OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 3 March 2011 [1]

I — Introduction

1. The reference for a preliminary ruling from the Tribunale di Vicenza of 15 February 2010 concerns the interpretation of the concept of place of performance in 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]

2. Under this provision, the place of performance provides a basis for a jurisdiction alternative to the general forum of the defendant's domicile. [3] Under Article 5(1)(b) of Regulation No 44/2001, the place of performance in the case of contracts for the sale of goods is, in principle, [4] the place of delivery of the goods.

3. In this case the specific question arises as to where this place is when the goods are delivered 'free [the Italian seller's] business premises' of the seller to a carrier and are transported by the carrier to the purchaser.

4. As regards contracts involving the carriage of goods, the Court recently considered the problem of identifying the place of delivery in its judgment of 25 February 2010 [5] and in the absence of any agreement otherwise by the parties took as a basis the place where the physical transfer of the goods to the purchaser took place 'at the final destination of the sales transaction'. [6]

5. In this case it is essentially necessary to clarify, by reference to the judgment in *Car Trim*, what relevance a contractual term such as that referred to in paragraph 3 above can have in determining the place of delivery.

1 — Original language: German.

2 — OJ 2000 L 12, p. 1. This regulation is now in force in the version amended by Commission Regulation (EC) No 416/2010 of 12 May 2010 (OJ 2010 L 119, p. 7).

3 — Article 2(1) of Regulation No 44/2001.

4 — '[U]nless otherwise agreed' (Article 5(1)(b) of Regulation No 44/2001).

5 — Case C-381/08 *Car Trim* [2010] ECR I-1255.

6 — According to paragraph 2 of the operative part of the judgment in *Car Trim*.

II — Legal framework

6. Article 5 of Regulation No 44/2001 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.

…'

III — International Commercial Terms or, abbreviated, Incoterms [7]

7. In drawing up the Incoterms the International Chamber of Commerce (ICC) created for the first time in 1936 a set of standard terms which has been constantly revised in the meantime. [8] Their purpose is to list international, but legally non-binding, rules to interpret the contractual formulae frequently used in foreign trade contracts. The uncertainties which may arise from different interpretations of such terms are thus to be avoided as much as possible. [9] As from 1 January 2011 a fundamentally new version of the Incoterms (Incoterms 2010) has been in force. [10]

8. The Incoterms build on standardised terms. They are assigned a particular meaning and a memorable three-letter abbreviation. The terms list the main obligations of

7 — 'Incoterms' is a trade mark of the International Chamber of Commerce.

8 — New versions, supplements and additional terms were published in 1953, 1967, 1976, 1980, 1990 and 2000 to keep pace with the development of international trade. See, in this regard, Jolivet, E., *Les Incoterms, Etude d'une norme du commerce international*, Litec, Paris 2003, paragraph 136 et seq. and p. 475 et seq., containing a chronological list of French Incoterms (up to 2000).

9 — *Incoterms 2000, Die offiziellen Regeln der ICC zur Auslegung von Handelsklauseln*, ICC Deutschland-Vertriebsdienst, Cologne 1999, p. 2.

10 — Zwilling-Pinna, C., *Update wichtiger Handelsklauseln: Neufassung der Incoterms ab 2011*, Betriebs-Berater 2010, p. 2980 et seq.

the seller [11] and purchaser [12] with regard to the supply of the goods, such as the rules governing delivery, the time of the transfer of risk, and which of the parties is to bear transport or insurance costs. The various terms and the list of obligations take account of the parties' possible different areas of interest. Sometimes they place a heavier burden on the purchaser, sometimes on the seller. In terms of terminology the Incoterms 2000 are guided by the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980. [13]

9. In relation to delivery the so-called 'EXW' (ex works) collection term of the Incoterms 2000 provides under A4:

'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 …'

10. Point B4 reads:

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

IV — Facts and question referred

11. In the main proceedings goods were delivered 'free business premises [of the Italian seller]' [14] to a carrier and transported to France to the purchaser established there. When pursued for payment in Italy, the purchaser raised the objection that the Italian courts lacked jurisdiction and pointed out that it had its headquarters in France. In the view of the seller the jurisdiction of the Italian court followed from the abovementioned contractual term.

12. The referring court considered that the final destination of the goods in France or the place where the goods were handed over to the carrier in Italy could be the place of performance, establishing jurisdiction, within the meaning of Article 5 of Regulation No 44/2001.

11 — In the Incoterms 2000 marked in the list of obligations with the letter 'A' and numbered throughout. For example, the rules on delivery are to be found under A4.

12 — Marked 'B'.

13 — *Incoterms 2000, Die offiziellen Regeln der ICC zur Auslegung von Handelsklauseln* (footnote 9), p. 10.

14 — The original of the contract of 13 March 2008 states: 'Resa: Franco ns. sede'.

13. That is the context in which the national court referred the following question to the Court for a preliminary ruling:

'Must Article 5(1)(b) of Regulation No 44/2001 – 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?'

V — Legal assessment

A — *Preliminary remark*

14. By its request for a preliminary ruling, received at the Court Registry on 15 February 2010, the referring court initially stirred up a legal 'hornets' nest',[15] namely that of identifying the place of delivery in the case of contracts involving the carriage of goods.[16]

15. The question was the subject of great dispute in legal literature[17] and case-law.[18] The approaches to the problem ranged across the spectrum of alternatives listed by the referring court. In schematically outlining the state of the debate, it was unclear inter alia whether the place of delivery should be determined in accordance with more easily accessible factual criteria or by reference to assessments in the light of substantive law.

15 — According to Mankowski in his comments on the *Car Trim* judgment published in EWiR 2010, Art. 5 EuGVVO 1/10, p. 287 et seq.

16 — In his abovementioned comments on the *Car Trim* judgment Mankowski points out that the Court does not make a distinction according to whether the carrier of the goods was commissioned by the seller or the purchaser.

17 — A subtle interpretation of the provision with a comprehensive assessment of academic writings and case-law is to be found in Wipping, F., *Der europäische Gerichtsstand des Erfüllungsorts – Art. 5 Nr. 1 EuGVVO*, Duncker & Humblot, Berlin 2008, p. 180 et seq.; Lynker, Th., *Der besondere Gerichtsstand am Erfüllungsort in der Brüssel I-Verordnung (Art. 5 Nr. 1 EuGVVO)*; Peter Lang, Frankfurt am Main 2006, p. 84 et seq.; and Ignatova, R., *Art. 5 Nr. 1 EuGVO – Chancen und Perspektiven der Reform des Gerichtstands am Erfüllungsort*, Peter Lang, Frankfurt am Main 2005, p. 210 et seq. The latter investigates inter alia whether the place of dispatch or destination is to be taken as the basis, makes a grammatical comparison of the various language versions in that respect, and concludes that '[t]he wording of the provision is open.'

18 — See the references in footnote 17, the overall view in Wittwer, A., *Gerichtsstand des Erfüllungsorts beim internationalen Versendungskauf*, European Law Reporter 2010, p. 151, at p. 152, and the request for a preliminary ruling from the German Bundesgerichtshof of 9 July 2008 in the case of *Car Trim* to be found under file reference VIII ZR 184/07 on the homepage of the Bundesgerichtshof (http://www.bundesgerichtshof.de/cln_134/DE/Entscheidungen/entscheidungen_node.html).

16. However, 10 days after the request for a preliminary ruling was received, the Court smoked out the 'hornets' nest', so to speak, and in its judgment in *Car Trim* ruled: '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 ["the Car Trim formula"].' [19]

17. Consequently, at first sight the problems raised by the referring court appeal appear to have been resolved in the light of the *Car Trim* judgment. In the first instance, the place of delivery must accordingly be determined by the national court [20] on the basis of the arrangements between the parties, which are by themselves conclusive, but only in so far as this is possible without, in advance and in addition, applying applicable substantive law to the contract. [21] Where the place of delivery cannot be determined thus on the basis of the contract, it is necessary to take as a basis, in the second instance, the place where the goods were handed over to the purchaser. [22]

B — *Similarities and differences between the present case and the Car Trim case*

18. However, on closer inspection it is clear that both the facts underlying the judgment in *Car Trim* and the questions to be answered at that time differ from those of the present case.

1. *Car Trim* case

19. In *Car Trim* delivery was to be made to the defendant Italian purchaser 'as agreed, at call free works Colleferro' [23] ('the Car Trim term').

20. It is at first surprising that this term is not examined in greater detail in *Car Trim*.

19 — Paragraph 2 of the operative part. Emphasis added here alone.

20 — *Car Trim*, paragraph 54.

21 — *Car Trim*, paragraph 53.

22 — *Car Trim*, paragraphs 60 to 62.

23 — According to point No 3 of the Opinion of Advocate General Mazák of 24 September 2009.

Essentially, the Court merely makes the general finding that 'the parties to the contract enjoy a certain freedom in defining the place of delivery of the goods.' [24] It does not comment on whether such freedom of the parties to define the place of delivery can be expressed specifically in the term 'at call free works'.

21. However, for two reasons the Court was not required to consider in detail the 'at call free works' arrangement between the parties and examine whether it could constitute agreement concerning the place of delivery. Firstly, the Court assigns clarification of such matters to the national court, [25] and, secondly, it is not assumed even in the question referred that the term at issue could be relevant in defining the place of delivery. [26] Nor is that surprising since it is clear from the request for a preliminary ruling from Bundesgerichtshof of 9 July 2008 [27] that the court hearing the appeal examined 'in light of the facts' this 'clause agreed at the beginning of the contractual relationship' and ruled that 'in the overall context of the contractual settlement' it was to be regarded not as an agreement concerning the place of delivery but rather an arrangement regarding costs. [28]

22. In other words, neither the national court nor the Court of Justice was obliged to attach to the term in question any meaning relevant to the resolution of the dispute in terms of identifying the place of delivery.

2. Electrosteel Europe case

23. The contract at issue in the main proceedings contains a provision, which on the face of it appears similar to the Car Trim term, under which the goods are to be handed over as per contract 'free business premises [of the Italian seller]'. However, in this regard the referring court merely points to the existence of this term without commenting specifically on its relevance in determining the place of delivery.

24. By contrast, the parties to the proceedings take firm and opposite views on this point. The seller regards it as a commercial term which is to be equated with the Incoterm

24 — *Car Trim*, paragraph 45.

25 — *Car Trim*, paragraph 54.

26 — The second question in the *Car Trim* case was worded: '[I]n 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?'

27 — See footnote 18 above.

28 — This appears to have been overlooked by Wittwer (footnote 18), p. 193, at p. 195.

'franco fabbrica' (ex works, abbreviated to: EXW) and therefore constitutes determination, on the basis of the contract, of the place of delivery within the meaning of the *Car Trim* judgment. Therefore, the decisive factor as regards the place of performance is the place where items sold are handed over to the carrier in Italy and not the final destination of the goods in France. On the other hand, the Commission places high requirements on determination, on the basis of the contract, of the place of delivery by the parties. which must specify clearly the form, time and place of the handover of the items sold. Incoterms and similar terms primarily govern the transfer of risk and the bearing of costs. The term at issue in the main proceedings is irrelevant in determining the place of delivery because it is unclear, from an overall assessment of the case files, as to what normative purpose the term pursues. Therefore, in the light of the *Car Trim* judgment it is necessary, in the absence of a definition, in the contract, of the place of delivery, to take as a basis the final destination of the goods at which the purchaser obtains actual power of disposal over them. This must be understood in purely factual terms as taking of possession, without any importance being attached to the legal aspect of transfer of ownership.

C — *Questions to be resolved*

25. First and foremost it is necessary to clarify the meaning of the term 'free business premises [of the Italian seller]' in the present case.

26. It is ultimately for the referring court to provide that clarification. [29] It may have to examine whether or not the term has become an effective part of the contract, to establish the parties' specific intentions, and, where necessary, also to acknowledge that the term in question is not completely identical to the Incoterm 'franco fabbrica'. [30]

27. However, it is not for the Court of Justice to comment on this.

28. This must be distinguished from the general question of what requirements Article 5(1)(b) of Regulation No 44/2001 places on an agreement concerning the place of performance or definition in the contract of the place of delivery which is to be taken into account by the national court.

29. Although the *Car Trim* judgment allows the place of delivery to be established on the basis of the provisions of the contract, it makes it clear that the place of delivery is to be determined in any event without reference to the law applicable to the contract. [31]

29 — *Car Trim*, paragraph 54.

30 — As regards the problems of interpreting delivery terms, see Fogt, M.M., *Die Vereinbarung und Auslegung von FRANCO-Lieferklauseln beim CISG-Kauf*, The European Legal Forum 2003, pp. 61, 67 and 68.

31 — *Car Trim*, paragraph 53.

30. In those circumstances, the question arises as to whether commercial terms such as Incoterms, in respect of whose interpretation the rules of the International Chamber of Commerce must be relied on, satisfy the requirement that provisions must be clearly defined that is touched on in the operative part of the *Car Trim* judgment in relation to establishment of the place of delivery on the basis of the contract. If reference to the substantive law applicable to the contract is precluded, could the same also apply to reliance on the Incoterms.

31. Since it cannot be ruled out that the national court will refer to the Incoterms in interpreting the contractual term at issue,[32] I consider it useful to consider this issue in answering the question referred. It is also covered by the comprehensive question referred by the national court which makes a general request to the Court of Justice for an interpretation of Article 5(1)(b) of Regulation No 44/2001 ('… or is that rule open to a different interpretation …') in relation to the case brought before it.

32. Therefore, I will consider, as a first step, whether commercial terms such as Incoterms are capable of determining the place of delivery on the basis of the contract for the purposes of paragraph 2 of the operative part of the *Car Trim* judgment. As a second step, the 'Car Trim formula' must be adapted to the present case in the light of the conclusion thus reached.

1. Are Incoterms and similar commercial terms with specifically defined content provisions of a contract on whose basis the place of delivery within the meaning of Article 5(1)(b) of Regulation No 44/2001 can be determined?

33. The *Car Trim* judgment sets out the latitude available to the parties as regards determination on the basis of the contract of the place of delivery within the meaning of Article 5(1)(b) of Regulation No 44/2001.

34. From a schematic point of view, according to the structure of Article 5(1)(b) of Regulation No 44/2001 a distinction must be drawn between agreements concerning 'the place of performance of the obligation' and agreements concerning the place of delivery.

32 — Magnus suggests that reference should be made to the Incoterms definition to interpret a term which is also defined in the Incoterms even if the parties have not expressly taken it into account, where there are no clear indications of a different intention of the parties (von Staudinger, J., Magnus, U., *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht [CISG]*, Sellier-de Gruyter, Berlin 2005, Art. 31 CISG, paragraph 31).

(a) Permissibility of agreements concerning the place of performance in the light of the conflicting expressions 'unless otherwise agreed' and '[place of delivery] under the contract' (Article 5(1)(b) of Regulation No 44/2001)

35. At first sight the wording of Article 5(1)(b) of Regulation No 44/2001 appears to provide two possibilities as regards determination of the place of performance on the basis of the contract: one, a kind of indirect agreement concerning the place of performance by specifying the place of delivery in the contract [33] as the 'the place … where, under the contract, the goods … should have been delivered' [34] and, two a direct agreement concerning the place of performance which is possibly even unrelated to the place of delivery, [35] since according to the wording of Article 5(1)(b) reference is to be made to the place of delivery to determine the place of performance only 'unless otherwise agreed'.

36. However, the extent to which the parties can accordingly agree 'otherwise' as a link to the place of delivery ultimately remains largely unclear even after the *Car Trim* judgment, [36] and therefore the disputed approaches to interpretation in academic writings [37] on this matter still need to be clarified. [38]

37. However, this question is irrelevant in the present case because it does not concern whether possible agreements concerning the place of performance which are *unrelated to the place of delivery* are permitted, but whether the *place of delivery* can be effectively specified by a commercial term and whether the place of performance can be laid down thus by a contract.

33 — At paragraph 51 the *Car Trim* judgment acknowledges that the regulation is silent as to the definition of the concept of 'place of delivery' and refers first to the provisions of the contract for the purpose of determining it (paragraph 54).

34 — So-called 'legal' place of performance.

35 — However, within the scope of the Brussels Convention the Court objected to 'abstract agreements on the place of performance' having no connection with the service rendered by its judgment in Case C-106/95 *MSG* [1997] ECR I-911, paragraph 35, and held that they are permitted only where the requirements relating to agreements conferring jurisdiction (Article 17 of the Brussels Convention) are complied with at the same time. See, as regards the, moreover, pro-agreement case-law, the judgment in Case 56/79 *Zelger* [1980] ECR 89, paragraph 5.

36 — In his commentary on the *Car Trim* judgment in EuZW 2010, pp. 303 to 305, Lieble takes the view that since paragraph 46 refers to an agreement concerning the 'place of performance of the obligation' it can at least be concluded that, one, the Court does not permit account to be taken of places referred to in the contract instead of the place of performance and, two, that it continues to disapprove of abstract agreements concerning the place of performance.

37 — German academic writings in particular contain a large number of approaches to interpretation: for example, Klemm, M., *Erfüllungsortvereinbarungen im Europäischen Zivilverfahrensrecht*, Jenaer Wissenschaftliche Verlagsgesellschaft, Jena 2005, pp. 71 to 80, and comprehensively on the status of the dispute, Leible, S., in Rauscher, Th., *Europäisches Zivilprozessrecht und Kollisionsrecht EuZPR/EuIPR*, 2011 revised edition, Sellier, Munich 2011, Art. 5 Brüssel I-VO, p. 57b.

38 — Significant is the apparently fatalistic finding by Briggs, A. and Rees, R., *Civil Jurisdiction and Judgments*, Informa Publishing Group, 3. 2002 edition, p. 131: 'It is close to impossible to make sense of the words "or otherwise agreed" … They can be forgotten until an imaginative court is able to breathe meaning into them.'

(b) The criteria of the 'Car Trim formula' on determination of the place of delivery on the basis of the contract and the application thereof to commercial terms with specifically defined content

38. According to the *Car Trim* judgment, the parties to the contract are free to conclude an agreement concerning the place of delivery, [39] but it must be possible to identify that place of delivery from the contract, 'without reference to the substantive law applicable to the contract.' [40]

39. If these criteria are projected, for example over the ex work term of the Incoterms 2000, it can first be seen that it does not refer to the substantive law applicable to the contract. If the *Car Trim* judgment were taken strictly on its wording, the term would therefore be unobjectionable.

40. The ex works clause would also be readily capable of determining the place of delivery because it describes not only the transfer of risk (Points A5 and B5), but also the place of delivery (Points A4 and B4) in the sense that it is a pure collection term. A view taken in academic writings [41] and case-law [42] that the place of delivery and performance within the meaning of Article 5(1)(b) of Regulation No 44/2001 can be determined by the ex works Incoterm effectively incorporated into the contract is accordingly confirmed.

41. This view also seems tenable to me. Why should the parties be precluded from using precise commercial terms to determine the place of delivery on the basis of a contract? They have in their favour the fact that they are well thought-out and have an objectively identifiable meaning on account of the rules of the International Chamber of Commerce unlike, perhaps, contractual terms which are drawn up freely by the parties or in a foreign language which is not perfectly mastered.

42. By contrast, the objection that the specific meaning of the term will not be evident to the person applying the law, such as the court examining its jurisdiction, until it has consulted the rules of the International Chamber of Commerce, is unconvincing.

43. Although in *Car Trim* the Court expressly supported the principle of pragmatic determination of the place of enforcement with

39 — *Car Trim*, paragraphs 45 and 46.

40 — *Car Trim*, paragraph 55.

41 — See, for example, Leible (footnote 37), with further references.

42 — See, for example on the term 'delivery: ex works', the decision of the Oberlandesgericht Karlsruhe of 28 March 2006, IPRspr 2006, No. 111, pp. 242 to 250.

no reference to conflict-of-law rules and substantive law,[43] reference to clearly specified Incoterms does not appear to me comparable with the 'reference to the substantive law applicable to the contract'[44] condemned by the Court. Their specific meaning can be established independently of complex legal issues by consulting the readily available rules. This is true at least where the Incoterm is worded clearly also as regards the version in force (e.g. Incoterms 2000). It would be sheer formalism, with no legal basis in Article 5 of Regulation No 44/2001, to make the answer to the question whether a place of delivery may be effectively agreed by an Incoterm, contingent on whether or not a copy of the relevant rules describing the term is attached additionally to the contract.

(c) Interim conclusion

44. As an interim conclusion, it must therefore be stated that Incoterms and similar commercial terms can in principle be provisions of contracts on whose basis the place of delivery within the meaning of Article 5(1)(b) Regulation No 44/2001 can be determined.

2. Adaptation of the 'Car Trim formula' in the present case

45. In order to provide the referring court with a meaningful reply, it should be pointed out that principles listed in *Car Trim* are to apply to contracts of sale in general and not only to contracts involving the carriage of goods. Article 5(1)(b) of Regulation No 44/2001 – like, moreover, the question referred in the present case – does not differentiate by contracts involving the carriage of goods and other contracts of sale,[45] although it must be conceded that determining the place of delivery gives rise to particular problems precisely in the case of contracts involving the carriage of goods.

46. As a preliminary point, the agreement between the parties, which is by itself conclusive, is generally decisive.[46] Incoterms and similar commercial terms with specifically defined meaning can in principle be provisions of contracts on whose basis the place of

43 — *Car Trim*, paragraphs 53 and 54.

44 — *Car Trim*, paragraph 2 of the operative part.

45 — See also Advocate General Mazák at point 32 of his Opinion in *Car Trim*.

46 — *Car Trim*, paragraphs 54 and 55.

delivery within the meaning of Article 5(1)(b) of Regulation No 44/2001 can be determined.

47. Where it is not possible to determine the place of delivery on the basis of the arrangement between the parties, which is by itself conclusive, it is necessary, as in *Car Trim*, to proceed in accordance with the principle of 'pragmatic determination of the place of enforcement' on the basis of factual criteria [47] and to take as a basis the place where the physical transfer of the goods to the purchaser took place, as a result of which actual power of disposal over those goods is obtained.

48. The fact that this is a purely factual criterion linked to mere ownership is sufficiently clear from the binding version of the judgment in *Car Trim* and requires no clarification.

49. However, what the Car Trim formula means by transfer 'at the final destination of the sales transaction' does require further clarification.

50. It is to be the place where 'the goods which are the subject-matter of the contract [are], *in principle*, … after performance of the contract [by physical transfer to the purchaser [48]].' [49]

51. From this it is evident, one, that the handing over of the goods to the carrier (who is not the same person as the purchaser) does not in any event establish a place of delivery. [50] From the point of view of the Court, the sales transaction is not completed until the physical transfer of the goods to the purchaser has taken place.

52. From this it is clear, two, that any *unforeseen* further movement of the goods by the purchaser is irrelevant in identifying the place of delivery since such as further transportation, for example from the purchaser's warehouse to other business premises, would fall outside the sales transaction and lead to a place where the goods do *not, in principle,* have to be after performance of the contract.

53. Moreover, since decisive account must be taken of the sales transaction, the criterion of the final place of destination would appear to apply not only to contracts involving the carriage of goods but also to cases where the purchaser collects goods in person. Then

47 — *Car Trim*, paragraph 52.

48 — *Car Trim*, paragraph 60.

49 — *Car Trim*, paragraph 61. Emphasis added here alone.

50 — See also Mankowski (footnote 15), p. 288.

the 'final destination of the sales transaction' would be reached precisely at the seller's establishment and the sales transaction would be completed by the transfer of the goods to the purchaser collecting them.

54. Therefore, the physical transfer to the purchaser during the performance of the contract is ultimately decisive in all these cases. On closer examination of the situations cited, that transfer is necessary, and also sufficient, to establish the place of delivery.

55. In the light of the foregoing, the question arises as to whether taking additional account of the criterion of the 'final place of destination' creates more confusions than it brings benefit. From a schematic point of view, this criterion also appears questionable because it is reminiscent of that of the 'final place of delivery of the goods …' in Article 63(1) of Regulation No 44/2001, which is to apply expressly only to persons domiciled in Luxembourg. There are no grounds for generalising this exception in the case of contracts involving carriage of goods.

56. However, the adjective 'final' in particular causes confusion. How would the situation have to be assessed if, for example, the goods were placed temporarily in intermediate storage in a warehouse of the purchaser and then moved to other business premises by the purchaser and the seller had been aware of this intention from the outset? It is easy to imagine serious debate arising over the criterion of 'final'. In this case the problem also arises of the division between any final place of destination (other business premises) and the place where the first transfer actually takes place (temporary store).

57. Therefore, it would appear to me preferable to abandon the expression 'at the final destination of the sales transaction'. The place where the physical transfer of the goods to the purchaser took place provides the parties with a sufficiently clear and foreseeable criterion which requires no further adaptation.

VI — Conclusion

58. I therefore suggest that the Court answer the question submitted by the referring court as follows.

'Article 5(1)(b) of Regulation (EC) No 44/2001 must be interpreted as meaning that the place of delivery, relevant for the purposes of determining the court having jurisdiction, is to be determined on the basis of the contractual arrangements between the parties concerned.

Incoterms and similar commercial terms with specifically defined content can in principle be the provisions of a contract on whose basis the place of delivery within the meaning of Article 5(1)(b) of Regulation No 44/2001 can be determined.

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.'