OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 24 September 2009 [1]

I — Introduction, facts and main proceedings

1. The reference for a preliminary ruling is submitted to the Court by the Bundesgerichtshof (German Federal Court of Justice; 'the referring court'). The questions referred concern 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 [2] ('Regulation No 44/2001').

2. The referring court requires the Court's answers in order to determine whether the German courts have jurisdiction to give judgment on the action for damages brought in the main proceedings by Car Trim GmbH, an undertaking established in Plauen (Germany) ('the claimant'), against KeySafety Systems SRL, an undertaking established in Villastone (Italy) ('the defendant').

3. From July 2001 to December 2003 the defendant bought from the legal predecessor of the claimant components for airbag systems, the necessary parts and materials for which were primarily provided by other 'upstream' suppliers. With regard to the production and delivery of these components, which the claimant agreed to deliver to the defendant at call, free works Colleferro (Italy), the parties concluded five framework delivery contracts, each relating to a specific type of vehicle.

4. The defendant terminated the various contracts with effect from the end of 2003. Considering those terminations to be a breach of contract, the claimant brought an action for damages before the Landgericht (Regional Court) Chemnitz which at that time had jurisdiction for its place of production. That court rejected the action as inadmissible, on the ground that the German courts lacked international jurisdiction. The claimant's appeal was rejected by the Oberlandesgericht (Higher Regional Court) Dresden. The claimant then brought an appeal on a point of law before the referring court, for which permission was granted by the appeal court.

1 — Original language: French.
2 — OJ 2001 L 12, p. 1.

II — Legal framework

5. The second recital in the preamble to Regulation No 44/2001 provides:

'Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions 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 are essential.'

6. Pursuant to the eleventh recital in the preamble to Regulation No 44/2001:

'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.'

7. The twelfth recital in the preamble to Regulation No 44/2001 provides:

'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.'

8. The rules of jurisdiction are set out in Chapter II of Regulation No 44/2001.

9. Article 2(1) of Regulation No 44/2001, which forms part of Section 1 ('General provisions') of Chapter II, 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.'

10. Article 5 of Regulation No 44/2001, which forms part of Section 2 ('Special jurisdiction') of Chapter II, 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,

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

...'

III — Questions referred and procedure before the Court of Justice

11. The referring court decided to stay the proceedings and to refer the following two questions to the Court of Justice 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 delivery of goods to be produced or manufactured are, notwithstanding specific requirements by 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?'

12. Written observations were lodged by the defendant in the main proceedings, the German, Czech and United Kingdom Governments and the Commission of the European Communities.

delivery of goods to be produced or manufactured and delivered in accordance with the specific obligations on the part of the customer, have to be classified as a 'sale of goods' or as a 'provision of services' within the meaning of Article 5(1)(b) of Regulation No 44/2001. It also asks what criteria are decisive for distinguishing between a 'sale of goods' and the 'provision of services' for the purposes of Regulation No 44/2001.

14. As regards contracts for the delivery of goods to be produced or manufactured, the parties which lodged written observations unanimously believe that they should be classified as contracts for the sale of goods, notwithstanding specific requirements 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. The Commission adds that that is not the case if the person who orders those goods has itself to provide an essential part of the materials necessary for the production or manufacturing.

IV — Assessment

A — *The first question referred*

13. By its first question the referring court seeks to determine whether contracts for the

15. The German and United Kingdom Governments have also given thought to the decisive criteria for distinguishing between 'sale of goods' and 'provision of services'. In the view of the German Government, economic criteria need to be used to examine which obligations characterise the

contract. According to the United Kingdom Government, the characteristic performance of such contracts remains the delivery and transfer of title to the produced goods.

16. I consider that the first question referred may be interpreted in several ways. It may be understood as inviting the Court to define the criteria for distinguishing between 'sale of goods' and 'provision of services' in a general manner or to define the criteria solely for the purposes of the case in the main proceedings, or as a means of drawing inferences for the specific case of the general distinction between 'sale of goods' and 'provision of services'.

17. It should be pointed out that the wording of Article 5(1)(b) of Regulation No 44/2001 does not, in itself, provide an answer to the question referred since it fails to define 'sale of goods' and 'provision of services'. In that regard, the Court has pointed out that the answer must be based on the origins, objectives and scheme of Regulation No 44/2001. [3] I do not consider it useful to go back over the origins, objectives and scheme of that regulation. It is sufficient to refer to the Court's recent case-law. [4]

18. Community law and the Court's case-law are not sufficient to establish the criteria for a general distinction between 'sale of goods' and 'provision of services'. As is apparent from paragraph 33 of *Falco Privatstiftung and Rabitsch*, [5] the notion of 'service' used in Regulation No 44/2001 has its own content which is independent of the interpretation of that notion in relation to Article 50 EC or secondary Community legislation other than Regulation No 44/2001. The same finding can be made, in my view, for the notion of 'goods'. Consequently, the Court's case-law which interprets the notions of 'service' and 'goods' with regard to the fundamental freedoms of the internal market is not applicable in the context of Regulation No 44/2001.

19. Thus far the Court has only given a partial, negative definition of the notion of 'contract for the provision of services' within the meaning of Regulation No 44/2001, ruling that that notion does not concern a contract

3 — See Case C-386/05 *Color Drack* [2007] ECR I-3699, paragraph 18; Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327, paragraph 20; and Case C-204/08 *Rehder* [2009] ECR I-6073, paragraph 31.

4 — See *Falco Privatstiftung and Rabitsch*, cited in footnote 3 above, paragraphs 21 to 27.

5 — Cited in footnote 3.

under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration. [6] However, no general conclusions can be drawn from that.

20. I consider it unnecessary to carry out a general analysis of the distinction. In the light of the numerous aspects of economic life, a general distinction is not objectively possible. In so far as procedural law uses notions with a substantive content, such as 'goods' and 'services' in the present case, it is evident that the interpretation of such notions and their distinction from one another must be determined on a case by case basis in substantive Community law, taking account, in particular, of the object of using such notions.

21. That premiss provides a starting point for my answer to the first question referred. It should be noted that I can only give an answer in the light of the particular circumstances of the case in the main proceedings.

22. In that regard, the claimant concluded with the defendant five framework delivery contracts for components for airbag systems.

It is true that the defendant, which was the purchaser, set certain conditions relating to the quality of those components. None the less, that in no way changes the fact that the purpose of the contracts at issue was the delivery of goods with the agreed properties.

23. Even if it were to be accepted, following the example of the Oberlandesgericht Dresden, the appeal court in the main proceedings, that among the contractual obligations of the claimant are those falling within the concept of provision of services, namely the cutting and transformation of components purchased from 'upstream' subcontractors to adapt them to meet the needs of the defendant, those obligations would only constitute ancillary contractual obligations. The Court has already recognised the principle of *accessorium sequitur principale*, [7] which the defendant also refers to in its written observations.

24. It follows that the essential obligation in the contracts in question was the delivery of components for airbag systems and, conse-

6 — See *Falco Privatstiftung and Rabitsch*, cited in footnote 3, paragraph 44.

7 — See Case 266/85 *Shenavai* [1987] ECR 239, paragraph 19.

quently, the contractual relationship between the claimant and the defendant, its content and its consequences must fall under the first indent of Article 5(1)(b) of Regulation No 44/2001.

25. Finally, if the contracts entered into between the claimant and the defendant were tested in the light of the criteria of the fundamental freedoms of the internal market, it is indisputable that they would fall within the free movement of goods and not the free movement of services.

26. Therefore, the answer to the first question referred is that Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that contracts for the delivery of goods to be produced or manufactured are to be classified as a sale of goods, notwithstanding specific requirements 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.

B — *The second question referred*

27. By its second question, the referring court essentially asks the Court to interpret, in relation to contracts involving the carriage of goods, the meaning of 'the place in a Member State where, under the contract, the goods were delivered or should have been delivered' in the first indent of Article 5(1)(b) of Regulation No 44/2001 in order to determine the place of performance of the obligation, which is a linking factor to determine the competent court in matters relating to a contract.

28. The defendant and the Czech and German Governments unanimously agree, in principle, that, in the case of contracts involving carriage of goods, the place where, under the contract, the goods were delivered or should have been delivered should be determined according to the place of their physical transfer to the purchaser.

29. In their proposed answers to the second question referred, the United Kingdom Government and the Commission specify the type of contract of sale in more detail.

30. Nevertheless, the Commission's answer corresponds, in principle, to the answers proposed by the defendant and the Czech and German Governments. In the Commission's view, in the case of sales which require the carriage of goods and for which the seller has to hand over those goods to the first carrier for transmission to the purchaser ('sales by consignment'), the place of delivery

must be determined according to the place where the purchaser obtains actual possession of the goods or should have obtained it under the contract (place of destination of the goods sold).

31. According to the United Kingdom Government, the determination of the place of delivery depends on the terms of the contract. In cases where the seller's essential obligation is to ship the goods and (if applicable) provide documents transferring title to the buyer, then, subject to any contractual terms to the contrary, the relevant place of delivery is that at which the goods were handed over to the carrier for transmission to or at the direction of the buyer.

32. As a preliminary point, attention needs to be drawn to the fact that the notion of sale 'contracts involving carriage of goods' is one of national law and that its content may vary in the legal systems of the various Member States. Consequently, I believe that it would not be appropriate for the Court to interpret the wording 'the place in a Member State where, under the contract, the goods were delivered or should have been delivered' specifically in relation to that type of contract. The Court can only interpret that wording in relation to contracts of sale in general.

33. The wording 'the place in a Member State where, under the contract, the goods were delivered or should have been delivered' must be interpreted in accordance with the following facts.

34. First, according to the Court's case-law, Regulation No 44/2001 pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Community, by enabling both the claimant easily to identify the court in which he may sue and the defendant easily to foresee the court in which he may be sued. [8] It follows that the interpretation requested in the present case must ensure the right balance between the interests of the seller and the purchaser.

35. Second, the rule of special jurisdiction set out in Article 5(1) of Regulation No 44/2001 in matters relating to a contract, which supplements the rule that jurisdiction is generally based on the defendant's domicile, 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. [9]

8 — See Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraphs 24 and 25; *Color Drack*, cited in footnote 3, paragraph 20; and *Falco Privatstiftung and Rabitsch*, cited in footnote 3, paragraph 22.

9 — See *Color Drack*, cited in footnote 3, paragraph 22, and *Rehder*, cited in footnote 3, paragraph 32.

36. Third, regarding the place of performance of the obligations arising from contracts for the sale of goods, the first indent of Article 5(1)(b) of Regulation No 44/2001 defines that criterion autonomously, in order to reinforce the objectives of unifying the rules of jurisdiction and of predictability. [10]

37. It follows from the above that the interpretation sought must take account of the objectives of proximity and predictability and be in conformity with the requirement of legal certainty.

38. I consider that those requirements are best met if 'the place in a Member State where, under the contract, the goods were delivered or should have been delivered' is understood as the place where the goods are physically handed over or should have physically been handed over to the purchaser. That interpretation of the place of delivery is most closely in line with the special jurisdiction rule in Article 5(1)(b) of Regulation No 44/2001.

39. Such an interpretation not only complies with the criterion of proximity, but also satisfies the requirement of predictability, in so far as it allows the claimant, as well as the defendant, easily to identify the courts before which proceedings may be brought.

40. My suggested interpretation makes the place of physical transfer of the goods to the purchaser the basis for determining the place of delivery of the goods, without reference to the national law of the various Member States. That criterion is easily identifiable and easy to prove, so that the court with jurisdiction can be identified without any difficulty.

41. The answer to the second question referred is therefore that the wording 'the place in a Member State where, under the contract, the goods were delivered or should have been delivered' in the first indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as referring to the place where the goods are or should have been physically handed over to the purchaser.

10 — See *Color Drack*, cited in footnote 3, paragraphs 24 and 26, and *Rehder*, cited in footnote 3, paragraph 33.

V — Conclusion

42. In view of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling from the Bundesgerichtshof as follows:

(1) Article 5(1)(b) of Regulation 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 contracts for the delivery of goods to be produced or manufactured are to be classified as a sale of goods, notwithstanding specific requirements by the customer with regard to the provision, fabrication and delivery of the components to be produced, including a guarantee of the quality of production.

(2) The wording 'the place in a Member State where, under the contract, the goods were delivered or should have been delivered' in the first indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as referring to the place where the goods are or should have been physically handed over to the purchaser.