Jurisdiction	USA
Tribunal	U.S. District Court for the Southern District of Texas
Date of the decision	10 October 2023
Case no./docket no.	4:22-CV-3877
Case name	*NF Smith & Associates, L.P. v. Karl Kruse GmbH & Co. KG*

Memorandum and Recommendation

Before the Court is Plaintiff's Motion to Remand and Defendant's Rule 12(b)(2) Motion to Dismiss and, alternatively, Rule 12(b)(3) Motion to Dismiss.[1] For the reasons set forth below, the Court RECOMMENDS that Plaintiff's Motion to Remand be GRANTED and that the case be REMANDED to the 164th Judicial District Court of Harris County, Texas. The Court further RECOMMENDS that Defendant's Motion to Dismiss be DENIED WITHOUT PREJUDICE to being re-urged in Texas state court. 1

I. Background.

This case arises from a dispute over a contract for the sale of goods. Plaintiff NF Smith & Associates, L.P. («Smith») is a wholesale retailer of electronics and electronic equipment and is a limited partnership domiciled in Texas. Defendant Karl Kruse GmbH & Co. GK («Kruse») is a distributor of electronic components and is a German corporation with its principal place of business in Düsseldorf, Germany. 2

In December 2018, Smith's representative Cesar Rojas, while located in Mexico, contacted Kruse about purchasing Murata-branded capacitors. On December 10, 2018, Kruse sent Rojas a price quotation («Quotation») for the sale of 9,000,000 Murata capacitors at a price of $0.0110 per unit. In an email accompanying the Quotation, Kruse described it as «our offer without engagement», and the Quotation indicated that it was «Valid Until» December 13, 2018. The Quotation referenced «International Conditions for Supplies and Service» which could be viewed on the Kruse website, www.kruse.de. *Id.* The «International Conditions for Supplies and Service» available on the website included a «Dispute Settlement/Applicable Law» provision which provided for arbitration in Zurich, Switzerland of «[a]ll disputes arising out of or in connection with the Contract.» The provision also identified the applicable law as the substantive law of Switzerland and excluded the application of the UN Convention on Contracts for the International Sale of Goods («CISG»). 3

Around December 31, 2018, after the expiration of the price quote from Kruse, Rojas sent an email to Klaus Kruse informing him that he would be placing an order the next day for a 4

[1] The District Judge referred the case the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72.

«sample reel» of the capacitors and asking Kruse to start processing 10,000 units. The next day, Rojas sent Kruse a Purchase Order for 10,000 Murata capacitors at a price of $.0110 per unit. The Purchase Order and the email to which it was attached both instructed Kruse to «[p]lease process and ship ASAP.» The face of the Purchase Order contained Smith's «Standard Purchase Order Terms and Conditions,» including the following:

> 8. The Terms are effective upon performance by Supplier or when Smith receives a copy of the Purchase Order Confirmation executed by an authorized representative of Supplier acknowledging the Terms, which are binding notwithstanding any conflict with any terms or conditions in any prior or later communications with Supplier.
>
> * * *
>
> 10. The Purchase Order shall be governed and construed in accordance with the laws of the state of Texas, exclusive of any provisions of the United States Convention on International Sale of Goods and without regard to principles of conflicts of law. *All disputes which may arise shall be determined by the state district court of Harris County, Texas, without prejudice to Smith's right to bring such dispute before any other competent court.* Supplier hereby expressly submits and consents to jurisdiction of the state district courts of Harris County, Texas for the purpose of legal resolution.

Id. at 12 (emphasis added). In addition, the email to which the sample reel Purchase Order was attached stated:

> Please see the PO for the sample reel of the murata part. Please process and ship ASAP. Please see the attachment. Any changes to this attachment need to be saved and then attached to the reply email.

Id. at 11.

On January 3, 2019, Rojas sent Kruse another Purchase Order for 8,300,000 units at a price of $0.0092 per unit. Kruse responded the same day, stating «Order received and processing. I will advise, when we can ship those[.]» Kruse shipped the sample order of 10,000 units on January 10, 2019 and another order of 8,320,000 units on January 14, 2019. Included with each shipment was a packing slip providing that «[t]he General Terms & Conditions of Kruse shall apply exclusively. For more information visit www.kruse.de.» 5

Smith received the capacitors around February 4, 2019, and, in turn, sold them to two of its customers. On or about March 4, 2021, one of Smith's customers alerted it that the capacitors were testing at a higher-than-expected capacitance. A Murata representative inspected a sample of the capacitors and concluded that the capacitors were counterfeit. *Id.* On or about May 25, 2021, Smith notified Kruse of the purported defects and demanded indemnity of potential claims. Neither Kruse nor its insurer indemnified Smith for the costs, fees, and expenses to recall the counterfeit capacitors. 6

On June 2, 2022, Smith filed a petition against Kruse in the 164th Judicial District Court of Harris County, Texas, alleging breach of contract, negligence, and breach of warranty of fitness for a particular purpose, and seeking economic damages totaling $2,184,872.65. Kruse, 7

asserting diversity jurisdiction, removed the case to this Court on November 7, 2022. Four days later, Kruse moved to dismiss the matter for lack of personal jurisdiction or, alternatively, improper venue. Smith then timely moved to remand the case. The Court terminated both motions on January 23, 2023.

On March 2, 2023, Kruse re-urged its Motion to Dismiss and Smith re-urged its Motion to Remand. Each party filed a response to the opposing motions. 8

II. Analysis

The first issue before the Court is the order in which it should address the pending motions. Defendant seeks dismissal of Plaintiff's claims for lack of personal jurisdiction under Rule 12(b)(2) or, alternatively, for improper venue under Rule 12(b)(3). Plaintiff, on the other hand, seeks remand on the grounds that Defendant contractually waived its removal rights. Neither party challenges the Court's subject matter jurisdiction over this matter.[2] 9

Generally, courts should decide jurisdictional questions before addressing questions relating to venue. *Laktapol Int'l v. Bassett & Walker Int'l, Inc.*, No. EP-12-CA-16-FM, 2013 WL 12130452, at *1 (W.D. Tex. Jan. 10, 2013) (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979)). A court may, however, «reverse the normal order of considering personal jurisdiction and venue» if «there is a sound prudential justification for doing so.» *Id.* Because the Court recommends that Plaintiff's Motion to Remand should be granted based on a contractual waiver of the right to remove this case to federal court, it need not address Defendant's personal jurisdiction arguments presented in the Motion to Dismiss. 10

A. The CISG Applies to the Issue of Contract Formation.

The parties agree that a contract for the sale of capacitors was reached, but they dispute whose terms and conditions govern the contract. Smith relies on Texas common law principles to argue that the Terms in its Purchase Orders apply. Defendant Kruse discusses Texas common law, the Texas Uniform Commercial Code, the CISG, and Swiss law. 11

In order to determine which terms and conditions govern the parties' agreement, the Court first addresses what law governs the issue of contract formation. This case arises out of an agreement for the sale of goods from a German party to a United States party who was doing business in the Netherlands through its representative in Mexico. All four countries are signatories to the CISG, a treaty that governs «contracts of sale of goods between parties whose places of business are in different States [nations].» *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 336 (5th Cir. 2003) (quoting CISG art. 1(1)(a)). The CISG specifically «governs issues of contract formation that are antecedent to determining the validity of and enforcing forum selection clauses.» *Chateau des Charmes Wines Ltd v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003); CISG art. 4 («This Convention governs ... the 12

[2] Where, as here, it is apparent from the original petition that (1) the parties are diverse and (2) the amount in controversy exceeds $75,000, Defendant has met its burden to establish that this Court has subject matter jurisdiction over the dispute under 28 U.S.C. § 1332(a).

formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.»). The CISG is a «self executing treaty with the preemptive force of federal law.» *Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc.*, 81 F. Supp. 3d 543, 551 (S.D. Tex. 2015). It creates a private right of action in federal court, and thus preempts state common law and the UCC. *Id.* at 551–52. Accordingly, the issues of when the parties formed an agreement and which party's terms govern the dispute are governed by the CISG.

B. The Terms of Smith's Purchase Orders Govern the Dispute.

Smith maintains that the Terms of its Purchase Orders govern the dispute. Kruse, on the other hand, argues that under the CISG or any other body of law, its price Quotation, which included a reference to terms and conditions found on its website, constitutes an «offer» which was accepted by Smith. In the alternative, Kruse maintains that it modified any agreement to include the Conditions contained in the packing slips and invoices shipped with the goods. 13

1. Kruse's Quotation expired prior to any acceptance by Smith.

Kruse maintains that its initial Quotation was the «offer,» and that Smith's issuance of a purchase order with «specifications nearly identical to Kruse's price quote» amounted to acceptance of the offer. However, the Quotation expired by its own terms on December 13, 2018 (ECF 21-1 at 3 (noting the Quotation was «Valid Until» December 13, 2018)), more than seventeen days before Smith issued a Purchase Order that could have constituted an acceptance. Where Kruse's Quotation was not a valid offer at the time that Smith issued its Purchase Orders, Smith did not agree to the terms in the Quotation. 14

2. Smith's Purchase Orders constitute offers that Kruse accepted by shipping the goods.

Under the CISG, an offer is valid if it is «sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.» CISG art. 14(1). Once a valid offer has been extended, the offeree can accept by words or conduct, but not by silence or inactivity. CISG art. 18(1). «[I]f, by virtue of the offer ..., the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, ... the acceptance is effective at the moment the act is performed.» CISG art. 18(3). 15

Smith's Purchase Orders constituted «offers» under the CISG. They were directed to Kruse specifically, indicated the goods to be shipped, the quantity, the price, and the location of goods to be shipped. *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247, 252 (7th Cir. 2016) (holding that a purchase order with similar criteria was an «offer» under the CISG). In addition, the initial Purchase Order and email to which it was attached reinforced Smith's intention to be bound by instructing Kruse to «[p]lease process and ship ASAP» and notifying Kruse of an address change for its Netherlands distribution center. In addition, Smith informed Kruse that any changes to the Purchase Order would «need to be saved and then attached to the reply email.» *Id.* Based on the evidence currently before the Court, Smith's Purchase Orders amounted to «offers» as defined under the CISG. 16

Kruse argues that it materially altered Smith's offer contained in the Purchase Orders by shipping the capacitors with a packing slip and invoice that incorporated the Kruse's 17

Conditions which were implicitly assented to by Smith. However, Kruse's argument fails. First, the packing slips themselves state «THIS IS A NON-CANCELABLE, NON-RETURNABLE ORDER[,]» demonstrating that the agreement was final before the goods reached Smith. Second, Smith's Purchase Orders specified that the «Terms are *effective upon performance* by Supplier ....» (emphasis added). Where the Purchase Orders amounted to the «offer» and Kruse's shipment amounted to the «acceptance,» the agreement was finalized upon Kruse's shipment of the goods. *See* CISG art. 18(3) («[T]he acceptance is effective at the moment the act [amounting to acceptance] is performed ....»). Thus, Kruse's acceptance of Smith's offers was effective when Kruse performed by shipping the goods. *See VLM Food Trading Int'l*, 811 F.3d at 252 n. 2 (explaining that «delivery of the [product in accordance with the terms of the purchase orders] would have constituted an acceptance by conduct»).

Kruse's inclusion of packing slips and invoices with the shipment did not alter the parties' agreement or incorporate additional or conflicting terms. At best, Kruse's attempt to incorporate Conditions identified in the packing slips and invoices amounted to an attempt to modify the agreement after its execution. *See Chateau des Charmes*, 328 F.3d at 531 (rejecting the argument that a party's invoice, sent with a shipment, created an agreement related to the proper forum where an agreement had previously been consummated). Under the CISG, agreements «may be modified or terminated by the mere agreement of the parties[,]» (CISG art. 29(1)), but neither the packing slips nor the invoices specify a means of accepting the Conditions. Furthermore, the record contains no indication that Smith accepted the Conditions in Kruse's packing slips and invoices. 18

For these reasons, the Court finds that Kruse accepted Smith's Purchase Orders and Terms by shipping the goods. 19

C. By accepting Smith's Purchase Orders, which included a forum selection clause Kruse waived its removal rights.

1. The forum selection clause is incorporated into the parties' agreement.

The CISG's rules on formation «extend[ ] to the question of whether standard contract terms are incorporated into a contract, including whether [forum selection] clauses contained in standard terms are incorporated into the contract.» Franco Ferrari & Marco Torsello, *International Sales Law – CISG – In a Nutshell* 224–25 (3d ed. 2022) (citations omitted). If the offeree «knew or could not have been unaware» that it was the offeror's intent that the standard terms be part of the offer, the terms are considered an integral part of the offer. *Id.* at 225 (citing CISG art. 8(1)). Nonetheless, the terms are considered an integral part of the offer if a «reasonable person of the same kind» as the offeree «in the same circumstances» would have understood that the terms were supposed to be part of the offer. *Id.* (citing CISG art. 8(2)); *Roser Techs., Inc. v. Carl Schreiber GmbH*, No. 11cv302, 2013 WL 4852314, at *8 (W.D. Pa. Sept. 10, 2013) (To be part of a contract, standard terms «must be included in the proposal of the party relying on them as intended to govern the contract in a way that the other party under the given circumstances knew or could not have been reasonably unaware of this intent.») (quoting Oberster Gerichtshof [OGH] [Supreme Court] (*Tantalum powder* 20

case I), Dec. 17, 2003, 7 Ob 275/03x (Austria), English translation available at https://cisg-online.org/files/cases/6754/translationFile/828_60876720.pdf (last visited Oct. 5, 2023)).

Here, Smith's Purchase Orders contained ten enumerated Terms which provided, in part, that «[t]he following [Terms], together with any [additional specifications or conditions], shall constitute the entire and exclusive agreement between Supplier and Smith» and «[t]he Terms are effective upon performance by Supplier.» The forum selection clause is the tenth term in the Purchase Orders and appears immediately above the signature lines. *Id.* at 12, 24 («All disputes which may arise shall be determined by the state district court of Harris County, Texas, without prejudice to Smith's right to bring such dispute before any other competent court.»). Rojas' email accompanying the Purchase Orders also provided that «[a]ny changes to [the Purchase Order] need to be saved and then attached to the reply email,» calling further attention to the Terms contained in the Purchase Orders. 21

Based on the evidence currently before the Court, Kruse «knew or could not have been unaware» that it was Smith's intent that the General Terms be part of the parties' agreement. Thus, Smith's General Terms and Conditions, including the forum selection clause, were part of the offer which Kruse accepted by performance. *Golden Valley Grape Juice & Wine, LLC v. Centrisys Corp.*, No. CV F 09-1424 LJO GSA, 2010 WL 347897, at *3 (E.D. Cal. Jan. 22, 2010) (holding that General Conditions attached contemporaneously as an email to the offer formed part of the offer under the CISG). 22

2. The Court must apply Texas law when interpreting the forum selection clause.

As a threshold matter, the Court must determine what substantive law applies to the interpretation of the parties' agreement, including the forum selection clause. *Sabal Ltd. LP v. Deutsche Bank AG*, 209 F. Supp. 3d 907, 918 (W.D. Tex. 2016). While federal law governs the enforceability of a forum selection clause in diversity cases such as this one, «the clause's interpretation is governed by the law of the forum state.» *Dynamic CRM Recruiting Sols., L.L.C. v. UMA Educ., Inc.*, 31 F.4th 914, 918 (5th Cir. 2022). Kruse, however, argues that Texas law «should not apply to this international transaction.» 23

The Terms in Smith's Purchase Orders include a choice-of-law provision stating that «[t]he Purchase Order shall be governed and construed in accordance with the laws of the state of Texas, *exclusive of any provisions of the [CISG].*» (emphasis added). Thus, while the «antecedent» issue of contract formation must be resolved under the CISG, *see Chateau des Charmes*, 328 F.3d at 530, the parties' agreement excludes the application of the CISG when interpreting the contract and requires the Court to interpret the contract according to Texas law.[3] Texas courts «permit choice-of-law agreements and the default position is that they are enforceable.» *Van Rooyen v. Greystone Home Builders, LLC*, 295 F. Supp. 3d 735, 746 (N.D. Tex. 2018). Texas courts 24

[3] This choice-of-law provision is consistent with the CISG which provides that «parties may exclude [its] application or ... derogate from or vary the effect of any of its provisions.» CISG art. 6.

> will enforce a choice-of-law clause unless (1) «the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice» or (2) the chosen law would be «contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which ... would be the state of applicable law in the absence of an effective choice of law by the parties.»

Doe v. Facebook, Inc., No. CV H-22-0226, 2023 WL 3483891, at *4 (S.D. Tex. May 16, 2023) (quoting *W.-S. Life Assurance Co. v. Kaleh*, 879 F.3d 653, 658 (5th Cir. 2018)); Tex. Bus. & Comm. Code § 1.301(a).

Smith is domiciled in Texas and has its principal place of business in Houston, Texas. Further, Smith's Texas office was identified in the Purchase Orders and the invoices as the «Bill To» location for the sales. Thus, the chosen state bears a reasonable relationship to the parties and the transaction. Further, Kruse has not demonstrated that the application of Texas law in this case would be «contrary to a fundamental policy» of any of the relevant states or nations. Accordingly, the choice-of-law provision is effective, and Texas law governs the interpretation of the forum selection clause. *Doe*, 2023 WL 4383891, at *4. 25

When interpreting a written contract under Texas law, «a court's 'prime directive' ... is to ascertain the parties' intent as expressed in the instrument.'» *Dynamic*, 31 F.4th at 918 (quoting *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 757 (Tex. 2018)). In doing so, courts «give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense.» *Murphy Expl. & Prod. Co.-USA v. Adams*, 560 S.W.3d 105, 108 (Tex. 2018) (citation omitted). Courts must «examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.» *Id.* 26

3. The Court interprets the forum selection clause as a waiver of Kruse's right to remove this case to federal court.

Generally, a defendant may remove a civil action filed in state court to a federal district court if the district court has original jurisdiction. 28 U.S.C. § 1441(a). However, a defendant may contractually waive the right to remove an action to federal court. *See Waters v. Browning-Ferris Indus., Inc.*, 252 F.3d 796, 797 (5th Cir. 2001). «For a contractual clause to prevent a party from exercising its right to removal, the clause must give a 'clear and unequivocal' waiver of that right.» *City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501, 504 (5th Cir. 2004) (citation omitted). The Fifth Circuit has recognized three ways in which a party may waive its removal rights: (1) «by explicitly stating that it is doing so,» (2) «by allowing the other party the right to choose venue,» or (3) «by establishing an exclusive venue within the contract.» *Dynamic*, 31 F.4th at 918. 27

Smith argues that its Purchase Orders contain an unambiguous, mandatory venue clause which requires that all disputes be litigated in the state district court of Harris County, Texas. Again, the relevant provision states: **28**

> All disputes which may arise *shall* be determined by the state district court of Harris County, Texas, *without prejudice to Smith's right* to bring such dispute before any other competent court. Supplier hereby expressly submits and consents to jurisdiction of the state district courts of Harris County, Texas for the purpose of legal resolution.

ECF 21-1, at 12, 23 (emphasis added). Kruse argues that this provision neither allows Smith to choose venue nor establishes an exclusive venue. Kruse first relies on the second sentence in the provision to argue that an «[a]greement to submit to the jurisdiction of a single court is not the equivalent of allowing Plaintiff to choose venue.» Kruse then argues that the provision does not establish exclusive venue in the state district courts of Harris County, Texas, because it carves out Smith's right to bring suit in any other competent court. **29**

While Kruse is correct that «[a] party's consent to jurisdiction in one forum does not necessarily waive its right to have an action heard in another,» *see City of New Orleans*, 376 F.3d at 504, Kruse wholly fails to address the portion of the provision which establishes Harris County district courts as the exclusive forum in which any party other than Smith may bring suit. The forum selection clause uses the word *shall*, «the paradigmatic mandatory word,» when stating that all disputes *shall* be determined by the state district court in Harris County, Texas. *Dynamic*, 31 F.4th at 918-19. The exception from the mandatory forum of Harris County, Texas district court is an exception available only to Smith. ECF 21-1 at 12, 23 («without prejudice to *Smith's* right to bring such dispute before any other competent court») (emphasis added). **30**

The Fifth Circuit's decision in *Dynamic* is instructive here. In *Dynamic*, the Fifth Circuit interpreted a forum selection clause to determine whether the defendant had waived its right to removal. The clause at issue in *Dynamic* read: «Any dispute arising out of or under this Agreement shall be brought before the district courts of Harris County ... unless mutually agreed otherwise.» 31 F.4th at 918–19. The Fifth Circuit explained that the phrase «unless mutually agreed otherwise» was an exception to the exclusive forum set forth at the beginning of the phrase. *Id.* at 919. The exception was unavailing, however, because the parties had not mutually agreed on another forum. *Id.* **31**

As was the case in *Dynamic*, the exception to the choice of forum in this case does not apply because the forum selection clause allows only one party, Smith, an option to have a dispute decided by a court other than a Harris County, Texas district court. The forum selection clause is clear: the dispute «shall» be determined by the state district court of Harris County, Texas without prejudice to Smith's right to choose another competent court. Smith brought suit in Harris County, Texas civil district court and the forum selection clause contained in Smith's Purchase Orders operates as a waiver of Kruse's right to remove this case from Harris County district court to federal court. Accordingly, Plaintiff's Motion to Remand should be granted. **32**

III. Conclusion and Recommendation.

For the reasons stated above, the Court RECOMMENDS that Plaintiff's Motion to Remand be GRANTED, and that the case be REMANDED to the 164th Judicial District Court of Harris County, Texas. The Court also RECOMMENDS that Defendant's Motion to Dismiss be DENIED WITHOUT PREJUDICE to Defendant's right to raise the issues in state court. **33**

The Clerk of the Court shall send copies of the memorandum and recommendation to the respective parties, who will then have fourteen days to file written objections, pursuant to 28 U.S.C. § 636(b)(1)(c). Failure to file written objections within the time period provided will bar an aggrieved party from attacking the factual findings and legal conclusions on appeal. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc), superseded by statute on other grounds. **34**

Signed on October 10, 2023, at Houston, Texas.