JUDGMENT OF THE COURT (Third Chamber)

9 June 2011

(Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Regulation (EC) No 44/2001– Special jurisdiction – Article 5(1)(b), first indent – Court of the place of performance of the contractual obligation on which the application is based – Sale of goods – Place of delivery – Contract containing the clause 'Delivered Ex Works')

In Case C-87/10,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the Tribunale ordinario di Vicenza (Italy), made by decision of 30 January 2010, received at the Court on 15 February 2010, in the proceedings

Electrosteel Europe SA

v

Edil Centro SpA,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász (Rapporteur) and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Edil Centro SpA, by R. Campese, avvocatessa,

– the European Commission, by N. Bambara and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1; 'the Regulation').

2 The reference has been made in proceedings between Electrosteel Europe SA ('Electrosteel'), established in Arles (France), and Edil Centro SpA ('Edil Centro'), established in Piovene Rocchette (Italy), concerning the performance of a contract for the sale of goods.

Legal context

3 In Section 1, entitled 'General provisions', of Chapter II of the Regulation, Article 2(1) states:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

4 In the same section of Chapter II of the Regulation, Article 3(1) provides:

'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

5 In Section 2, entitled: 'Special jurisdiction', of Chapter II of the Regulation, Article 5 provides:

'A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

if [point] (b) does not apply then [point] (a) applies;

…'

6 In Section 7, entitled 'Prorogation of jurisdiction', of Chapter II of the Regulation, Article 23(1) is worded as follows:

'If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.'

7 In Chapter V of the Regulation, entitled 'General Provisions', Article 60(1) provides:

'For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.'

The facts and the question referred for a preliminary ruling

8 According to the file referred to the Court, Edil Centro – the seller – and Electrosteel – the buyer – concluded a contract for the sale of goods. As a result of a dispute regarding the performance of that contract, Edil Centro applied to the Tribunale ordinario di Vicenza (Vicenza District Court) for an order directing Electrosteel to pay EUR 36 588.26 in payment for the goods purchased.

9 By an opposition notice, Electrosteel pleaded by way of a preliminary objection that, under the Regulation, the Italian court seised lacked jurisdiction. In support of that opposition, Electrosteel stated that it has its seat in France and that, accordingly, it should have been sued before the French courts.

10 Edil Centro claims to the contrary that the contract, concluded at its own seat in Italy, contains the clause 'Resa: Franco ns. [nostra] sede' (Delivered free ex our business premises) concerning the place of delivery of the goods and that, accordingly, the Italian courts have jurisdiction to hear the case.

11 Edil Centro refers to the international commercial terms, known as 'Incoterms' – drawn up by the International Chamber of Commerce, whose headquarters are in Paris – in the version published in 2000 in English, the official language for those terms, and claims that 'Resa: Franco nostra sede' corresponds to the Incoterm 'EXW' ('Ex Works'), in relation to which rules A4 and B4 designate the place of delivery of the goods.

12 Rules A4 and B4 for use of the Incoterm 'Ex Works' are worded as follows:

'A4 Delivery

The seller must place the goods at the disposal of the buyer at the named place of delivery, not loaded on any collecting vehicle, on the date or within the period agreed or, if no such time is agreed, at the usual time for delivery of such goods. If no specific point has been agreed within the named place, and if there are several points available, the seller may select the point at the place of delivery which best suits his purpose.

B4 Taking delivery

'The buyer must take delivery of the goods when they have been delivered in accordance with A4 […]'

13 It is clear from the file that the goods covered by the contract at issue were delivered to the purchaser by a carrier which took charge of those goods in Italy, at the seller's premises, and delivered them in France, to the buyer's headquarters.

14 The referring court observes that the definition of 'place of delivery' as 'the place of performance of the obligation in question', in accordance with the first indent of Article 5(1)(b) of the Regulation, has given rise to divergent interpretations in Italy, both by the lower courts and by the Corte suprema di cassazione.

15 In view of those divergent interpretations, the Tribunale ordinario di Vicenza decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 5(1)(b) of [the] Regulation […] – and, in any event, Community law – which lays down that, in the case of the sale of goods, the place of performance of an obligation is the place where, under the contract, the goods were delivered or should have been delivered, be interpreted as meaning that the place of delivery, relevant for the purposes of determining the court having jurisdiction, is the place of final

destination of the goods covered by the contract or the place in which the seller is discharged of his obligation to deliver, in accordance with the substantive rules applicable to the individual case, or is that rule open to a different interpretation?'

Consideration of the question referred

16 It should first of all be stated that, after the present reference for a preliminary ruling was lodged by the referring court, the Court gave judgment in Case C-381/08 *Car Trim* [2010] ECR I-0000, in which it held, in paragraph 2 of the operative part, that the first indent of Article 5(1)(b) of the Regulation must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

17 The interpretation given by the Court in *Car Trim* of the first indent of Article 5(1)(b) of the Regulation can be transposed to the case before the Tribunale ordinario di Vicenza and it provides an almost complete answer to the question referred by that court.

18 However, the issue which remains to be clarified is how the words 'under the contract', used in the first indent of Article 5(1)(b) of the Regulation, are to be interpreted and, in particular, to what extent it is possible to take into consideration terms and clauses in the contract which do not identify directly and explicitly the place of delivery, which would in turn determine the courts with jurisdiction to settle disputes between the parties.

19 In that connection, it should be borne in mind that, under Article 23 of the Regulation, a jurisdiction clause may be agreed not only in writing – or evidenced in writing – but also in a form which accords with practices which the parties have established between themselves or, in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

20 There is no reason to believe that the European Union legislature wished no consideration to be taken of such commercial usage for the purposes of interpreting other provisions of the same regulation and, in particular, for the purposes of determining the court with jurisdiction, in accordance with the first indent of Article 5(1)(b) thereof.

21 Usages – especially if they are collected, explained and published by recognised professional organisations and widely followed in practice by traders – play an important role in the non-governmental regulation of international trade or commerce. They make it easier for traders to draft contracts because, through the use of short and simple terms, they can define many aspects of their business relations. The Incoterms drawn up by the International Chamber of Commerce, which define and codify the content of certain terms and clauses commonly used in international trade or commerce, are particularly widely recognised and used.

22 Thus, in order to determine, in the course of examining a contract, the place of delivery for the purposes of the first indent of Article 5(1)(b) of the Regulation, the referring court must take into account all the relevant terms and clauses in that contract, including, as the case may be, the terms and clauses generally recognised and applied in international commercial usage, such as the Incoterms, in so far as they enable that place to be clearly identified.

23 Where the contract concerned contains such terms or clauses, it may be necessary to examine whether they are stipulations which merely lay down the conditions relating to the allocation of the risks connected to the carriage of the goods or the division of costs between the contracting parties, or whether they also identify the place of delivery of the goods. As regards the Incoterm, 'Ex Works', which is relied on in the dispute before the referring court, it must be held – as the Advocate General pointed out in point 40 of her Opinion – that that clause entails not only the application of Rules A5 and B5, entitled 'Transfer of risks', and Rules A6 and B6, entitled 'Division of costs', but also – and separately – the application of Rules A4 and B4, entitled 'Delivery' and 'Taking delivery'.

24 On the other hand, where the goods covered by the contract are merely in transit, passing through the territory of a Member State which is a third party, in terms both of the domicile of the parties and of the place of departure or destination of the goods, it must be ascertained, in particular, whether the place mentioned in the contract, situated in such a Member State, is used only to spread the costs and risks relating to the carriage of the goods or whether it is also the place of delivery of the goods.

25 It is for the national court to determine whether the clause 'Resa: Franco [nostra] sede' in the contract at issue before the referring court corresponds to the Incoterm, 'Ex Works', entailing the application of rules A4 and B4, or to another clause or another usage habitually used in trade or commerce and which is an appropriate means of clearly identifying – without there being any need to refer to the substantive law applicable to the contract – the place of delivery of the goods under that contract.

26 In the light of the foregoing considerations, the answer to the question referred is that the first indent of Article 5(1)(b) of the Regulation must be interpreted as meaning that, in the case of distance selling, the place where the goods were or should have been delivered pursuant to the contract must be determined on the basis of the provisions of

that contract. In order to verify whether the place of delivery is determined 'under the contract', the national court seised must take account of all the relevant terms and clauses of that contract which are capable of clearly identifying that place, including terms and clauses which are generally recognised and applied through the usages of international trade or commerce, such as the Incoterms drawn up by the International Chamber of Commerce in the version published in 2000. If it is impossible to determine the place of delivery on that basis, without referring to the substantive law applicable to the contract, the place of delivery is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

Costs

27 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The first indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the case of distance selling, the place where the goods were or should have been delivered pursuant to the contract must be determined on the basis of the provisions of that contract.

In order to verify whether the place of delivery is determined 'under the contract', the national court seised must take account of all the relevant terms and clauses of that contract which are capable of clearly identifying that place, including terms and clauses which are generally recognised and applied through the usages of international trade or commerce, such as the Incoterms drawn up by the International Chamber of Commerce in the version published in 2000.

If it is impossible to determine the place of delivery on that basis, without referring to the substantive law applicable to the contract, the place of delivery is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

[Signatures]

* Language of the case: Italian.