

# High court rules on significance of CIF clause to jurisdiction dispute

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## Facts

[Aalborg City Court decision](#)

[High Court of Western Denmark decision](#)

## Comment

On November 8 2017 the High Court of Western Denmark decided in favour of a Danish cost insurance and freight (CIF) seller in a jurisdiction dispute involving a Czech buyer. The court found that:

- the "CIF Bratislava" clause agreed under the International Commercial Terms (Incoterms) 2010 stipulated that the place of delivery under the contract was located in Denmark; and
- the Danish court seized had enjoyed jurisdiction under Articles 7(1)(a) and (b) of the EU Brussels I Regulation (1215/2012).

## Facts

In 2016 a Danish seller (S) entered into a contract with a Czech buyer (B) for the sale of a large machine weighing approximately 16 tonnes. A CIF Bratislava clause was included in the offer and invoice that S issued to B. It was undisputed before the first-instance court and the High Court of Western Denmark on appeal that the CIF term (ie, that costs, insurance and freight be paid to Bratislava, Slovakia) constituted a term of the contract. The parties reached no specific agreement on dispute resolution, choice of law or jurisdiction.

S handed the machine over to a road carrier at its place of business in Svenstrup, inland Denmark, which performed the carriage to Bratislava. After taking delivery of the machine, B failed to pay the purchase price. S subsequently instigated legal proceedings before the Aalborg City Court to secure the €136,637 payment for the goods.

However, as its primary request for relief, B claimed that the court seized lacked jurisdiction and that pursuant to Article 4(1) of the EU Brussels I Regulation, B could be sued only in the courts of the EU member state in which it was domiciled (ie, the Czech Republic).

Further in support of its request for relief, B argued that under Article 7(1)(b) of the EU Brussels I Regulation, the place of performance of the obligation shall be the place in an EU member state where, under the contract, the goods were delivered or should have been delivered, unless otherwise stipulated under the contract. Given that the Incoterms clause chosen by the parties was CIF Bratislava, S had not made the delivery in Denmark. As a result, Article 7(1)(a) could not merit a finding that the Danish courts enjoyed jurisdiction on the substantive dispute. B argued that a CIF clause could not be construed to mean that the parties had reached an agreement on special jurisdiction for the purposes of Article 7(1)(a) and (b).

Conversely, S argued that under Article 7(1)(a), in matters relating to contract, a person domiciled in an EU member state could be sued in another member state in the courts for the place of performance of the obligation. S argued that when determining the place of performance of an obligation under Article 7(1), the court should consider the terms of the contract, including the

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place of delivery under the contract. In the case at hand, S referred to:

- the contract, which included the CIF Bratislava clause; and
- Section 10 of the Danish Sale of Goods Act.

Section 10 of the Sale of Goods Act – which applies to sale and purchase agreements other than those concerning real estate – stipulates that if a seller, in order to make a delivery, has agreed to arrange for the carriage of the goods from one place to another, it will be deemed to have delivered the goods when:

- they have been handed over to the carrier that has promised to perform the carriage from the place of shipment; or
- in the case of a carriage of goods by sea, the goods are brought on board.

Therefore, given that S handed the goods over to an independent carrier in Svenstrup, Denmark, the place of performance of S's obligation under Article 7 of the EU Brussels I Regulation was Svenstrup, granting jurisdiction to the court of Aalborg, Denmark.

S further argued that CIF clauses and their terms enjoy broad recognition and that the court should determine the place of delivery in accordance with the ordinary understanding that the parties ascribe to it – in this particular case, that S had made delivery when it handed the goods over to the independent carrier. The first-instance court ruled on the question of jurisdiction as a preliminary issue.

### **Aalborg City Court decision**

The Incoterms 2010 clause as a part of the contract was not in dispute. The dispute therefore exclusively concerned whether "CIF Bratislava" meant that:

- the parties had agreed that the place where the goods were handed over to a third-party carrier constituted the place of delivery; or
- the place of delivery was Bratislava, Slovakia.

In Paragraph 22 of *Electrosteel Europe SA v Edil Centro SpA* (C-87/2010), the European Court of Justice (ECJ) held that to determine the place of delivery under the first indent of Article 7(1)(b) of the EU Brussels I Regulation, the court must consider all relevant contract terms and clauses, including those generally recognised and applied in international commercial usage, such as the Incoterms, insofar as they enable that place to be clearly identified.

The Aalborg City Court found that as a main rule, the CIF clause merely determined which party carried the risk of damage to the goods at a given point in time. Further, the court explicitly highlighted that the CIF Bratislava clause made no reference to the place where the goods were to be handed over to a third-party carrier.

Accordingly, for the purposes of the test set out in *Electrosteel*, the clause could not constitute a basis for determining the place of performance of S's obligations.

The court therefore resorted to Paragraph 16 of *Car Trim* (C-381/08), in which the ECJ had found that where it is impossible to determine the place of delivery on the basis of the contract without reference to the substantive law applicable to the contract, the place of delivery is determined to be where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over the goods at the sales transaction's final destination. For the Aalborg City Court, it was sufficient to note that this was irrefutably not in Denmark. Therefore, the court seized did not enjoy jurisdiction and the case was dismissed.

### **High Court of Western Denmark decision**

On appeal, the High Court of Western Denmark considered whether:

- the CIF clause meant that the parties had agreed that the place of performance of the

obligation under Article 7(1)(a) of the EU Brussels I Regulation was where the goods were handed over to the third-party carrier; or

- the parties had agreed that the place of delivery and performance of the obligation was Bratislava, Slovakia.

Witness testimony provided by B's sales manager before the court stated that he had been accustomed to the Incoterms 2010 when the contract had been drawn up, but had not been aware that the goods were to be handed over to a third-party carrier in Svenstrup, Denmark.

Reversing the first-instance decision, the High Court of Western Denmark found that the court seized enjoyed jurisdiction and that the CIF Bratislava clause meant that the parties had agreed that S made delivery when the goods were handed over to the third-party carrier in Svenstrup, Denmark.

The court explicitly based its decision on the circumstances of the case, including that CIF clauses:

- are generally recognised and applied in international commercial usage; and
- entail, among other things, that delivery has been made upon handing over goods to a third-party carrier.

The court seized therefore enjoyed jurisdiction.

## **Comment**

The High Court of Western Denmark decision gives rise to a number of considerations. Much ink has been spilt to remind commercial parties of the dire consequences that may arise when they fail to consider Incoterms properly. One obvious insight that can be gleaned from the decision is, once again, the importance that commercial parties should give to the Incoterm that they choose when carriage to the place of delivery remains a precondition under a sales agreement.

Further, it remains a stale point that a CIF clause is specific to sea carriage and that delivery will be deemed to have taken place when the seller has either placed the goods on board the vessel or procured the goods so delivered (eg, the International Chamber of Commerce Rules for CIF, A4) and not merely when the goods are handed over to a third-party carrier (eg, the Incoterms 2010 Free Carrier clause). Notwithstanding the ordinary construction of a CIF clause, the High Court of Western Denmark explicitly emphasised that in the case at hand, the CIF Bratislava clause meant that S had made delivery by handing the goods over to an independent carrier at S's place of business in Svenstrup, Denmark. Therefore, according to the decision, despite the fact that the parties had agreed to an Incoterms 2010 clause specific to sea carriage, such terms could have significant implications on questions of jurisdiction.

Notably, the test set out in *Electrosteel* stipulated that when determining the place of delivery for the purposes of the first indent of Article 7(1)(b) of the EU Brussels I Regulation, the national court must include the Incoterms insofar as they enable that place to be clearly identified. In this respect, it was not immediately apparent from the facts reported under the case or the considerations underpinning the decision on what grounds the court had determined that the place of delivery under the CIF clause had been clearly identified as Svenstrup, Denmark, although the seller did have its place of business in Svenstrup. A CIF buyer doing business with Danish commercial parties should therefore be aware of the ruling in order to avoid any unpleasant surprises. Further, buyers should clearly determine the place where the goods are to be handed over to an independent carrier or, alternatively, where the port of shipment is located. In this case, the parties could have incorporated a carriage and insurance paid to Bratislava Incoterms 2010 clause accompanied by a concise stipulation of the place where the goods were to be handed over to the first carrier.

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