Affirmed and Memorandum Opinion filed July 22, 2025.

In The

Fourteenth Court of Appeals

NO. 14-24-00693-CV

KARL KRUSE GMBH & CO. KG, Appellant

V.

N.F. SMITH & ASSOCIATES, L.P., Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 2022-33073

M E M O R A N D U M   O P I N I O N

Karl Kruse GmbH & Co. KG ("Kruse") appeals the denial of its special appearance. Appellee, N.F. Smith & Associates, L.P. ("Smith"), a Texas limited partnership that sells electronics and electronic equipment, purchased components from Kruse, a German electrical components distributor. After receiving complaints from customers, Smith determined the parts were counterfeit and sued Kruse in Harris County district court for breach of contract, negligence, and breach of warranty.

Kruse filed a special appearance, which the trial court denied. Concluding that Kruse contractually consented to jurisdiction in Texas state courts, we affirm the trial court's order.

Background

This case concerns a dispute over a contract for the sale of goods. Smith, a limited partnership domiciled in Texas, alleges that it is a wholesale retailer of electronics and electronic equipment. Kruse, a German corporation with its principal place of business in Germany, is a distributor of electronic components.

In December 2018, Smith's representative, Cesar Rojas, while located in Mexico, contacted Kruse's managing partner and chief executive, Klaus Kruse ("Klaus"), about purchasing Murata-branded capacitors. Klaus sent Rojas a price quote for 9,000,000 Murata capacitors at a price of $0.0110 per unit (the "Quote"). The Quote stated it was valid until December 13, 2018. It referenced "International Conditions for Supplies and Service" (the "Kruse Conditions"), which could be viewed on the Kruse company website, www.kruse.de, but those conditions were not printed on the Quote. The Kruse Conditions included a "Dispute Settlement/Applicable Law" provision, providing for arbitration in Zurich, Switzerland of "[a]ll disputes arising out of or in connection with the contract" and stated that the contract "shall be subject to the substantive laws of Switzerland." In a December 10, 2018 email accompanying the Quote, Klaus described it as "our offer without engagement."

After the Quote expired, Rojas emailed Klaus on December 31 that Smith would be placing an order the next day for a "sample reel" of Murata capacitors and asked Klaus to start processing 10,000 units. Rojas sent Kruse purchase order number 402772 for the sample of 10,000 units at a price of $0.0110 per unit (the

"First Purchase Order"). The First Purchase Order reflected Smith's standard 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. . . .
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> 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 laws. *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.*

(Hereafter, the "Smith Terms.") Rojas's December 31 email to Klaus stated, "Please see the PO for the sample reel of the [M]urata 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."

Three days later, Rojas sent Kruse a second purchase order, again containing the Smith Terms, for 8.3 million Murata capacitors, at price of $0.0092 per unit (the "Second Purchase Order").[1] The Second Purchase Order referenced the same order number as the First Purchase Order: 402772. It appears from the record that the 10,000 units referenced in the First Purchase Order were intended to be a sample of, but included within, the overall requested amount of 8,300,000 units referenced in the Second Purchase Order. Klaus responded via email, stating, "Order received and processing. I will advise when we can ship . . . ."

[1] The purchase order is dated December 31, 2018, but the email attaching the purchase order is dated January 3, 2019.

Kruse shipped the sample of 10,000 capacitors requested in the First Purchase Order to Smith's warehouse in the Netherlands on January 10. The packing slip referenced Smith's order number 402772, indicated that 10,000 units had shipped, and stated that 8,290,000 units were on "backorder." The packing slip stated that the "General Terms and Conditions of Kruse shall apply exclusively."[2] Kruse also sent an invoice dated January 10, for $92.00 (10,000 units at $.0092 per unit).[3]

Kruse shipped the remainder of the order on January 14.[4] The packing slip again stated that the Kruse General Terms and Conditions would apply exclusively. Kruse also invoiced Smith at its Houston headquarters for the total amount due. The invoices for both purchase orders reflected a price of $0.0092 per capacitor, but only the invoice for the second, larger order provided, "To count 'International Condition for Supplies and Service' from [Kruse] pls visit 222.kruse.de." As with the Quote, the Kruse Conditions were not printed on the invoices and packing slips, but the buyer was referred to Kruse's website for the Kruse Conditions language.

Smith sold the capacitors to two customers. Around March 4, 2021, one of the customers alerted Smith that the capacitors were "testing at a higher-than-expected capacitance." A Murata representative inspected a sample of the capacitors and concluded that they were counterfeit. Smith notified Kruse of the purported defect and demanded indemnity. Neither Kruse nor its insurers indemnified Smith as required under the Smith Terms.

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[2] Kruse does not distinguish between the Kruse Conditions and the "General Terms and Conditions" referenced on the packing slip. We treat them as the same conditions.

[3] It appears the parties re-negotiated the price for the entire order of 8,300,000 units to $0.0092 per unit.

[4] The packing slip for the second shipment reflected a total quantity ordered of 8,330,000 units and indicated that 8,320,000 units were included in the second shipment.

On June 2, 2022, Smith filed the present lawsuit, alleging breach of contract, negligence, and breach of warranty. Smith alleged that the court had personal jurisdiction over Kruse because Kruse "consented to personal jurisdiction in Texas."[5] On December 20, 2023, Kruse filed a special appearance and, alternatively, motion to dismiss for forum non conveniens. Relevant here, Kruse contended in its special appearance that Smith failed to make a prima facie showing of either general or specific jurisdiction and that the Smith Terms do not control the jurisdictional analysis.

The trial court denied the special appearance and motion to dismiss on August 30, 2024. Kruse timely filed this interlocutory appeal.[6]

Analysis

Kruse argues that the trial court erred for two reasons: (1) Smith failed to establish specific or general jurisdiction; and (2) the Kruse Conditions control, negating the Smith Terms.

A. Standard of Review and Applicable Law

We review de novo a trial court's denial of a special appearance. *M&F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 885 (Tex. 2017). When, as here, the district court does not issue findings of fact or conclusions

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[5] Kruse, asserting diversity jurisdiction, removed the case to federal court. There Kruse moved to dismiss on grounds of lack of jurisdiction and improper venue. Smith sought remand to state court on the ground that Kruse contractually waived its removal rights. The federal court adopted the magistrate judge's recommendation that Kruse's motion to dismiss be denied without prejudice and remanded proceedings to the state district court. *See N.F. Smith & Assocs., L.P. v. Karl Kruse GmbH & Co. KG*, No. 4:22-CV-3877, 2023 WL 7474046, at *3 (Oct. 10, 2023 mem. & recommendation), *adopted*, 2023 WL 7462860 (S.D. Tex. Nov. 9, 2023).

[6] Kruse separately filed a petition for writ of mandamus challenging the trial court's denial of its motion to dismiss. We issue a separate opinion denying mandamus relief in that proceeding today. *See In re Karl Kruse GmbH & Co. KG*, No. 14-24-00700-CV.

of law, we presume the court resolved all factual disputes in favor of its ruling. *Spir Star AG v. Kimich*, 310 S.W.3d 868, 871-72 (Tex. 2010).

The Texas long-arm statute authorizes Texas courts to exercise jurisdiction over a nonresident defendant who "does business" in the state. Tex. Civ. Prac. & Rem. Code § 17.042. The Supreme Court of Texas has interpreted the Texas long-arm statute to extend a Texas court's personal jurisdiction "as far as the federal constitutional requirements of due process will permit." *M&F Worldwide*, 512 S.W.3d at 885. A plaintiff bears the initial burden of pleading allegations sufficient to bring a nonresident defendant within the scope of the long-arm statute. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794-95 (Tex. 2002). A defendant challenging a Texas court's personal jurisdiction must negate all jurisdictional bases alleged. *Id.*

A trial court may constitutionally exercise personal jurisdiction over a party when (1) the nonresident defendant has minimum contacts with the forum state and (2) the assertion of jurisdiction complies with traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Peters v. Top Gun Exec. Grp.*, 396 S.W.3d 57, 62 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Minimum contacts are sufficient for personal jurisdiction when the nonresident defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *M&F Worldwide*, 512 S.W.3d at 886. "The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The personal jurisdiction requirement recognizes an individual liberty interest in that it protects a defendant against the burdens of litigating in a distant or inconvenient forum. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982). Because the requirement of personal jurisdiction represents an individual right, it can, like other such rights, be waived. *Id.* at 703; *Megadrill Servs. Ltd. v. Brighouse*, 556 S.W.3d 490, 496-97 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Thus, a defendant may submit to the personal jurisdiction of a court otherwise lacking such jurisdiction over him in a variety of ways—for example, by a contractual forum selection clause. *See Ins. Corp. of Ir.*, 456 U.S. at 703-04 (citing *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964)); *Megadrill Servs.*, 556 S.W.3d at 497. To the extent a party has consented to jurisdiction in a particular forum, the trial court's exercise of personal jurisdiction over it does not violate due process even in the absence of minimum contacts with Texas. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985); *see also Megadrill Servs.*, 556 S.W.3d at 497.

B. Application

We address only Kruse's second issue, because it is dispositive of this appeal. The parties agree that they formed a contract for the sale of capacitors, but they dispute whose terms and conditions control.

This case arises out of an agreement for the sale of goods from a German company to a Texas company, with the goods being shipped to the Texas company's warehouse in the Netherlands. The United States and Germany are signatories to the United Nations Convention for Contracts for the International Sale of Goods (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 Petroleous de Ecuador*, 332 F.3d 333, 336 (5th Cir. 2003) (quoting CISG, art. 1(1)(a)); *see also N.F. Smith & Assocs., L.P. v. Karl Kruse GmbH & Co. KG*, No. 4:22-CV-3877, 2023 WL 7474046, at *3 (Oct. 10, 2023 mem. & recommendation), *adopted*, 2023 WL 7462860 (S.D. Tex. Nov. 9, 2023). The parties agree that the CISG applies to the issue of whether and when a contract was formed in this case.[7] We agree that the CISG "governs the substantive question of contract formation as to the forum selection clauses." *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003); *see also* CISG, art. 4.

Under the CISG, a valid offer is one that is "sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance." CISG, art. 14(1). An offer may be accepted by words or conduct. *Id.*, art. 18(1). "A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect." *Id.* art. 21(1). But if a "reply to an offer which purports to be an acceptance . . . contains additions, limitations or other modifications[, it] is a rejection of the offer and constitutes a counter-offer," unless the terms do not "materially alter the terms of the offer . . . . *Id.* art. 19(1), (2). "Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially." *Id.* art. 19(3).

Kruse's Quote was an offer: it was sufficiently definite and stated it was an "offer," thus indicating Kruse's intent to be bound in case of acceptance. *Id.* art. 14(1). But this offer expired December 13, 2018, and Smith did not accept Kruse's offer before it expired.

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[7] The CISG may be found online at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf. It is also available in the Federal Register. *See* 52 Fed. Reg. 6262 (Mar. 2, 1987).

Kruse argues that Smith's later purchase orders were late acceptances of the Quote. But Smith's purchase orders could not be acceptances under the CISG for two reasons: (1) because the offeror did not without delay orally so inform the offeree or dispatch a notice to that effect, *id.* art. 21(1); and (2) because the purchase orders contained materially different terms from the Quote. *See id.* art. 19(1). On the latter point, the purchase orders differ from Kruse's Quote on, among other things, price, quantity of goods, and the settlement of disputes. *See id.* art. 19(3); *see also Laktapol Int'l v. Bassett & Walker Int'l, Inc.*, No. EP-12-CA-16-FM, 2013 WL 12130452, *6 (W.D. Tex. Jan. 10, 2013) (explaining that reply to offer adding forum-selection term altered terms of offer materially). In fact, after Kruse's Quote had expired, Smith notified Klaus that it wanted to discuss a "new price," and the parties ultimately agreed to a new price. And when Smith sent the First Purchase Order, it instructed Klaus to "see the attachment"—i.e., the purchase order—and that "[a]ny changes to this attachment need to be saved and then attached to the reply email." Smith directed the purchase orders to Kruse specifically, indicated the goods to be shipped, the quantity, the price, and the location to which to ship the goods.

Thus, we conclude that Smith's First Purchase Order and Second Purchase Order were counter-offers under the CISG.[8] *See* CISG, arts. 14(1), 19(1); *cf. VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247, 251-52 (7th Cir. 2016) (purchase order with similar criteria was an "offer" under the CISG).

Kruse argues additionally that it did not expressly accept Smith's offer. Kruse, however, relies on its own conditions, which provided that a customer's terms and conditions apply only when Kruse expressly accepts them in writing. Because

[8] We note that the federal district court also concluded that Smith's purchase orders were counter-offers. *See N.F. Smith & Assocs.*, 2023 WL 7474046, at *3-4, *adopted*, 2023 WL 7462860, at *1.

Kruse's offer—the Quote—was not accepted by Smith, the Kruse Conditions do not form a part of the parties' bargain for the reason Kruse advances. Instead, the CISG controls whether Kruse accepted Smith's offer.

Under the CISG, an offer may be accepted by words or conduct, although silence or inaction does not amount to acceptance. *See* CISG, art. 18(1); *see also VLM Food Trading Int'l*, 811 F.3d at 251. Here, Smith's representative, Rojas, sent the First Purchase Order for the "sample reel," requesting Kruse to "process and ship ASAP" and to notify Smith of any changes. Kruse did not notify Smith of any changes; rather, Kruse responded via email that it had received the order, was processing it, and would advise when the items would ship. Smith then sent the Second Purchase Order, which likewise included the Smith Terms. Our record contains no written response to the Second Purchase Order. Kruse simply shipped the items to the address contained on the order and invoiced Smith accordingly. Thus, Kruse accepted Smith's offer by its conduct. *See* CISG, art. 18(1); *see also VLM Food Trading Int'l*, 811 F.3d at 252 n.2 (noting that, even absent email confirmations, delivery of the product pursuant to purchase orders "would have constituted an acceptance by conduct").

Alternatively, Kruse maintains that it modified the parties' agreement via the packing slips and invoices shipped with the goods, which incorporated the Kruse Conditions. We disagree. The purchase orders were counter-offers by Smith. Under the CISG, the conduct of the offeree indicating assent to an offer is acceptance. CISG, art. 18(1). Such acceptance becomes effective "at the moment the indication of assent reaches the offeror." *Id.* art. 18(2). If the email from Kruse indicating that it had received Smith's order and was processing it did not suffice as "assent," then certainly Kruse's actual shipment of the items did. The CISG provides that an "offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods . . . , without notice to the offeror, [and] the acceptance is effective at the moment the act is performed. . . ." *Id.* art. 18(3). As detailed above, the Smith Terms contained on the purchase orders specify that they are "effective upon performance" by Kruse.

In sum, Smith's purchase orders were offers, which Kruse accepted by either emailing Smith that it had received and was processing the orders or by actually shipping the capacitors to Smith. The agreement was final at that point. *See VLM Trading Int'l*, 811 F.3d at 252 n.2 (explaining that "delivery of the [product in accordance with the terms of the purchase order] would have constituted an acceptance by conduct"); *N.F. Smith & Assocs.*, 2023 WL 7474046, at *4; *see also* CISG, art. 18. Kruse's inclusion of or reference to contrary contract terms on the packing slips and invoices sent simultaneously with the shipments did not alter the parties' agreement or incorporate conflicting terms. *Cf., e.g., Chateau des Charmes Wines, Ltd.*, 328 F.3d at 531 (forum selection clause contained in invoices was not part of parties' agreement because agreement was complete before invoices were sent); *Solae, LLC v. Hershey Canada, Inc.*, 557 F. Supp. 2d 452, 457-58 (D. Del. 2008) (when there was no agreement to modify terms after contract was completed, forum selection clause contained in subsequent conditions of sale did not become part of parties' agreement). At most, Kruse's attempt to incorporate its conditions in that manner may have been an attempted modification of the parties' agreement, but the CISG only permits modification by agreement. *See* CISG, art. 29(1). Neither the packing slips nor invoices specified a means of accepting the Kruse Conditions, and our record contains no indication that Smith accepted these conditions. *See N.F. Smith & Assocs.*, 2023 WL 7474046 at *4.

Because the agreement between the parties is governed by the Smith Terms, we hold that Kruse consented to the jurisdiction of the state district courts of Harris

County, Texas. Accordingly, the trial court's exercise of personal jurisdiction over it does not violate due process even assuming Kruse lacks minimum contacts with Texas. *See Burger King Corp.*, 471 U.S. at 473 n.14; *see also Megadrill Servs.*, 556 S.W.3d at 497; *CNOOC Se. Asia Ltd. v. Paladin Res. (SUNDA) Ltd.*, 222 S.W.3d 889, 894 (Tex. App.—Dallas 2007, pet. denied).

We overrule Kruse's second issue, and we need not reach its first issue. *See* Tex. R. App. P. 47.1.

Conclusion

We affirm the trial court's order denying Kruse's special appearance.

/s/ Kevin Jewell
Justice

Panel consists of Chief Justice Christopher and Justices Jewell and McLaughlin.