JUDGMENT OF THE COURT (Fourth Chamber)

25 February 2010

(Jurisdiction in civil and commercial matters – Regulation (EC) No 44/2001 – Article 5(1)(b) – Jurisdiction in matters relating to a contract – Determination of the place of performance of the obligation – Criteria for distinguishing between 'sale of goods' and 'provision of services')

In Case C-381/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 9 July 2008, received at the Court on 22 August 2008, in the proceedings

Car Trim GmbH

v

KeySafety Systems Srl,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting for the President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– KeySafety Systems Srl, by C. von Mettenheim, Rechtsanwalt,

– the German Government, by M. Lumma and J. Kemper, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the United Kingdom Government, by H. Walker, acting as Agent, and A. Henshaw, barrister,

– the Commission of the European Communities, by A.-M. Rouchaud-Joët and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 September 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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; 'Regulation No 44/2001') and, more specifically, concerns the issues of where, precisely, the difference lies between contracts for the 'sale of goods' and contracts for the 'provision of services' and how to determine the place of performance in the case of contracts involving carriage of goods.

2 The reference was made in the course of proceedings between Car Trim GmbH ('Car Trim') and KeySafety Systems Srl ('KeySafety') concerning the contractual obligations of the parties in relation to the supply of components for the manufacture of airbag systems.

Legal context

Community legislation

3 Under Article 68(1) thereof, Regulation No 44/2001 – which entered into force on 1 March 2002 – supersedes, as between the Member States with the exception of the Kingdom of Denmark, the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by further conventions by which new Member States became party to that convention.

4 In accordance with Recital 2 in the preamble to Regulation No 44/2001, that regulation aims, in the interests of the proper functioning of the internal market, 'to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation'.

5 Recitals 11 and 12 in the preamble to Regulation No 44/2001 describe as follows the relationship between the various rules of jurisdiction, as well as their regulatory aims:

'(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must

always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

6 Article 2(1) of Regulation No 44/2001, which comes under Section 1 of Chapter II, entitled 'General provisions', is worded as follows:

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

7 Article 5 of Regulation No 44/2001, which comes under Section 2 of Chapter II, entitled 'Special jurisdiction', states:

'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,

(c) if subparagraph (b) does not apply then subparagraph (a) applies'.

8 Article 1(4) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12) provides:

'Contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive.'

International rules

9 The United Nations Convention On Contracts For The International Sale Of Goods, signed at Vienna on 11 April 1980 ('the CISG') entered into force in Italy on 1 January 1988 and in Germany on 1 January 1991.

10 The third paragraph of the preamble to the CISG states:

'… the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade'.

11 Article 1(1)(a) CISG provides:

'This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States … .'

12 As regards the material scope of the CISG, Article 3 CISG provides:

'(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.'

13 Under Article 30 CISG, '[t]he seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention'.

14 Article 31 CISG provides:

'If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods – in handing the goods over to the first carrier for transmission to the buyer;

… .'

15 Under Article 6 of the United Nations Convention on the Limitation Period in the International Sale of Goods, signed in New York on 14 June 1974:

'(1) This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced shall be considered to be sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 KeySafety, which is established in Italy, supplies Italian car manufacturers with airbag systems. Between July 2001 and December 2003, KeySafety purchased from Car Trim components used in the manufacture of those systems, in accordance with five supply contracts ('the contracts').

17 KeySafety terminated the contracts with effect from the end of 2003. On the view that those contracts should have run, in part, until summer 2007, Car Trim claimed that the terminations were in breach of contract and brought an action for damages before the Landgericht Chemnitz (Regional Court, Chemnitz), which has jurisdiction for the place where the components were manufactured. The Landgericht Chemnitz held that it had no jurisdiction to rule on the action on the ground that the German courts have no international jurisdiction.

18 The Oberlandesgericht (Higher Regional Court) dismissed the appeal brought by Car Trim.

19 The Oberlandesgericht noted that, under the contracts, Car Trim was obliged to manufacture airbags of a certain shape, in the traditional manner of a supplier of equipment for the automobile industry, using products purchased from agreed suppliers, so as to be able to supply them to order, according to the needs of KeySafety's production process and in conformity with a large number of requirements relating to the organisation of the work, quality control, packaging, labelling, delivery orders and invoices.

20 Car Trim brought an appeal on a point of law before the Bundesgerichtshof (German Federal Court of Justice).

21 According to the Bundesgerichtshof, the success of that action turns on whether the Landgericht Chemnitz was wrong in denying that it had international jurisdiction, an issue which has to be determined on the basis of Regulation No 44/2001.

22 The answer to that question depends on the interpretation of Article 5(1)(b) of Regulation No 44/2001, given that KeySafety has its 'business domicile' – which, under Article 2 of Regulation No 44/2001, can determine jurisdiction – in Italy, and the Oberlandesgericht found that the German courts neither have exclusive jurisdiction under Article 22 of Regulation No 44/2001, nor express or implied jurisdiction under Articles 23 and 24 of that regulation respectively.

23 Consequently, it is possible for the German courts to have jurisdiction to adjudicate the action for damages only if the place of production is to be regarded as the place of performance of 'the obligation in question' within the meaning of Article 5(1) of Regulation No 44/2001.

24 The Bundesgerichtshof considers that jurisdiction lies with the court which has the closest geographical connection to the place of performance of the tasks which characterise the contract. For those purposes, it is necessary to identify the preponderant contractual obligations, which, in the absence of any other suitable connection, must be determined by reference to economic criteria. The criterion of the preponderant economic obligation is also that specified in Article 3(2) CISG or Article 6(2) of the United Nations Convention on the Limitation Period in the International Sale of Goods of 14 June 1974.

25 In the event that the place of performance determining jurisdiction is the place identified in the first indent of Article 5(1)(b) of Regulation No 44/2001, it would be necessary to determine the place to which the goods sold were delivered, or should have been delivered, under the contracts. The Bundesgerichtshof considers that, even in the case of sales contracts involving carriage of goods, that place of performance refers to the place where, under the contracts, the purchaser obtained, or should have obtained, actual power of disposal over the delivered goods.

26 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 5(1)(b) of Council Regulation No 44/2001 to be interpreted as meaning that contracts for the supply of goods to be produced or manufactured are, notwithstanding specific requirements on the part of the customer with regard to the provision, fabrication and delivery of the components to be produced, including a guarantee of the quality of production, reliability of delivery and smooth administrative handling of the order, to be classified as a sale of goods (first indent), and not as provision of services (second indent)? What criteria are decisive for the distinction?

2. If a sale of goods is to be presumed: in the case of sales contracts involving carriage of goods, is the place where under the contract the goods sold were delivered or should have been delivered to be determined according to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the first carrier for transmission to the purchaser?'

The questions referred for a preliminary ruling

Question 1

27 By Question 1, the referring court is asking the Court, in essence, how 'contracts for the sale of goods' are to be distinguished from 'contracts for the provision of

services', within the meaning of Article 5(1)(b) of Regulation No 44/2001, in the case of contracts for the supply of goods to be produced or manufactured, where the customer has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced.

28 First of all, it should be noted that that question has been raised in proceedings between two manufacturers in the automobile sector. That industrial sector is characterised by a high level of cooperation between manufacturers. The finished product on offer must be tailored to the precise requirements and individual specifications of the customer. As a rule, the customer identifies his requirements with precision and provides instructions regarding the manufacture of the product which the supplier must respect.

29 In a manufacturing process of that type, which is also used in other sectors of the modern economy, the manufacture of goods can entail the provision of services, which, together with the subsequent supply of the finished product, contributes to fulfilling the ultimate aim of the contract in question.

30 Article 5(1)(b) of Regulation No 44/2001 is silent both as regards the definition of the two types of contract and as regards the distinguishing features of those two types of contract in the context of a sale of goods which at the same time involves the provision of services. Specifically, the first indent of that provision, which relates to the sale of goods, does not state whether, in cases where the seller must manufacture or produce the goods in compliance with certain requirements specified in that regard by the customer, it still applies, regard being had to the fact that such manufacture or production, or part thereof, could be classified as a 'service' within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001.

31 In that connection, it should be noted that, for the purposes of identifying the court with jurisdiction in relation to contracts for the sale of goods or the provision of services, Article 5(1) of Regulation No 44/2001 identifies as a connecting factor the obligation which characterises the contract in question (see, to that effect, Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-0000, paragraph 54).

32 In view of that fact, it is therefore necessary to take as a basis the obligation which characterises the contracts at issue. A contract which has as its characteristic obligation the supply of a good will be classified as a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of Regulation No 44/2001. A contract which has as its characteristic obligation the provision of services will be classified as a 'provision of services' within the meaning of the second indent of Article 5(1)(b) of that regulation.

33 It is necessary to take the following factors into consideration in order to determine the characteristic obligation of the contracts at issue.

34 First, it should be noted that the classification of a contract the aim of which is the sale of goods which must first be manufactured or produced by the seller is governed by certain provisions of European Union law and international law which can affect the interpretation to be given to the concepts of 'sale of goods' and 'provision of services'.

35 First of all, under Article 1(4) of Directive 1999/44, contracts for the supply of consumer goods to be manufactured or produced are also to be deemed contracts of sale and, under Article 1(2)(b) of that directive, any tangible movable item is classified as 'consumer goods', with certain exceptions which are not relevant in a case such as that before the referring court.

36 Moreover, under Article 3(1) CISG, contracts for the supply of goods to be manufactured or produced are to be considered sales contracts unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

37 Furthermore, Article 6(2) of the United Nations Convention of 14 June 1974 on the Limitation Period in the International Sale of Goods provides also that contracts for the supply of goods to be manufactured or produced are to be considered to be sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

38 The above provisions are an indication, therefore, that the fact that the goods to be delivered are to be manufactured or produced beforehand does not alter the classification of the contract at issue as a sales contract.

39 Furthermore, the Court came to the same conclusion with regard to public procurement contracts. In Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-0000, paragraph 64, the Court held that the concept of 'public supply contracts' referred to in the first paragraph of Article 1(2)(c) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) covers the purchase of products, irrespective of whether the product under consideration is supplied to consumers ready-made or after being manufactured in accordance with consumers' requirements. In paragraph 66 of that judgment, the Court held that, where the goods supplied are individually manufactured and tailored to the needs of each customer, the manufacture of those goods is part of the supply of the goods at issue.

40 Secondly, it is necessary to take into account the criterion, relied upon by the Commission of the European Communities, relating to the origin of the raw materials. Another factor which can be taken into consideration is whether or not those materials were supplied by the purchaser, for the purposes of the interpretation of Article 5(1)(b) of Regulation No 44/2001. Where all the materials from which the goods are manufactured, or most of them, have been supplied by the purchaser, that fact could be

an indication that the contract should be classified as a 'contract for the provision of services'. On the other hand, where the material has not been supplied by the purchaser, that fact is a strong indication that the contract should be classified as a 'contract for the sale of goods'.

41 It is clear from the case-file referred to the Court that, in the case before the referring court, even though KeySafety determined the suppliers from which Car Trim had to obtain certain parts, it did not provide Car Trim with any materials.

42 Thirdly, even though the referring court does not provide any information in that regard, it is necessary to note that the supplier's responsibility can also be a factor to consider for the purposes of classifying the characteristic obligation of the contract at issue. If the seller is responsible for the quality of the goods – the result of its activity – and their compliance with the contract, that responsibility will tip the balance in favour of a classification as a 'contract for the sale of goods'. On the other hand, if the seller is responsible only for correct implementation in accordance with the purchaser's instructions, that fact indicates rather that the contract should be classified as a 'provision of services'.

43 In view of the above, the answer to Question 1 is that where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of Regulation No 44/2001.

Question 2

44 By Question 2, the referring court asks in essence whether, in the case of a sales contract involving carriage of goods, the place where, under the contract, the goods sold were 'delivered' or should have been 'delivered' within the meaning of the first indent of Article 5(1)(b) of Regulation No 44/2001 is to be determined by reference to the place of physical transfer to the purchaser.

45 It should be stated at the outset that, under Article 5(1)(b) of Regulation No 44/2001, the parties to the contract enjoy a certain freedom in defining the place of delivery of the goods.

46 The words 'unless otherwise agreed' in Article 5(1)(b) of Regulation No 44/2001 show that the parties can come to an agreement concerning the place of performance of the obligation for the purposes of the application of that provision. Furthermore, under the first indent of that provision, which contains the words 'under the contract', the place of delivery of the goods is in principle to be that agreed by the parties in the contract.

47 In order to answer the question referred, the Court bases its considerations on the origins, objectives and scheme of Regulation No 44/2001 (see Case C-386/05 *Color Drack* [2007] ECR I-3699, paragraph 18, and Case C-204/08 *Rehder* [2009] ECR I-0000, paragraph 31).

48 It is settled case-law that the rule of special jurisdiction in matters relating to a contract, as set out in Article 5(1) of Regulation No 44/2001, which complements the rule that jurisdiction is generally based on the domicile of the defendant, reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case (see *Color Drack*, paragraph 22, and *Rehder*, paragraph 32).

49 Regarding the place of performance of 'the obligation in question', the first indent of Article 5(1)(b) of Regulation No 44/2001 defines that criterion of a link autonomously in the case of the sale of goods in order to reinforce the primary objective of unification of the rules of jurisdiction whilst ensuring their predictability (see, to that effect, *Color Drack*, paragraph 24, and *Rehder*, paragraph 33).

50 In the context of Regulation No 44/2001, that rule of special jurisdiction in matters relating to a contract thus establishes the place of delivery as the autonomous linking factor to apply to all claims founded on one and the same contract for the sale of goods rather than merely to the claims founded on the obligation of delivery itself (*Color Drack*, paragraph 26).

51 Nevertheless, Regulation No 44/2001 is silent as to the definition of the concepts of 'delivery' and 'place of delivery' for the purposes of the first indent of Article 5(1)(b) thereof.

52 Moreover, it should be noted that, at the time of drafting that provision, the Commission, in its Proposal of 14 July 1999 for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final, p. 14), stated that it was intended 'to remedy the shortcomings of applying the rules of private international law of the State whose courts are seised' and that that 'pragmatic determination of the place of enforcement' was based on a purely factual criterion.

53 First of all, it should be noted that the autonomy of the linking factors provided for in Article 5(1)(b) of Regulation No 44/2001 precludes application of the rules of private international law of the Member State with jurisdiction and the substantive law which would be applicable thereunder.

54 In those circumstances, it is for the referring court to determine first whether the place of delivery is apparent from the provisions of the contract.

55 Where it is possible to identify the place of delivery in that way, without reference to the substantive law applicable to the contract, it is that place which is to be regarded as the place where, under the contract, the goods were delivered or should have been delivered, for the purposes of the first indent of Article 5(1)(b) of Regulation No 44/2001.

56 On the other hand, there could be circumstances in which the contract would not contain any provisions indicating, without reference to the applicable substantive law, the parties' intentions concerning the place of delivery of the goods.

57 In such circumstances, since the rule on jurisdiction provided for in Article 5(1)(b) of Regulation No 44/2001 is autonomous, it is necessary to determine that place in accordance with another criterion which is consistent with the origins, objectives and scheme of that regulation.

58 The referring court contemplates two places which could serve as the place of delivery for the purposes of fixing an autonomous criterion, to be applicable in the absence of a contractual provision. The first is the place of the physical transfer of the goods to the purchaser and the second is the place at which the goods are handed over to the first carrier for transmission to the purchaser.

59 It must be held, in concurrence with the referring court, that those two places seem to be the most suitable for determining by default the place of performance, where the goods were delivered or should have been delivered.

60 It should be noted that the place where the goods were physically transferred or should have been physically transferred to the purchaser at their final destination is the most consistent with the origins, objectives and scheme of Regulation No 44/2001 as the 'place of delivery' for the purposes of the first indent of Article 5(1)(b) of that regulation.

61 That criterion is highly predictable. It also meets the objective of proximity, in so far as it ensures the existence of a close link between the contract and the court called upon to hear and determine the case. It should be pointed out, in particular, that the goods which are the subject-matter of the contract must, in principle, be in that place after performance of the contract. Furthermore, the principal aim of a contract for the sale of goods is the transfer of those goods from the seller to the purchaser, an operation which is not fully completed until the arrival of those goods at their final destination.

62 In the light of all the above considerations, the answer to Question 2 is that the first indent of Article 5(1)(b) of Regulation No 44/2001 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.

Costs

63 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 (Fourth Chamber) hereby rules:

1. **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 where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of that regulation.**

2. **The first indent of Article 5(1)(b) of Regulation No 44/2001 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.**

[Signatures]

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* Language of the case: German.