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Case No: HT-2020-000027

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building
Fetter Lane,
London, EC4Y 1NL

Date: 08/01/2021

Before:

MR JUSTICE KERR

Between:

TRW LIMITED

Claimant

- and -

(1) PANASONIC INDUSTRY EUROPE GmbH

Defendants

(2) PANASONIC AUTOMOTIVE SYSTEMS EUROPE GmbH

Mr David Caplan (instructed by **Oury Clark Solicitors**) for the **Claimant**
Mr Andrew Legg (instructed by **McDermott Will & Emery UK LLP**) for the **Defendants**

Hearing date: 15 December 2020

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE KERR

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time of hand-down is
10am on 8 January 2021

Mr Justice Kerr

Introduction

1. The defendants (where appropriate, collectively **Panasonic**) make, among other things, resistors used in vehicle parts. One of their customers is the claimant (**TRW**), now called ZF Automotive UK Limited. TRW is a supplier of parking brakes and electronic stability control assemblies in the automotive industry. TRW's parts include resistors made by Panasonic.
2. In January 2020, TRW sued the defendants, alleging that certain resistors supplied by Panasonic from 2015 to 2017 were defective. The defendants applied in March 2020 to set aside service and for a declaration that the English court has no jurisdiction over the claim or, alternatively, for a stay of the action. The defendants rely on provisions in the recast Brussels I Regulation (Regulation (EU) No 1215/2012) (**the Recast Brussels Regulation**).
3. The defendant Panasonic companies are based in Germany. Panasonic's Group headquarters are in Japan. It has subsidiaries in many countries. TRW is the English subsidiary, based in Solihull, of a German group of companies, ZF Group. The defendants say the parties agreed to German law and exclusive jurisdiction of the Hamburg court over any claim by TRW arising from supply of the resistors. TRW says the parties agreed to English law and jurisdiction.
4. Alternatively, the defendants submit that if the English court does have jurisdiction, I should stay the claim in the exercise of my discretion to avoid the risk of irreconcilable judgments because there are related proceedings in Michigan, USA, with judgment expected in about April 2021. TRW says a stay would be pointless because judgment in the Michigan proceedings will not determine the present proceedings, which are still at an early stage.
5. The resistors were supplied by the first defendant (**PIEU**). There is an agreement that, it is alleged, may have transferred PIEU's liabilities to the second defendant (**PASE**). That is why PASE has also been sued. But the parties agree that nothing turns on this possible transfer of liabilities and that it is not necessary to distinguish between the two defendants for the purpose of determining their present application.

The Facts

6. Panasonic companies have had commercial relations with TRW companies in Europe since at least 1998. Customers of PIEU are requested to sign a "customer file" document. TRW companies (now ZF Group companies) in Europe, including England, signed such documents from 1998 to 2019. There are copies of such documents relating to supplies by Panasonic to TRW companies in Italy, Poland, Czech Republic and within Germany, as well as to TRW in Birmingham and County Durham.
7. Mr David Jones of TRW signed a "customer file" document on 28 January 2011. It recorded payment terms and delivery conditions. Under the heading "Special Agreements", there was a declaration agreeing to comply with relevant export laws and confirming that the customer does not produce or develop or sell weapons of mass destruction. The text then continued:

“The submission of this customer file and the handing over of the General Conditions do not automatically constitute a supply claim. We have received and acknowledged the General Conditions of [PIEU].”

8. The **PIEU General Conditions** provided as follows:

“1. Even if no reference is made to them in particular cases, the following terms and conditions shall apply exclusively to the entire business relation with us, particularly to all agreements for deliveries and services, unless different conditions, particularly conditions of purchase of the contracting party, have expressly been confirmed by us in writing.

Conditions of the buyer diverging from our terms and conditions shall not be valid even if we effected delivery or rendered services without reservation.

2. All offers are made without engagement. Contracts shall become effective on our written confirmation only. If delivery is carried out without the buyer having received such confirmation, the contract shall become valid by acceptance of delivery and subject to these conditions

9. The **PIEU General Conditions** further provided at the end:

“12. For contracts with contractors for whom these general conditions apply, Hamburg is stipulated as place of performance and jurisdiction, also for action on a promissory note or cheque. Contracts concluded with us shall be governed by the law of the Federal Republic of Germany to the exclusion of the UN Sales Convention as amended at any time We also have the right to file a suit at the domicile of the buyer or one of his branches. Statutory jurisdiction applies otherwise.

Contracts concluded with us are subject to German law.

If any provision of these conditions shall be or become invalid in whole or in part, the validity of the other provisions shall remain unaffected.

The present conditions are written in different languages. In case of conflict the German version shall prevail.”

10. In February 2013, the parties discussed by email the supply of certain resistors, being or including the ones now alleged to be defective. This led to the placing of orders for those resistors as recorded in two “blanket order” documents (**the 2015 and 2016 purchase orders**) dated 10 March 2015 and 25 January 2016.

11. The 2015 purchase order asked for the goods to be delivered “in accordance with [TRW’s conditions of] purchase” (**the TRW Terms**) and gave a website reference for where to find them. It went on to state:

“Commencement of any work or delivery of any goods or service under this order or delivery schedules or releases shall constitute your confirmation [that you] are aware of and accept such terms, conditions and requirements.”

12. Before turning to the 2016 purchase order, I should mention annual price negotiations that were being conducted during December 2015 and early January 2016. These were directed to agreeing prices for the calendar year 2016. They closed on 8 January 2016. They took place by emails and attachments between the US Panasonic company,

Panasonic Industrial Devices Sales Company of America (**PIDSA**) and representatives of the ZF Group.

13. The outcome of the negotiations was set out in a letter sent by ZF Group to PIDSA in December 2015, with a spreadsheet attached to it setting out the agreed prices for 2016 for each specific part. The parts list included the resistors at issue in these proceedings. Thus, they were priced according to the global negotiations that took place between the ZF Group and PIDSA. They covered deliveries of parts to factories in China, the USA, England and elsewhere.
14. The letter setting out the results of the price negotiations included reference to the TRW Terms, in the following paragraph numbered 4:

“Any Purchase Order issued by ZF TRW will be subject to (a) ZF TRW Automotive Global Supplier Quality Manual And (b) the TRW Automotive Terms and Conditions of Purchase (‘Terms’). The Supplier is responsible for accessing the VIN website for purposes of reviewing the latest version of the Terms ..., and will immediately notify TRW in writing if it has any problems or is unable to access the VIN website.”
15. The 2016 purchase order, dated 25 January 2016, provided:

“This Order shall form a contract accepted by Seller based exclusively on, and limited to the terms of, this Order when Seller does any of the following: (i) begins performance under the Order; (ii) acknowledges the Order; or (iii) engages in any other conduct that recognizes the existence of a contract with respect to the subject matter of the Order. Buyer hereby objects to and rejects any proposal by Seller for additional or different terms. If Seller proposes additional or different terms, Seller’s proposal will be deemed a material alteration of the terms of this Order, and the terms of this Order will be deemed accepted by Seller without Seller’s additional or different terms. If the Order is deemed an acceptance of Seller’s prior offer, Buyer’s acceptance is expressly conditioned upon and limited to Seller’s assent to the terms of this Order exclusively.”
16. The 2016 purchase order then repeated the wording of the 2015 purchase order: commencement of work or delivery of goods under the order “shall constitute your confirmation [that you] are aware of and accept such terms, conditions and requirements.”
17. The TRW Terms referred to in the two purchase orders were dated 1 November 2012. They were lengthy and detailed. Clause 32 provided:

“Governing Law: The Order will be governed by the laws of the state or country shown in Buyer’s address on the Order, and the Convention on Contracts for the International Sale of Goods shall not apply. Buyer and Seller agree irrevocably to submit to the personal jurisdiction of the courts of the above-referenced location and waive all challenges to the personal jurisdiction of such courts for any and all claims arising out of or relating to the subject matter of the Order.”
18. PIEU was not asked to sign and return the purchase orders, nor otherwise to confirm in writing its agreement to the TRW Terms. PIEU did, however, act on the 2015 and 2016 purchase orders by delivering the resistors to TRW’s premises in Birmingham, England. The way in which that happened was as follows.

19. TRW would call off resistors under the purchase orders periodically by submitting to Panasonic by an “electronic data interchange” (**EDI**) an “intermediate document” (**IDoc**) received by PIEU’s “SAP” system. I was told that “SAP” is a brand name for PIEU’s software used to receive the IDoc. The IDoc would quote the part number and purchase order number of the relevant product, i.e. in this case the resistors.
20. The process was described thus by Ms Kimberley Smith, Panasonic’s solicitor, in her witness statement:

“the Claimant transmitted their purchase schedule via EDI to the First Defendant on a weekly basis. This data was then mapped by a “pre-system” into the SAP-format IDoc. The IDoc is processed and the customer’s forecast is integrated into a sales schedule. The SAP planning function monitors the customer’s demand against available stock and creates purchase orders and sends them to the First Defendant’s manufacturing affiliates if required based on the customer’s demand. As soon as there is stock available, the system will check the requested delivery date and quantity and will prompt a delivery to the customer.”
21. In June 2016, a discussion was taking place by email between a representative of the ZF Group (Mr Wes Pierce) in the USA, and a Mr Nautiyal of PIDSA, concerning the TRW Terms. PIDSA was seeking amendments to the TRW Terms. In July 2016, Mr Dariusz Mazik of ZF Group in the USA emailed Mr Nautiyal declining to make changes which, Mr Mazik said, would reduce PIDSA’s liabilities in respect of products supplied.
22. The correspondence petered out without agreement, as noted with regret in an email sent in July 2016. No mention was made in those emails of separate Panasonic terms applying to contracts for deliveries of parts in Europe, though these had been referred to in the “customer file” documents already mentioned, acknowledged and signed by TRW representatives in various European states since the late 1990s.
23. In April 2019, proceedings were issued in the Oakland County Circuit Court in Michigan, USA, alleging defects in resistors of the same type, bearing the same part number, as those at issue in these proceedings. The parties to those proceedings are, as plaintiffs, two US TRW entities within the ZF Group, called TRW Automotive US LLC and TRW Vehicle Safety Systems, Inc; and, as defendant, PIDSA.
24. The allegations made in those proceedings are similar to those made in the present proceedings, but the contracts sued upon are different contracts between the relevant US entities. The proceedings are proceeding according to the law of Michigan and relate to contracts governed by Michigan law. Obviously, the Recast Brussels Regulation does not apply to those contracts. It is not said that the PIEU General Conditions apply to those contracts; they are said by Panasonic to apply to contracts for supplies in Europe, not the USA.
25. The present proceedings, as I have said, were issued in January 2020 and the two defendants made their application to set aside service and opposing English jurisdiction in March 2020. Those steps were taken during the currency of the Michigan proceedings. The present proceedings relate to supplies made pursuant to the 2015 and 2016 purchase orders, by delivery to TRW’s Birmingham premises. Damages are sought.

26. The Michigan proceedings are now at an advanced stage. A jury trial is fixed in March 2021 for two weeks. A verdict from the jury, without reasons, is expected in or about April 2021. Damages were initially sought by the plaintiffs on the basis of worldwide supplies of the relevant resistors, but the claim is now confined to supplies in the USA. The resulting judgment is likely to be capable of recognition and enforcement in this country, but the parties to the Michigan proceedings are different from those in the current proceedings.

Issues, Reasoning and Conclusions

Article 25 of the Recast Brussels Regulation

27. There was not much between the parties on the law. As is well known, article 25 of the Recast Brussels Regulation provides for jurisdiction by agreement, exclusive unless the parties agree otherwise. The agreement must be in or evidenced in writing, in a form conforming to practices established between the parties or to regularly observed international trade practices. Where another member state's court is given exclusive jurisdiction, the court seised must decline jurisdiction.
28. A jurisdiction clause may be asymmetric, where one party is bound to a particular forum while the other party has a choice of forum (see Cranston J's judgment in *Commerzbank AG v. Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm)). An asymmetric jurisdiction clause can confer exclusive jurisdiction on the courts of a member state chosen by the party with the choice of forum, if that choice is exercised. The PIEU General Conditions, if incorporated, include an asymmetric jurisdiction clause in PIEU's favour.
29. In determining whether there was an agreement evidenced in writing, the court must apply the autonomous standard of European Union law. The consensus must be clearly and precisely demonstrated, but not necessarily by the wording of the clause alone, read in isolation; see *Coreck Maritime GmbH v. Handelsveem BV* (Case C-387/98) [2000] ECR I-9337, at [15] (after citing earlier authority):
- “[i]t is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or ... courts Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances.”
30. As Clarke J (as he then was) put it in *Africa Express Line Ltd v. Socofi SA* [2010] 2 Lloyds Rep 181, at [31], “the ultimate issue is what objectively did the parties intend ...”. In ascertaining whether the requisite intention is clearly and precisely demonstrated, the commercial likelihood of whether or not something was intended is relevant (*AIG Europe SA v. QBE International Insurance Ltd* [2001] 2 Lloyds Rep 268, per Moore-Bick J (as he then was) at [25]-[26]).
31. As Moore-Bick J there observed, incorporation of a jurisdiction clause is more likely to be demonstrated where it is included in standard trading terms, where either all or none are likely to be incorporated; rather than being included in the terms of an underlying contract (in that case, of insurance) incorporated into another contract (of reinsurance).

32. The document relied on as establishing agreement to the jurisdiction clause must be one that has contractual force, i.e. has effect in the making of a contract, rather than in the execution of the contract. Documents such as time sheets, invoices or statements of account tend to be relevant to the execution of a contract, not its formation: see the discussion in Auld LJ's judgment in *Grogan v. Robin Meredith Plant Hire* [1996] CLC 1127, at 1130-1131.
33. As for domestic law, I was shown the cases described using the warfaring metaphors "battle of the forms" and "last shot"; see e.g. *Tekdata Interconnections Ltd v. Amphenol Ltd* [2009] 2 CLC 866 and the discussion in Longmore LJ's judgment of Lord Denning MR's analysis in *Butler Machine Tool Co v. Ex-Cell-O Corporation* [1979] 1 WLR 401 (at 404F-G).
34. Lord Denning MR observed that the court should "look at all the documents passing between the parties – and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points – even though there may be differences between the forms and conditions printed on the back of them".
35. Longmore LJ in *Tekdata* nevertheless noted at [11] and [21] that it is likely to be difficult to displace the traditional offer and acceptance analysis unless there is a long course of dealing between the parties. Dyson LJ at [25] emphasised that while it is not possible to lay down a general rule that the last document in a series will always prevail, "the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases".
36. In volume 1 of the current 33rd edition of *Chitty on Contracts*, the learned editors discuss these cases and in the course of doing so observe at 2-036 that "it is possible by careful draftsmanship to avoid losing the battle of forms, but not (if the other party is equally careful) to win it". They then refer to the possibility of a "stalemate situation in which there is no contract at all"; though where goods are delivered, the buyer may be liable to pay a reasonable price.
37. To what standard must the court be persuaded? The question is, broadly, which side can raise a good arguable case and has the better of the argument on jurisdiction. The exact wording of the test has varied from case to case. Various of the cases both domestic and European were cited to me, as was the discussion of the authorities in David Joseph QC's book *Jurisdiction and Arbitration Agreements and their Enforcement*, 3rd edition, 2015, at 10.97.
38. In greater detail, more recent guidance on applying article 25 is found in the three limbed formulation of Lord Sumption JSC in his judgment in the *Brownlie* case [2018] 1 WLR 192, at [7] and in the *Goldman Sachs* case [2018] 1 WLR 3683, at [9]; see the citations and discussion in the judgment of Green LJ in *Kaefler Aislamientos SA v. AMS Drilling Mexico SA de CV* [2019] 1 WLR 3514 at [62]-[71].
39. I need not set out the discussion in full but am guided by it. The three limbs are, in shorthand (i) a plausible evidential basis for the jurisdictional gateway (ii) the court must take a view of any factual issue on available material and (iii) if no reliable assessment can be made, a good arguable case must be made to propel the claimant through the gateway. Green LJ's step by step guide to how to apply the three limbed test follows at [72]-[80].

40. Then, at [83], he explained that where article 25 of the Recast Brussels Regulation is in play, “the ‘clear and precise’ test must be taken into account as a component of the domestic test and the melding of the two is necessary to ensure that domestic law remains consistent with the Regulation”. He referred to a lack of precision in the “clear and precise” criterion, but still, he said:
- “... I would rely upon it as providing at least an indication of the quality of the evidence required. It supports the conclusion that the prima facie test (in limbs (i) and (ii) is a *relative* [Green LJ’s emphasis] one; and in so far as the court cannot resolve outstanding material disputes (limb (iii)) it affords an indication as to the sort of evidence that a court will seek. I would not go much beyond this though.”
41. The above propositions of law were not controversial. Applying them is. Panasonic submitted, through Mr Legg, that PIEU had the better of the argument. The PIEU General Conditions, he said, were incorporated expressly into a document signed on behalf of TRW setting terms that precluded TRW from relying on incorporation of subsequent inconsistent terms by conduct, including by delivery of goods, unless expressly agreed in writing by PIEU.
42. Mr Legg submitted that the competing TRW Terms were never the subject of agreement; they were not signed on behalf of PIEU and no agreement to them by PIEU is evidenced in writing. Although the TRW Terms are referred to in the 2015 and 2016 purchase orders sent to PIEU, no document went back from PIEU to TRW agreeing to the TRW Terms in writing. The PIEU General Conditions therefore continued in full force, said Mr Legg.
43. That state of affairs was not, he submitted, altered by delivery of the resistors using the EDI system used to call off the goods identified in the two purchase orders. The PIEU General Conditions explicitly state that divergent conditions are not valid “even if we effected delivery ... without reservation”; and where there is no written confirmation of an order from PIEU, “the contract shall become valid by acceptance of delivery and subject to these conditions”.
44. As for the price negotiations in the USA, those concerned different group companies on both sides. Although they determined prices on a global basis, they said nothing about other terms governing sales within Europe to companies such as TRW, the claimant, located in Europe. Those were characterised by use of the PIEU General Conditions signed on behalf of TRW companies since 1998. The attempt by PIDSA to alter TRW terms in 2016 was confined to the USA and irrelevant to supply contracts entered into for deliveries in Europe.
45. Such were Mr Legg’s submissions for Panasonic. For TRW, Mr Caplan’s were very different. He submitted that PIEU agreed that the sale of the resistors would be governed by the TRW Terms; that PIEU’s agreement was evidenced in writing; and that the parties did not agree that the PIEU General Conditions would apply to the sale. He developed those arguments as follows.
46. First, Mr Caplan pointed out that the PIEU General Conditions were not set out in a document which had contractual force either before or after Mr Jones signed a copy of them. He signed acknowledging receipt of them but his signature did not confirm TRW’s agreement that they would apply to any subsequent sales, said Mr Caplan.

Indeed, neither party was obliged to agree either to buy or sell any products after Mr Jones signed the PIEU General Conditions.

47. Therefore, the ordinary battle of the forms analysis applied; TRW fired the last shot by referring to the TRW Terms in the two purchase orders. By delivering the goods, PIEU agreed to incorporation of the TRW Terms into the contract, to the exclusion of the PIEU General Conditions which were rejected expressly by the wording of two purchase orders and fell away.
48. Nor was there any prior course of dealing evidencing use of the PIEU General Conditions, Mr Caplan submitted. The course of dealing evidenced use of the TRW Terms, as shown by the price negotiations in the USA setting the cost of these very resistors and the unsuccessful attempt by PIDSA to alter the TRW Terms in mid-2016.
49. Mr Caplan submitted, further, that the requirement that the agreement as to jurisdiction be evidenced in writing is flexible and not formal (*Mastermelt Ltd v. Siegfried Evionnaz SA* [2020] EWHC 927 (QB) per Waksman J at [99]-[100]). It can be in an informal document such as an acknowledgment that the parties are doing business together, as in *Mastermelt* itself.
50. Here, Mr Caplan argued, the requirement was met because the 2016 pricing agreement negotiated in the USA, albeit between affiliates of the parties to this action, applied globally including to delivery of resistors of the type at issue here to TRW's factory in England; and made express reference at paragraph 4 to the applicability of the TRW Terms.
51. Both parties submitted, in the alternative, that if I were to find that neither side could succeed in passing the tests necessary to travel through the jurisdictional gateway, it was open to me to decide just that and to reason that article 25 exclusive jurisdiction did not exist here. It was common ground that in that event, the combined effect of articles 7 and 34 of the Recast Brussels Regulation was that I would have to consider whether to stay these proceedings.
52. I shall return to that issue. Before doing so, I come to my reasoning and conclusions on the article 25 issue. The first limb of the test is whether either party has established a plausible evidential basis to support its case on jurisdiction. The evidence available to me here consists mainly of documents and appears not to leave much if any scope for cross-examination. There are no disputed telephone calls or other conversations.
53. The second limb of the test is to take a view on such factual material as is available. As the factual material consists mainly of documents and not conversations, and the documents are, for the most part, before the court – neither party relying heavily on absent documents or complaining of non-disclosure – I am in a good position to take a view on the documents before me, reasonably confident that I am not missing any of importance.
54. The one exception is that I do not have precise delivery dates and EDI documentation for all deliveries of these resistors. I have only a small sample of EDI generated documents. It is, therefore, not possible to know on what exact date each delivery occurred and what the timing of the deliveries was in relation to the pricing negotiations in the USA and the attempt to alter the TRW Terms in June and July 2016.

55. With regard to that omission from the documented history, I must do the best I can and arrive at a conclusion if I “reliably” can, using judicial common sense and pragmatism (see Green LJ in the *Kaefer* case at [78]). I do not consider that the absence of a full schedule of delivery dates or the absence of delivery scheduling documents created on the EDI system is fatal to my ability to reach a conclusion.
56. The third limb – whether, if an assessment cannot be made, either side can establish a good arguable case – therefore does not, in this case, add anything to the first limb. Applied in the present case, the three limbs merge into the single question which party, if either, has the better of the argument for exclusive jurisdiction of, as the case may be, the Hamburg court based on the PIEU General Conditions, or of the English court based on the TRW Terms and on the place of delivery.
57. It would, I suppose, be possible to conclude that the arguments are so finely balanced, on the evidence, that neither side can pass through the article 25 gateway because the result is a “dead heat” with no winner. Both counsel alluded to the possibility that I could find neither side able to pass through the article 25 gateway.
58. It is also possible to reach the same conclusion by reasoning that on the evidence, objectively speaking, no consensus was reached at all with the result that delivery of the resistors gave rise to a *quantum meruit* obligation on the buyer and no more; the situation referred to in the passage quoted above from *Chitty* as a “stalemate”, with “no contract at all” and an implied obligation to pay a reasonable price.
59. I do not think either of those possibilities is satisfactory or the right outcome. I am in a position, on the evidence, to decide which of the rival analyses is the stronger. For reasons I shall come to in a moment, I do not find the arguments so finely balanced that the result is a draw. And neither party contended positively for a “stalemate” with no contract at all beyond, at the most, an implied obligation to pay a reasonable price.
60. That outcome seems objectively unlikely in the context of commercial trading such as this. TRW’s case was that binding obligations on the parties under the TRW Terms arose on delivery of each batch of resistors in response to EDI generated requests for supplies. PIEU’s case was that binding obligations on the parties under the PIEU General Conditions arose on “our written confirmation” (the words in the General Conditions) or on delivery of resistors. Both analyses are more commercially plausible than neither being correct.
61. I come then to consider which party’s analysis is correct, represents the better of the argument or, in Green LJ’s words in *Kaefer* at [80], best meets “a test combining good arguable case and plausibility of evidence”. I do so recognising that the matter is essentially one of national law, but subject to an overriding duty to ensure that it is “consistent with the aims and objectives of the Regulation” (*ibid.* at [81]).
62. I must approach my task applying judicial pragmatism and common sense, melding together the “clear and precise” test derived from the decisions of the Court of Justice and the three limbed formulation of the test ordained by the Supreme Court (*ibid.* at [83]).
63. I pay careful heed to the conventional domestic “battle of the forms” cases and find no reason to suppose them inconsistent with the “clear and precise” cases representing the

autonomous EU law standard; while bearing in mind, on the other hand, the observations of Lords Denning and Dyson (in, respectively, *Tekdata* and *Butler Machine Tool Co*) that the last shot fired may not in every case hit the target.

64. Adopting that approach, I have come to the clear conclusion that the defendants have the better of the argument by a comfortable margin. Their case for article 25 jurisdiction is strong and, in my judgment, passes through the gateway for the following reasons.
65. First, the PIEU General Conditions and the practice of signing a “customer file” document accompanied by the General Conditions, were a familiar feature in the trade done over the years between Panasonic entities and TRW entities in Europe. It is a reasonable inference from the practice of signing the customer file that the various TRW companies in Europe that did so from 1998 to 2019, including in England, regularly contracted on PIEU General Conditions terms, including German law and jurisdiction, with PIEU or other Panasonic entities.
66. Next, TRW’s Mr Jones signed a customer file acknowledgment in January 2011. The surrounding evidence shows that this was not unusual for TRW companies buying supplies from Panasonic in Germany. His signature clearly acknowledged the General Conditions and, in my judgment, their applicability to any subsequent supply contract. I reject Mr Caplan’s suggestion that Mr Jones’ signature was acknowledging only their existence and not their applicability. His signature would have been pointless if that were the position.
67. Next, I accept that the signing of the customer file document with the General Conditions did not, of themselves, create any obligation on the parties to buy or sell Panasonic products. But the signing of that document was not wholly devoid of contractual effect. It placed the parties under an obligation, if they later chose to enter into supply contracts, to do so on PIEU General Conditions terms unless PIEU should agree otherwise in writing.
68. Furthermore, the PIEU General Conditions crucially protected PIEU against falling victim to what in English law is called the last shot doctrine. The words used were “[c]onditions of the buyer diverging from our terms and conditions shall not be valid even if we effected delivery or rendered services without reservation”. I can see no reason why those words should not mean exactly what they say. Their meaning is clear and in no way ambiguous.
69. There is some analogy, albeit approximate, between the PIEU General Conditions and the practice of “calling off” goods in a public procurement framework agreement. The customer (a public body) appoints a panel of suppliers of particular types of goods. A supplier wins a place on the panel. The customer may not be obliged to buy any supplies from the supplier but may choose to do so. If the supplier is selected on a particular occasion, the terms of the supply are pre-ordained in the framework agreement, to which the parties have earlier committed themselves, if supply contracts should later be entered into. Goods from the supplier may be “called off” by specific purchase orders.
70. Similarly, applying the autonomous EU standard and English law, I see no reason why parties may not agree binding terms of future trades that may or may not occur. The buyer gains access to the seller’s goods and the likelihood of being able to buy them if

it wishes. In return, the buyer agrees to the seller's conditions. The seller says, in effect: "I may or may not sell to you but if I do it will be on the following terms even if you later say otherwise and we do not contradict you, unless we confirm in writing that we agree to different terms."

71. In the discussion of the cases in *Chitty*, the learned editors recognise that "it is possible by careful draftsmanship to avoid losing the battle of forms ..." (2-036). In my judgment, that is what happened here. PIEU's careful draftsmanship secured applicability of the PIEU General Conditions to any future trade, unless it should agree otherwise in writing.
72. The editors of *Chitty* go on to say in the same paragraph: "but not (if the other party is equally careful) to win it". TRW's remedy, if unwilling to abide by the PIEU General Conditions, was not to advance invalid contrary terms but either not to buy from PIEU at all or to persuade PIEU to agree in writing to renounce the PIEU General Conditions. TRW did neither.
73. That analysis is also consistent with the observations of Lord Denning MR in *Butler Machine Tool* and of Dyson LJ and Longmore LJ in *Tekdata*. Although it is unusual, the last shot doctrine was displaced on the facts here. The last shot missed the target.
74. When TRW tried to impose the TRW Terms by means of the 2015 and 2016 purchase orders, its attempt to infuse those purchase orders with contractual force failed because it had already committed itself, through Mr Jones' signature, to the proposition in the PIEU General Conditions that divergent terms would be ineffective even if delivery were made without reservation.
75. The contractual position appears to be different for contracts where supplies are delivered to the USA. These do appear to have been entered into on TRW terms and not on the terms in the PIEU General Conditions. But I do not think that assists TRW in relation to its contracts with Panasonic for supplies from Germany to England.
76. The fact that prices, including of these very resistors, were negotiated globally is not sufficient to displace the PIEU General Conditions. There is no reason why prices should not be negotiated globally while other terms, in particular choice of law and jurisdiction clauses, are negotiated on a regional basis. The PIEU General Conditions do not deal with pricing.
77. PIDSA's attempt in mid-2016 to persuade TRW to alter its terms is likewise not directly relevant; it affects US contracts, while the practice for supply in Europe was the signing of the customer file document.
78. Paragraph 4 of the December 2015 letter from the ZF Group to PIDSA attempted to impose the TRW Terms, at least for USA supply contracts. If it was intended to apply in Europe, it was not effective to displace the PIEU General Conditions because the TRW terms referred to in paragraph 4 of that letter were "[c]onditions of the buyer diverging from our terms and conditions" which "shall not be valid", unless PIEU should agree otherwise in writing.
79. I therefore agree with the defendants' interpretation of the contractual position. In my judgment, it establishes with the necessary clarity and precision the consensus required

for article 25 exclusive jurisdiction. The agreement conferring jurisdiction is, as article 25 requires, evidenced in writing by the PIEU General Conditions themselves and by Mr Jones' signature acknowledging them. The contract of supply is completed on confirmation of acceptance of an order or on delivery of goods.

80. I think that is the most natural reading of the documents. TRW's contrary arguments are too crude; they depend on inferences being drawn from external facts from another continent, bearing at best obliquely on the issues; and on an over-rigid application of the orthodox last shot doctrine. PIEU's arguments, by contrast, proceed directly from its clearly drafted PIEU General Conditions and Mr Jones' signature acknowledging them on behalf of TRW.
81. I should add that the two purchase orders, even though unsigned, and through them the TRW Terms, also unsigned, could in normal circumstances have acquired contractual force by standard offer and acceptance analysis and applying the traditional battle of the forms approach. It is true, as Mr Caplan submitted, that PIEU delivered against them and against EDI instructions derived from them.
82. But that argument is weaker by far than PIEU's argument that its General Conditions set binding terms for future trading which could only be undone by written consent, which never came. I prefer the submissions of the defendants and accept that they have shown the exclusive jurisdiction of the Hamburg court in this case. I must therefore decline jurisdiction and I do so.

Articles 7 and 34 of the Recast Brussels Regulation

83. The second issue identified by the parties therefore does not arise, but I will address it briefly since I heard argument on it, in case it assists the parties. As already mentioned, it is common ground that if jurisdiction under article 25 of the Recast Brussels Regulation is established by neither party, TRW was at liberty to sue in England as the place of delivery of the goods, under article 7; and that for article 34 purposes there is a related *lis alibi pendens* in Michigan.
84. On that footing, this court may stay the proceedings if the three conditions in (a), (b) and (c) of article 34(1) are met; namely, "it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments ..." ((a)); "it is expected that the court of the third State will give a judgment capable of recognition and ... enforcement" in the member state where the defendant is sued ((b)); and this court is "satisfied that a stay is necessary for the proper administration of justice" ((c)).
85. The defendants contended that all three conditions are met and invite me to stay the present proceedings in the exercise of my discretion. TRW contended that I had no power to do so because the first condition is not met; alternatively, that I should refrain from exercising my discretion, if I have one, to stay the proceedings because the first and third conditions are not met.
86. I was referred by both counsel to a feature of the case law on article 34 and its predecessors, which gave rise to a disagreement of law and to Mr Caplan reserving his position as to the correctness of the reasoning in certain of the cases. The issue is whether the word "expedient" in article 34(1)(a) of the Recast Brussels Regulation

bears the meaning “desirable, even if not practicable” or “both practicable and desirable”.

87. The former interpretation found favour in *JSC Commercial Privatbank v. Kolomoisky* [2020] 2 WLR 993 (judgment of the court (David Richards, Flaux and Newey LJJ) at [191]); and in three more recent first instance decisions: *SCOR SE v. Barclays Bank plc* [2020] EWHC 133 (Comm), at [31] per Mr Christopher Hancock QC, sitting as a judge of the High Court); the *Fundão Dam Disaster* case [2020] EWHC 2930 (TCC), per Turner J at [199]-[190]; and *Federal Republic of Nigeria v. Royal Dutch Shell plc* [2020] EWHC 1315 (Comm), per Butcher J at [77].
88. It is said by Mr Caplan that these authorities are not consistent with the reasoning in the judgment of Bean LJ (with whose judgment, so far as material, Baker and Lewison LJJ agreed) preferring the latter interpretation, in *EuroEco Fuels (Poland) Ltd v. Szczecin and Swinoujscie Seaports Authority SA* [2019] 4 WLR 156 at [52]-[53]; and that this interpretation is the correct one and to be preferred. Consequently, Mr Caplan reserved his position as to the law.
89. On the factual position, Mr Legg proposed a stay in order to avoid the risk of irreconcilable judgments. He also submitted that the outcome of the Michigan proceedings would be likely to determine, in practice, the outcome of the present claim. The judgment of the Michigan court would be recognised and enforceable in England. The resisters were of the same type and the alleged defects were the same. Although the parties were different, they belonged to the same groups.
90. Mr Legg preferred the first, broad interpretation emerging from the case law. He accepted that it was not practicable for the present claim, still in its infancy, to be joined to the Michigan case, shortly to come to trial, but submitted that it would be desirable for the two cases to be heard together and that is enough; and, he said, the closeness of the parties here to their respective affiliates in the Michigan proceedings was such that doctrines such as abuse of process, if not actual issue estoppel, would probably lead to resolution of this claim.
91. Mr Legg argued that the compass of the evidence, including expert evidence, would be the same in both actions and that it would be wasteful of the time and resources of both parties for the same issues to be tried in this country. A judgment in the Michigan proceedings could be expected soon and it was not desirable that the present claim should go any further until the outcome of the Michigan claim is known.
92. Mr Caplan strongly opposed any stay. He submitted that, assuming I have any discretion to grant a stay (contrary to his reserved position), I should not exercise it. The risk of irreconcilable judgments could not be eliminated, he argued. The Michigan case would shortly produce a judgment binding on neither party to the present claim and, probably, applying Michigan law.
93. There was no scope for issue estoppel or abuse of process because the parties were different and the law could be different. Neither party in this case had opted for Michigan as the chosen forum and Michigan law as the choice of law. If the outcome of the Michigan litigation helped to promote settlement of the present claim, that could happen anyway, without a stay, since this claim is still at an early stage; the first case management conference has yet to take place.

94. On the issue of possibly conflicting Court of Appeal authority, I need say little. I agree with Butcher J in the *Nigeria* case that the Court of Appeal in *EuroEco* referred to the earlier decision of the Court of Appeal in *Kolomoisky* (which became available the day before the hearing in *EuroEco*) and did not suggest it was not bound by *Kolomoisky*. *EuroEco* was a case under article 30 of the Recast Brussels Regulation, not article 34.
95. I do not propose to address whether, and if so how, the reasoning in the two decisions can be reconciled. It is unnecessary for me to do so since, if the issue arose and if I have any discretion, I would refuse a stay in the exercise of my discretion, mainly for the reasons submitted by Mr Caplan which I need not repeat.
96. Furthermore, the present claim could proceed towards a first case management conference without much expenditure of resources. The Michigan materials can no doubt largely be reused for this case, since the issues are said to be the same. The expert witnesses are likely to be the same or to give evidence to the same effect on each side.
97. I agree that the law of Michigan cannot be counted on to produce the same outcome as English law. I would add that a Michigan jury's assessment of the lay and expert evidence on the issue of defects may not be the same as that of an English judge of this court. At any rate, either party might want to try persuading a judge of this court that the Michigan jury was over generous to one party or the other. It is unclear to what extent its unreasoned verdict would be supplemented by judicial reasoning on liability, quantum or both.
98. For those brief reasons, if the issue had arisen, I would refuse a stay. The first condition in article 34(1)(a) – the expediency condition – may well be met, subject to clarification of the test emerging from the case law. The second condition is met. The third is not. I am far from satisfied that a stay is necessary for the proper administration of justice.

Disposal

99. For the reasons given above, I will allow the application. I will set aside service of the claim and I propose to declare that the Hamburg court has exclusive jurisdiction over the claim. The defendants have undertaken to submit to the jurisdiction of the Hamburg court, subject to seeking a stay of proceedings in Hamburg to await the outcome of the Michigan proceedings.