Neutral Citation No: [2023] NIMaster 7	*Ref:* **2023NIMaster7**
	ICOS No: **20/047315**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **20/10/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION

_____

NORBEV LIMITED

Plaintiff

and

CSI HUNGARY KFT

Defendant

_____

Mr Fletcher BL (instructed by A&L Goodbody Solicitors) for the Defendant,
Mr McCausland BL (instructed by Hinds & Co Solicitors) for the Plaintiff.

_____

Master Harvey

Introduction

[1] This is a two-fold application by the defendant in a commercial action seeking to set aside service of the writ of summons together with a further application for a stay of proceedings on the basis that exclusive jurisdiction to hear the claim is contractually reserved to the courts in Hungary.

[2] Both counsel's submissions were of a high standard and of great assistance to the court.

Background

[3] The plaintiff is a Northern Ireland company based in Ballymena which manufactures soft drinks on behalf of world leading brands for distribution globally. The defendant is a supplier of closure devices for bottles based in Hungary. The cause of action against the defendant alleges breach of contract for alleged failure to supply

closures that were fit for purpose. There was no bespoke supply agreement or contract between the parties, therefore, a series of emails, purchase orders, order confirmations, invoices and delivery notes represent the only documentation exchanged.

[4] The Plaintiff issued a writ of summons on 10 July 2020 in which it claimed the following relief:

> "Damages for loss and damage sustained by the Plaintiff by reason of the breach of contract of the Defendant, its servants and agents, in or about the sale and supply of goods by the Defendant to the Plaintiff from in or about 2017 to November 2018 in respect of sale and supply of closures for bottles.
>
> Interest on damages pursuant to section 33A of the Judicature (NI) Act 1978."

[5] The solicitors for the plaintiff sought to effect service of the writ of summons (together with a notice of writ) directly to the defendant at its address in Hungary under cover of a letter dated 28 August 2020. No personal service was effected nor was a translation of the writ of summons or notice of writ provided at this stage.

[6] On 11 March 2021 the defendant issued the instant application. The plaintiff then served the writ of summons and notice of writ again on 16 June 2021 via a Hungarian lawyer, Dr Bohanek by post. On this occasion a Hungarian translation was provided.

[7] In addition to the disputed method of service, an issue arises regarding the proper jurisdiction for hearing the claim. The defendant asserts that the parties have agreed to an exclusive jurisdiction clause which was incorporated into the contract between the parties. Moreover, even if the court does not accept this, it is contended that the circumstances of the case are such that the relevant EU Regulations point to Hungary as the appropriate forum for the case to be heard. The plaintiff submits that there was no direction to the exclusive jurisdiction clause, its existence was not drawn to the plaintiff's attention and the clause is an unfair term, therefore, asserting that the correct jurisdiction for the proceedings is Northern Ireland.

The Service issue

The defendant's submissions

[8] In summary, the defendant argues that the plaintiff did not effect valid service as, by merely posting the writ of summons, it failed to comply with Regulation (EC) No 1393/2007 ("the Service Regulation") and Hungarian law and that the method of secondary service did not comply with Order 11 of the Rules of Court of Judicature (Northern Ireland) 1980 ("the Rules").

[9] The defendant's position is that quite clearly service has not been validly effected as direct service is not recognised in Hungarian law nor is it permissible under the Service Regulation which establishes a mandatory regime for service.

[10] The defendant contends that the Service Regulation does not give a plaintiff the right to serve a defendant domiciled in another member state by way of direct posting, but rather it allows a litigant to effect service by having that member state effect postal service (if its national laws permit this). The defendant asserts that this position was confirmed by the Irish High Court in *Grovit v Jan Jansen* [2018] IEHC 22 where Binchy J was faced with an argument by the plaintiff that direct postal service by it on the defendant in Amsterdam was valid under the Service Regulation. At [21] the learned judge framed the question as follows:

> "…the question of interpretation of Article 14 remains: is it confined in its application to use by the Member States themselves, or does it extend to individuals involved in litigation?"

[11] The learned judge reasoned as follows in concluding that the former was the correct position:

> "Article 14 is contained in s. 2 of the Service Regulation under the heading of "other means of transmission and service of judicial documents". It is clear to me that Article 14 is intended to afford to a transmitting agency the option of serving documents by registered post (or equivalent) on a party in another Member State, rather than serving through a receiving agency. It is not intended, in my view, to confer that entitlement upon the litigant himself."

[12] In the present case, the defendant's Hungarian lawyer, Mr Artúr Tamási, has averred in his affidavit that Hungarian law requires compliance with the Service Regulation and does not allow for direct service on a defendant from a party outside the jurisdiction.

[13] In addition to failing to serve the writ of summons and notice of writ through the Hungarian state, the plaintiff failed to serve Annex II of the Service Regulation, which is a Hungarian translation of a document giving notice to the recipient that service can be contested.

[14] The attempt to re-serve was after the "Brexit" transition period, at which point the Service Regulation was no longer applicable. The plaintiff required the leave of the Court for service out of the jurisdiction. This was not obtained.

[15] The defendant's counsel stated that in order to deem service good, the plaintiff has to prove the facts of this case are somehow exceptional and the court should look at the actions of the plaintiff. He stated this was not permissible service carried out wrongly but an impermissible method of service which was more than a minor defect.

[16] The plaintiff in the present action was told almost immediately of the issue with service, and there is no evidence as to what happened for several months thereafter. What followed was purported service via a different, but equally impermissible method. In the defendant's view, this was not an exceptional case.

The plaintiff's submissions

[17] The plaintiff argues that the writ, together with the notice of writ of summons were served on the defendant by recorded and signed for post under cover of letter dated 28 August 2020. The defendant received them and understood the documents and just four weeks later, on 25 September 2020, the defendant's lawyers wrote to the plaintiff stating:

> "We refer to your correspondence dated 28 August 2020 and the Writ of Service and Writ of Summons attached thereto relating to a dispute between Norbev Limited and CSI Hungary Kft ("Dispute"). We are responding on behalf of our Client, CSI Hungary Kft ("CSI")."

[18] The plaintiff further arranged for service through Hungarian attorneys in Budapest who served the proceedings on the defendant, with signed receipt on 16 June 2021. If there was any defect in service, it was an irregularity and not a significant defect. The court should deem service good in any event under Article 14 of the Service Regulation as there was postal service by registered letter and acknowledgment of receipt.

[19] The plaintiff argues that the defendant was thus able to instruct its lawyers promptly. While failing to provide a translation in Hungarian, in the first attempt at service, in line with the Service Regulation, the defendant and its lawyers have always

corresponded with the plaintiff in English, both in their email contact during the business relationship and after service of these proceedings. The plaintiff also re-served the writ of summons and notice of writ with a Hungarian translation via a Hungarian lawyer, Dr Bohanek on the 16 June 2021. Despite initially averring that it did not receive the translation of the proceedings in her first affidavit, the financial manager from the defendant company, Ms Ildiko Kelemen, conceded in a subsequent affidavit that they did in fact receive this on the aforementioned date.

[20] The plaintiff's counsel stated that "this is an *O'Shea* case", a reference to *O'Shea v Southern Health and Social Care Trust and Universitair Ziekenhuis Gent* [2014] NIMaster 7, and the court should approach it on the basis of deeming service good. The test of exceptionality from *O'Shea* does not apply as this relates to dispensing with service, not deeming service good, which is a separate issue. I observe here that defence counsel indicated his view that the test is not different and there is a clear equivalence cited in *O'Shea* at paragraphs 22 and 23 of the judgment.

[21] At the very least, the plaintiff contends that both attempts at service were reasonable, the existence of the proceedings was known to the defendant who could grapple with the issues immediately and the defendant has not demonstrated any prejudice. Essentially, it is argued that I should not validate service which had previously been ineffective but rather, determine that the method of service was valid.

[22] The plaintiff finally contends that even if the methods of service adopted are not in accordance with the Rules, the documents are deemed defective or there is some other error on the part of the plaintiff in relation to the service of proceedings on the defendant, the court can cure any irregularity in service under Order 2 Rule 1 of the Rules.

The legal principles

[23] The defendant's application is grounded on Order 12 Rule 8 of the Rules which provides:

> "Application to set aside writ, etc.
>
> "8. A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within the time limited for service of a defence, apply by summons or motion for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order

> giving leave to serve the writ or notice on him out of the jurisdiction."

[24] The court's discretion to cure irregularities with service of the writ, or deem service good, is contained in Order 2 Rule 1 of the Rules, which provide:

> "(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein.
>
> (2) ……..the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."

[25] Further the *White Book*, at 2/1/3 provides that:

> "Defective service of proceedings, however gross the defect, and even a total failure to serve, where the existence of the proceedings is nevertheless known to the defendant, is an irregularity which can be cured by the Court by exercise of discretion under Order 2 Rule 1."

[26] When effecting service outside of the jurisdiction, a plaintiff must comply with Order 11 Rule 5(2) of the Rules, which states as follows:

> "Nothing in this rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country."

[27] Initially, the proceedings were served prior to the end of the "Brexit" transition period on 31 December 2020, therefore, the Service Regulation still applied. This established a mandatory regime for service which was confirmed by the European Court of Justice in *Alder v Orlowska* (Case C-325/11) EU:C:2012:9773, [2013] All ER (D) 43 (Feb).

[28] The Service Regulation commences with 29 recitals, which include the following:

> "(6) Efficiency and speed in judicial procedures in civil matters require that judicial and extrajudicial documents be transmitted directly and by rapid means between local bodies designated by the Member States. Member States may indicate their intention to designate only one transmitting or receiving agency or one agency to perform both functions, for a period of five years …
>
> (17) Each Member State should be free to effect service of documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent.
>
> (18) It should be possible for any person interested in a judicial proceeding to effect service of documents directly through the judicial officers, officials or other competent persons of the Member State addressed, where such direct service is permitted under the law of that Member State."

[29] At Article 2, the Service Regulation provides for the designation by each member state of agencies for the transmission and reception of judicial or extrajudicial documents to be served in another member state, and in Chapter II, Section 1 (Articles 4 to 11) for the transmission of documents between the agencies designated pursuant to Article 2. Article 14 relates to service by post:

> "Article 14
>
> Service by postal services
>
> Each Member State shall be free to effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent."

[30] In *O'Shea*, the Court considered the issue of service. At paragraph [8], Master McCorry stated:

> "The primary means of service under the Regulation is through the transmitting and receiving agencies to be designated by each member state: for example, the appropriate agency in this jurisdiction is the Master (Queen's Bench and Appeals). However, article 14 of the Regulation provides for service by postal service. It states as follows "*Each member shall be free to effect service of judicial documents directly by postal service on persons residing in another Member State by registered letter with acknowledged of receipt of equivalent*."

[31] The second attempt at service was after the transition period ended. In *Cynthia Beattie t/as Beatties Transport v Man Truck and Bus SE* [2022] NIMaster 1, it was noted that after this date, the Service Regulation ceased to have any application in Northern Ireland. This means that leave of the court was required pursuant to Order 11 of the Rules.

[32] As with *O'Shea,* where service was to be effected in Belgium, also a Hague Convention state and a member of the European Union, the key issue for this court to determine is whether the plaintiff, by posting the writ of summons and notice of writ directly to the defendant in August 2020 was in compliance with Hungarian law. If the first service attempt is deemed impermissible, and the court sets aside service or refuses to deem service good, the same questions then arise in relation to the second attempt at service in June 2021, post-dating the end of the Brexit transition period, when leave to serve outside the jurisdiction would have been required from the court. In *O'Shea* the Court concluded it should exercise its discretion and correct the irregularity of service by deeming service good.

Conclusion

[33] Both methods of service adopted by the plaintiff were defective. The initial service of the writ should have been carried out in accordance with the Service Regulation. The second attempt at service did not have the necessary leave of the court. In such circumstances, the court has power to set aside service, as the defendant seeks here.

[34] The application turns on whether in all the circumstances of this case, taking into account the various authorities, the court should exercise its wide discretion to cure these defects pursuant to Order 2 Rule 1.

[35] Both parties relied on the case of *O'Shea*. In the case, the court concluded there had not been service without receipt, unlike the present case where there is clearly receipt. Similarly, the plaintiff was also still within the primary limitation period. At para [28] of *O'Shea*, the court held that:

> "Of more importance, in terms of establishing where justice lies, and whether the circumstances are truly exceptional, is to consider whether the service which has been achieved was effective in bringing to the attention of the party served the details of the claim made against it, and whether or not there has been prejudice to the party being served by the failure by the plaintiff to effect service by a stipulated method."

[36] In the present case, the plaintiff served a detailed, two-page letter of claim on 11 September 2019 attaching a copy of the pre-action protocol for commercial actions. The defendant's lawyers responded on the 4 October 2019 denying liability and raising the exclusive jurisdiction clause issue. The letter of claim in fact references even earlier investigations by the defendant dating back to its own internal report on 5 September 2018 which was shared with the plaintiffs and relates to the allegedly defective closures for bottles which forms the basis of the plaintiff's claim.

[37] The defendant then received two separate copies of the writ, firstly by "recorded signed for" post on the 28 August 2020. The defendant's lawyers responded, within just 28 days, on the 25 September 2020, rejecting the document and informing the plaintiff of its intention to instruct lawyers in Northern Ireland to file a conditional memorandum of appearance. This application was indeed filed with the court on the 5 October 2020 and the appearance lodged on the 21 October 2020.

[38] The plaintiff then sought to re-serve the writ in June 2021, via a Hungarian lawyer and accompanied by a translation of the document. On both occasions the defendant acknowledges it received the writ. The writ and notice of writ were not defective, the proceedings were issued within the limitation period and the writ was within its 12-month period of validity. The defendant was, from presentation of the first writ, able to understand the nature of the case and promptly instruct lawyers in respect of same. It cannot credibly argue this did not effectively bring the details of the claim to its attention. The defendant was not taken aback by the claim or unable to defend it. The defendant in this action has suffered no demonstrable prejudice.

[39] On the issue of prejudice to the defendant, I note at paras [29] and [30] of *O'Shea,* the court referred to the reasoning of Clarke M.R. at paragraph 32 of his judgment in *Olafsson* which has a resonance with this case, stating:

> "…the only loss to the second defendant in this case is an "opportunity of taking advantage of the point that service was not in accordance with the rules", or to use the language adopted by Lord Brown in Philips v Symes "steal a march" on the plaintiff. The second defendant has not demonstrated that it will suffer any other prejudice, and that prejudice, in so far as it can be described as such, must be balanced against the loss to the plaintiff, if Order 2 rule 1 is not used by the court to correct the irregularity in service, which is that the plaintiff will be required to re-serve notice of the writ outside the period of validity."

[40] I concur with the interpretation of Article 14 in the *Grovit* case that the service of court documents in the pre-Brexit transition period was a matter between member states. In this case it was an error on the plaintiff's part to believe that it conferred the right on parties to the litigation. I do not conclude, however, in all the circumstances of this case, that their error was such as to cause sufficient prejudice to the defendant as would result in service of the writ being set aside. I agree with the conclusion of Nicholson LJ in *Patterson* at para [34]:

> "In view of the insignificant prejudice to the defendants on the merits arising from a departure from the requirements of the rules I am exercising my discretion liberally in what I believe to be in accordance with justice."

[41] It is only in exceptional circumstances that irregularities with service are cured by exercise of the court's discretion. In relation to the issue of exceptionality, in *Olafsson v Gissurarson (No. 2)* [2008] 1 WLR 2016, the method of service was not fully effective as the claimant did not obtain a written receipt as was required from the defendant. The case pre-dated the Service Regulation and the issue with service arose from a third-party mistake, however, the court ultimately determined this was an exceptional case and at para [32], Clarke MR stated:

> "In my judgment, on the particular facts of this case, where the claim form was issued in time, and delivered to the defendant within the period for service by a method of service which the claimant and his solicitors could reasonably have thought was a reasonable method of service, and where the defendant know precisely what the claim was from the claim form, it would be unjust and contrary to the principles of the overriding objective that cases should be determined justly to refuse the relief."

[42] The rules of court are a procedural framework which must be followed; however, they should not be used as a straightjacket as there is a need to do justice between the parties and each case will turn on its own facts. The court must also give effect to the overriding objective contained in Order 1 Rule 1a of the Rules when the court exercises any power given to it by the rules or interprets any rule.

[43] Service issues often come before this court in interlocutory applications, and it is only in exceptional circumstances that the court will exercise its discretion to remedy them. I distinguish this case from a recent action also involving the disputed service of a writ, *Brian Bradley and Tara Bradley and Gerard Rodgers & Ors trading as Rodgers Properties* [2022] NIMaster 11. In that case, there was significant delay as the plaintiffs' solicitor firm was first instructed in October 2016. It was then almost four years before proceedings were issued and a further 12 months before the attempted service of the writ. The writ was replete with irregularities which were more than just trivial in nature; service was improperly attempted, the issues with service arose from mistaken assumptions or a degree of carelessness on the part of the plaintiff and there was prejudice to the defendant with the loss of an accrued limitation defence. In the present case, the disputed service of the writ comes down to "who posted it, that is the issue", as simply but quite aptly summarised by plaintiff's counsel. In other words, the plaintiff's only error was in not arranging service via the official channels which existed between member states.

[44] I take into consideration the need to prevent injustice being caused to any party by what has been described in the authorities as mindless adherence to the technicalities in the rules of procedure. There is no credible suggestion that the defendant was not aware of the proceedings or was disadvantaged by any issue arising with the reasonable, albeit procedurally flawed, methods of service adopted by the plaintiff. I conclude that the irregularities with service of the writ should be cured, and service deemed good under Order 2 Rule 1 of the Rules.

The jurisdiction issue

[45] I will now turn to address the jurisdictional point. Two issues arise, firstly whether the exclusive jurisdiction clause has been incorporated into the contract between the parties. Secondly, if it is deemed that jurisdiction is not contractually reserved to the courts in Hungary, it is necessary to determine the correct jurisdiction for the case to be heard.

The plaintiff's submissions

[46] It would be improper and unfair for the Defendant to be allowed to rely on the unnotified and unfair contract terms relating to the jurisdiction of Hungary.

[47] There was no direction to the exclusive jurisdiction clause and its existence was not drawn to the plaintiff's attention. The terms and conditions are not included in the order confirmation itself but rather there is a reference to an online document. They were never drawn fully, properly or to any extent, to the plaintiff's attention. The defendant only presented its terms after the fact via a hyperlink.

[48] In the absence of such terms prevailing, jurisdiction is set by the place of delivery of the goods, and it is a fact that such goods were delivered to premises in Northern Ireland.

[49] At no stage throughout the entire process did any member of the CSI Group make any distinction between CSI UK, CSI Spain or CSI Hungary. There was no identification that CSI would fulfil the orders from CSI Hungary.

The defendant's submissions

[50] If the court cannot be satisfied as to the location of the main provision of services by the defendant, then it must defer to the principle the defendant should be sued in its place of domicile. This accords with Article 4 of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Recast Brussels Regulation.")

[51] Alternatively, the court should determine that the parties have agreed to a clause in the contract that they would be subject to the exclusive jurisdiction of Hungary. The defendant's "General Terms and Conditions of Sale & Delivery" were referenced in a hyperlink appearing on all invoices and were readily available to the plaintiff. For each order issued after July 2017, the plaintiff was or could have been perfectly aware of these terms.

[52] The plaintiff has not denied that it received the defendant's purchase orders nor has it claimed that it made any effort to reject the terms of the purchase order. This is therefore, a clear case of incorporation by reference, hence the exclusive jurisdiction clause is valid, even if the plaintiff was not aware that it existed.

[53] If the Court finds the exclusive jurisdiction clause was not incorporated into the contract between the parties, then it does not follow from this that it has jurisdiction. The place of performance of the contract between the parties was not in Northern Ireland but rather in Hungary, as the products were manufactured there. This satisfies the test under Article 7 of the Recast Brussels Regulation.

[54] It is of no relevance that some initial purchase orders were fulfilled by a branch of CSI in Spain. The plaintiff's orders were exclusively fulfilled from Hungary at the latest from in or around July 2017 onwards. The first allegedly faulty shipment was in

October 2017. The plaintiff, therefore, had more than three months to realise that it was contracting with a Hungarian entity.

[55] There was no obligation on the defendant to deliver the goods to the plaintiff in Northern Ireland. All the defendant was required to do under the contract was load the goods for delivery by a carrier, known as "CIF", which was referred to in the invoices, therefore, Article 7 of the Recast Brussels Regulation renders the correct jurisdiction as Hungary as that is where performance of the contract occurred.

Legal principles

Domicile

[56] On the issue of domicile, the starting point is that a defendant "plays at home" unless there is a basis for conferring jurisdiction under another article. Article 4 of the Recast Brussels Regulation provides that:

> "(1) Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
>
> (2) Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State."

Performance of the contract/delivery of the goods

[57] On the issue of the place of performance of the contract or delivery of the goods, Article 7(1) of the Recast Brussels Regulation provides that a person domiciled in one member state may be sued in another (my emphasis added):

> "(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."

[58] Guidance on the relevant principles was provided by the Court of Appeal in *JEB Recoveries LLP v Binstock* [2016] EWCA Civ 1008, where Kitchin LJ summarised the law as follows:

> [52] First, the place of performance must be understood as the place with the closest linking factor between the contract and the court having jurisdiction and, as a general rule, this will be at the place of the main provision of the services.
>
> [53] Secondly, the place of the main provision of the services must be deduced, so far as possible, from the provisions of the contract itself.
>
> [54] Thirdly, if the provisions of the contract do not enable the place of the main provision of the services to be determined, either because they provide for several places where services are to be provided or because they do not expressly provide for any specific place where services are to be provided, but services have already been provided, it is appropriate, in the alternative, to take account of the place where activities in performance of the contract have for the most part been carried out, provided that the provision of services in that place is not contrary to the parties' intentions as appears from the contract.
>
> [55] Fourthly, if the place of the main provision of the services cannot be determined on the basis of the terms of the contract or its performance, then it must be identified by another means which respects the objectives of predictability and proximity, and this will be the place where the party providing the services is domiciled.

Incorporation of the exclusive jurisdiction clause

[59] On the question of incorporation, the Recast Brussels Regulation provides for the validity of jurisdiction clauses at 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.

[60] It has been held that a jurisdiction clause can be incorporated by reference. In *Africa Express Line Ltd v Socofi SA* [2009] EWHC 3223 (Comm) Christopher Clark J held, when considering the equivalent article in the original Brussels Regulation, as follows:

> "Where the contract refers expressly to one party's standard terms it is not necessary for there to have been a specific reference to the jurisdiction clause for the purposes of establishing the real consent required by art 23: 7E Communications Ltd v Vertex Antennentechnik GmbH [2007] EWCA Civ 140, [2007] 2 All ER (Comm) 798, [2007] 1 WLR 2175, 2185, para 32 (CA) Credit Suisse Financial Products v Société Générale d'Entreprises [1997] CLC 168, 171-172 (CA) (per Saville LJ, delivering the only reasoned judgment of the court in a case involving the 1992 ISDA Master Agreement). In those circumstances it is irrelevant that the party against whom the jurisdiction clause is sought to be enforced does not have a copy of the terms and conditions. Further the parties' agreement may be contained in more than one document eg by an exchange of correspondence: 7E Communications para 33."

[61] In some instances, it has been held that there may be a valid agreement in writing where a quotation is made on one party's own standard terms and is accepted, even though the acceptor did not have a copy of those terms. In *7E Communications Ltd,* a German company faxed a quotation to an English company offering to sell certain satellite equipment on its general terms and conditions. These contained an

exclusive German jurisdiction clause. No copy of those terms was sent to the Claimant, which faxed the defendant a purchase order for the goods in the quotation. It was held that there was an agreement in writing for the purpose of Art 23(1). A similar approach was taken in *Coys of Kensington Automobiles Ltd v Pugliese* [2011] 2 All ER (Comm) 664.

[62] In *AIG Europe SA V QBE International* All England Law Reports [2001] 2 All ER (Comm) the defendant applied for a declaration that the English courts had no jurisdiction to determine its dispute with the claimant, and sought an order setting aside service of proceedings on the ground that the parties had agreed, pursuant to Art 17 of the Recast Brussels Regulation, that the courts of France were to have exclusive jurisdiction. In that case at p. 623, the court summarised the test to be applied stating it had to:

> "construe the language of the contract in the context of its commercial background and ask itself whether a consensus on the subject matter of the jurisdiction clause was clearly and precisely demonstrated. In the instant case, it was not. The authorities supported the view that, in the context of contracts of reinsurance, jurisdiction clauses, being ancillary in nature and having no bearing on the definition of the risk, were not germane to the substance either of the underlying policy or of the reinsurance contract. In those circumstances, general words of incorporation would not suffice to demonstrate the existence of the necessary consensus with sufficient certainty to satisfy the requirements of art 17. Although the commercial background of the case did not reinforce that conclusion, it was not of sufficient weight to make good the deficiency in the language of the contract. Accordingly, the application would be dismissed."

[63] Also of note, at paragraph 13 of the *AIG* case it states:

> "only a clear reference to the terms containing the exclusive jurisdiction clause will suffice."

[64] In the *Africa Express Line case* the issue for the court regarding the exclusive jurisdiction clause was:

> "whether…there had been a real consent to, or actual acceptance of the jurisdiction clause."

[65] The court, at paragraph 25 set the test for the plaintiff as follows:

> "It is for (the claimant) to show that it has – a much better argument than the defendants that, on the material available at present, the requirements of form in art 23 (1) are met and that it can be established, clearly and precisely, that the clause conferring jurisdiction on the court was the subject of consensus between the parties."

[66] Defence counsel highlighted that, unlike the Civil Jurisdiction and Judgments Act 1982, the Recast Brussels Regulation makes no explicit provision for *forum conveniens* considerations. He drew my attention to the Court of Appeal decision in *Cook v Virgin Media Ltd* [2015] All ER (D) 127 (Dec) which he contends is strongly suggestive that the *forum conveniens* principle is in fact not permissible in the context of the Recast Brussels Regulation. *Forum conveniens* has in any event not been argued by the Plaintiff in the context of this application.

Conclusion

The transactions between the parties

[67] The sequence of how standard transactions operated between the parties requires consideration. Purchase orders were issued by the plaintiff to "Closure Systems International (CSI)", initially to an address in the UK and sometime after to CSI Hungary Ltd. The defendant, CSI Hungary, then issued an order confirmation stating the delivery address as the plaintiff's address in Ballymena, Northern Ireland and containing the hyperlink at the foot of the document, containing the "General Terms and Conditions of Sale & Delivery."

[68] The precise wording of the order confirmation was:

> "All our sales and services shall be subject to our General Terms and Conditions of Sale & Delivery
>
> https://csiclosures.com/csi/terms/Hungary_Standard_ Terms_and_Conditions_Sales _English.pdf".

[69] Attached to this document is an invoice, from CSI Hungary, also containing the same hyperlink. The defendant then issued a delivery note, from CSI Hungary, albeit I noted that two of the delivery notes states the shipping location as a UK distribution centre, rather than Hungary.

[70] The General Terms and Conditions of Sale & Delivery referenced by the hyperlink above run to four pages and provided the following at clause 16(c) "Miscellaneous":

> "Both the Agreement as well as the Orders are governed by Hungarian law and the Hungarian courts shall have exclusive jurisdiction regarding any and all disputes arising therefrom."

Domicile

[71] As stated previously, the starting point is that a defendant is sued in their place of domicile, unless there is a basis for conferring jurisdiction under another article of the relevant regulation. In relation to domicile, clearly the defendant is based in Hungary, however, the first series of purchase orders by the plaintiff were issued to CSI UK. Those initial purchase orders were not fulfilled by the defendant or CSI UK, but instead by CSI Spain. From the plaintiff's perspective, their interactions with the defendant at the early stages of their business relationship were not clearly between a Northern Ireland and Hungarian company. There is no evidence at any stage that a member of the CSI Group made any distinction between CSI UK, CSI Spain or CSI Hungary.

[72] I note in the affidavit of Rachel McCann, a finance director from the plaintiff company, she states:

> "there was no identification that CSI would fulfil the orders from CSI Hungary or was there any direction to any exclusive jurisdiction clause."

Ultimately, the issue will only turn on this if there is no other basis for conferring jurisdiction.

Performance/Delivery

[73] The defendant manufactured the goods in Hungary, they were clearly delivered to premises in Northern Ireland. The order confirmations, invoices and delivery notes plainly state:

> "Delivery Address: Norbev Ltd, 100 Raily Street, Ballymena BT42 2AF"

[74] The defendant asserted that delivery was within Hungary as they delivered the goods to a third-party haulage company in that country, who in turn shipped them to Northern Ireland. The plaintiff appears to have had no knowledge and certainly no

contractual relationship with this company. The only reference to this third party carrier was a single, obscure reference in the invoices to "Incoterm: CIF". I conclude that to argue this constituted the place of delivery of the goods in line with Art 7 of the Recast Brussels Regulation is not credible. The goods were ordered from, intended for and were or should have been delivered to Northern Ireland.

[75] On this basis, the place of delivery of the goods, pursuant to Article 7(1) of the Recast Brussels Regulation is satisfied.

Exclusive Jurisdiction

[76] I note the defendant's assertion that although the plaintiff does not accept the exclusive jurisdiction clause is applicable, it has not put forward a case as to what the terms of the contract between the parties actually were. The court is left to consider the documentation that is available, as set out in the preceding paragraphs.

[77] In line with the authorities, there was no clear reference in the documentation provided to the court as to the terms containing the exclusive jurisdiction clause. They are not included in the order confirmation document but rather it contains a hyperlink to an online document.

[78] As a result, the defendant seeks to rely on terms and conditions which post-dated the plaintiff's initial order, and there is no evidence they were to any extent brought to the attention of the plaintiff.

[79] There was no evidence of consent to or acceptance of the jurisdiction clause by the plaintiff. This is significant in circumstances where the plaintiff was dealing with a company which, prior to July 2017 at least, was operating out of three different jurisdictions that this court has been made aware of, in terms of the ordering, manufacture, and delivery of the goods.

[80] While I note the problems with the closures that give rise to the subject matter of this claim were manufactured in and supplied from Hungary from July 2017, the sequence of events prior to that is not entirely clear and involved more than just the Hungarian branch of the CSI Group. At no point was it expressly stated to the plaintiff that manufacture and supply would move to this Hungarian arm, which may have gone some way to alert the plaintiff to the possibility that any legal disputes arising would be dealt with in Hungary.

[81] I conclude that exclusive jurisdiction to hear the case has not been incorporated into the contract between the parties and therefore the action is not contractually reserved to the courts in Hungary pursuant to Article 25 of the Recast Brussels Regulation. Moreover, the place of delivery of the goods clearly was, or should have

been, Northern Ireland in line with Article 7. In light of this, the appropriate jurisdiction for hearing the claim is Northern Ireland.

[82] I will hear from counsel in relation to costs on a date to be fixed by the parties in consultation with the Master's office.