for which any court is responsible that would be responsible for an action for damages or specific performance of a reciprocal category may be brought at the Plaintiff's legal venue. However, this principle does not apply in this case. We are dealing with a principle developed from the jurisdiction in Germany. As in this case, however, the international jurisdiction of the EuGVVO is to be assessed, which supersedes the domestic system of jurisdiction, this principle may not be transferred into the sphere of application of the EuGVVO.

The order for payment of costs ensues from § 91, Section 1 Code of Civil Procedure (ZPO). The decision concerning the provisional enforceability is issued according to §§ 708, No. 11, 711 ZPO.

Dr. Wiese

Ruling

The value of the matter in dispute shall be set at € 581.34.

Dr. Wiese
(Signature)

Stamp: Hamburg Local Court

The action is dismissed.

The Plaintiff shall bear the costs for the legal dispute.

The judgement is provisionally enforceable.

The Plaintiff may avert the enforcement by provision of security to the sum of 110% of the amount enforceable on the basis of the judgement unless the Defendant provides security to the sum of 110% of the enforceable amount prior to enforcement.