JUDGMENT OF THE COURT (Fourth Chamber)

23 April 2009 *

In Case C-533/07,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Oberster Gerichtshof (Austria), made by decision of 13 November 2007, received at the Court on 29 November 2007, in the proceedings

Falco Privatstiftung,

Thomas Rabitsch

v

Gisela Weller-Lindhorst,

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of Chamber, T. von Danwitz, E. Juhász, G. Arestis and J. Malenovský, Judges,

Advocate General: V. Trstenjak,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2008,

after considering the observations submitted on behalf of:

— Falco Privatstiftung and T. Rabitsch, by M. Walter, Rechtsanwalt,

— G. Weller-Lindhorst, by T. Wallentin, Rechtsanwalt,

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

— the Italian Government, by I.M. Braguglia, acting as Agent, and by W. Ferrante, avvocato dello Stato,

— the United Kingdom Government, by C. Gibbs, acting as Agent,

— 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 27 January 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(1)(a) and the second 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).

2 The reference was made in proceedings between Falco Privatstiftung, a foundation established in Vienna (Austria), and Mr Rabitsch, residing in Vienna (Austria), on the one hand and Ms Weller-Lindhorst, domiciled in Munich (Germany), on the other hand, concerning, first, the performance of a contract pursuant to which the applicants in the main proceedings have licensed the defendant in the main proceedings to market, in Austria, Germany and Switzerland, video recordings of a concert and, second, the marketing, without any contractual basis, of audio recordings of the same concert.

Legal context

The Brussels Convention

3 Article 5(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), as amended by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1, 'the Brussels Convention') provides:

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

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

Regulation No 44/2001

4 Recital 2 in the preamble to Regulation No 44/2001 states:

'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.'

5 Recital 11 in the preamble to Regulation No 44/2001 is worded as follows:

'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. …'

6 Recital 12 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.'

7 Recital 19 in the preamble to Regulation No 44/2001 states:

'Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court …'

8 The rules on jurisdiction laid down by Regulation No 44/2001 are set out in Chapter II thereof, consisting of Articles 2 to 31.

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

'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 3(1) which appears in the same section, 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.'

11 Article 5, which appears in Section 2, entitled 'Special jurisdiction', of Chapter II 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,

— 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 Article 5(b) does not apply then Article 5(a) applies;

…

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

…'

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

12 It is apparent from the order for reference that the applicants in the main proceedings request payment of royalties, calculated by reference to the, partially known, amount of sales of video recordings of a concert. They also request that the defendant in the main proceeding be ordered to provide an account of all sales of video and audio recordings and to pay the resulting supplementary royalties. In support of their claims, the applicants in the main proceedings rely on, with regard to the video recordings, the provisions of the contract between them and their contractual partner and, with regard to the sales of audio recordings, a copyright infringement, there being no contractual basis in that regard.

13 At first instance, the Handelsgericht Wien (Commercial Court, Vienna), before which the applicants in the main proceedings brought the matter, held that it had jurisdiction to rule on those claims, pursuant to Article 5(3) of Regulation No 44/2001. It considered that, in view of the close link between the rights relied on, its jurisdiction also covered the fees owed for the video recordings pursuant to the contract at issue, a finding which was challenged by the defendant in the main proceedings.

14 On appeal, the Oberlandesgericht Wien (Higher Regional Court, Vienna) held that Article 5(3) of Regulation No 44/2001 was not applicable to contractual rights, nor was the second indent of Article 5(1)(b) applicable, since the contract in question was not a contract for the provision of services within the meaning of that provision.

15 An appeal on a point of law having being brought before the Oberster Gerichtshof (Supreme Court), concerning only the claims in relation to the distribution of the video recordings, that court noted that the concept of 'provision of services' is not defined in Regulation No 44/2001. Referring to the case-law of the Court of Justice on the freedom to provide services and to certain directives on value added tax ('VAT') favouring a broad interpretation of the concept of services, the referring court asks whether a contract under which the owner of an intellectual property right grants its contractual

partner the right to use that right in return for remuneration is a contract regarding 'the provision of services' within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001. Should that be the case, the referring court raises the question of the place of provision of that service and the question whether the competent court can also rule on the payments in relation to the use of the intellectual property rights in question in another Member State or in a third country.

16 If jurisdiction cannot be based on the second indent of Article 5(1)(b) of Regulation No 44/2001, the referring court considers that, by virtue of Article 5(1)(c) of that regulation, the rule set out in Article 5(1)(a) should be applied. According to the referring court, in matters involving Article 5(1)(a) of Regulation No 44/2001, the decisive factor is the place of performance of the contested obligation, pursuant to Case 14/76 *De Bloos* [1976] ECR 1497; the place of performance must be determined in accordance with the law applicable to the contract at issue in the main proceedings, in accordance with Case 12/76 *Industrie Tessili Italiana Como* [1976] ECR 1473.

17 In the light of all of the above considerations, the Oberster Gerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is a contract under which the owner of an intellectual property right grants the other contracting party the right to use that right (a licence agreement) a contract regarding "the provision of services" within the meaning of Article 5(1)(b) of [Regulation No 44/2001]?

2. If Question 1 is answered in the affirmative:

   (a) Is the service provided at each place in a Member State where use of the right is allowed under the contract and also actually occurs?

   (b) Or is the service provided where the licensor is domiciled or at the place of the licensor's central administration?

   (c) If Question 2(a) or Question 2(b) is answered in the affirmative, does the court which has jurisdiction also have the power to rule on royalties which result from use of the right in another Member State or in a third country?

3. If Question 1 or Questions 2(a) and 2(b) are answered in the negative: is jurisdiction as regards payment of royalties under Article 5(1)(a) and (c) of [Regulation No 44/2001] still to be determined in accordance with the principles which result from the case-law of the Court of Justice on Article 5(1) of the [Brussels Convention]?'

The questions referred for a preliminary ruling

The first question

18 By its first question, the national court asks, essentially, whether a contract under which the owner of an intellectual property right grants its contractual partner the right to use the right in return for remuneration, is a contract for the provision of services within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001.

19 First of all, it should be noted that the wording of the second indent of Article 5(1)(b) of Regulation No 44/2001 does not of itself enable an answer to be given to the question referred, since it does not define the concept of a contract for the provision of services.

20 Consequently, the second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted in the light of the origins, objectives and scheme of that regulation (see, to that effect, Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 29; Case C-283/05 *ASML* [2006] ECR I-12041, paragraphs 16 and 22; and Case C-386/05 *Color Drack* [2007] ECR I-3699, paragraph 18).

21 In that regard, it is apparent from recitals 2 and 11 in its preamble that Regulation No 44/2001 seeks to unify the rules of conflict of jurisdiction in civil and commercial matters by way of rules of jurisdiction which are highly predictable.

22 Accordingly, 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 the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see *Reisch Montage*, paragraphs 24 and 25, and *Color Drack*, paragraph 20).

23 The rules of jurisdiction laid down by Regulation No 44/2001 are founded on the principle that jurisdiction is generally based on the defendant's domicile, as provided in Article 2 thereof, complemented by the rules of special jurisdiction (see *Reisch Montage*, paragraph 22, and *Color Drack*, paragraph 21).

24 Thus, the rule that jurisdiction is generally based on the defendant's domicile is complemented, in Article 5(1) of Regulation No 44/2001, by a rule of special jurisdiction in matters relating to a contract. The reason for that rule, which reflects a desire for proximity, is the existence of a close link between the contract and the court called upon to hear and determine the case.

25 Under that rule of special jurisdiction, the defendant may also be sued in the court for the place of performance of the obligation in question, since that court is presumed to have a close link to the contract.

26 In order to reinforce the primary objective of legal certainty which governs the rules of jurisdiction which it sets out, that criterion of a link is defined autonomously by Regulation No 44/2001 in the case of the sale of goods.

27 By virtue of the first indent of Article 5(1)(b) of that Regulation, the place of performance of the obligation in question is the place in a Member State where, under the contract, the goods were delivered or should have been delivered.

28 It is in the light of those considerations that it must be determined whether a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is a contract for the provision of services within the meaning of Article 5(1)(b) of Regulation No 44/2001.

29 In that respect, as the German, Italian and United Kingdom Governments have argued in the written observations which they have submitted to the Court, the concept of service implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration.

30 It cannot be inferred from a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration that such an activity is involved.

31 By such a contract, the only obligation which the owner of the right granted undertakes with regard to its contractual partner is not to challenge the use of that right by the latter. As pointed out by the Advocate General in point 58 of her Opinion, the owner of an intellectual property right does not perform any service in granting a right to use that property and undertakes merely to permit the licensee to exploit that right freely.

32 In that respect, it is immaterial whether the licensee of an intellectual property right holder is obliged to use the intellectual property right licensed.

33 That analysis cannot be called into question by the arguments concerning the interpretation of the concept of 'services' within the meaning of Article 50 EC or secondary Community legislation other than Regulation No 44/2001 and the broad logic and scheme of Article 5(1) of that Regulation.

34 First, no element in the broad logic and scheme of Article 5(1) of Regulation No 44/2001 requires that the concept of 'provision of services' set out in the second indent of Article 5(1)(b) of that Regulation be interpreted in the light of the Court's approach to the freedom to provide services within the meaning of Article 50 EC.

35 While that field requires, in certain circumstances, a broad interpretation of the concept of services, that approach is aimed at ensuring that as many economic activities as possible which do not fall within the scope of the free movement of goods, capital or persons do not, by virtue of being so excluded, fall outside the scope of application of the EC Treaty.

36 Under the scheme laid down by Regulation No 44/2001, the fact that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for the payment of remuneration, is not a contract for the provision of services within the meaning of Article 5(1)(b) of that Regulation, does not preclude that contract being subject to that regulation, in particular, to its other rules governing jurisdiction.

37 The broad logic and scheme of the rules governing jurisdiction laid down by Regulation No 44/2001 require, on the contrary, a narrow interpretation of the rules on special

jurisdiction, including the rule contained, in matters relating to a contract, in Article 5(1) of that Regulation, which derogate from the general principle that jurisdiction is based on the defendant's domicile.

38 For similar reasons, it is not necessary, secondly, to interpret the concept of the 'provision of services' set out in the second indent of Article 5(1)(b) of Regulation No 44/2001 in the light of the definition of the concept of 'services' in the Community directives on VAT.

39 As the Advocate General observed in points 71 and 72 of her Opinion, the definition of that concept provided by the directives on VAT is a negative definition which is, by its very nature, necessarily broad, since the concept of 'provision of services' is defined as any transaction which does not constitute a supply of goods. Therefore, those directives consider only two categories of economic activity as taxable transactions within the territory of the Community, namely the delivery of goods and the supply of services.

40 Under Article 5(1) of Regulation No 44/2001, when a contract for the sale of goods is not involved, jurisdiction is not determined, however, only on the basis of the rules which apply to contracts for the provision of services. In accordance with Article 5(1)(c) of that regulation, Article 5(1)(a) is applicable to contracts which are neither contracts for the sale of goods nor contracts for the provision of services.

41 Thirdly and lastly, the argument that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services, within the meaning the second indent of Article 5(1)(b) of Regulation No 44/2001, cannot be called into question by the requirement, put forward by the Commission of the

European Communities, that the scope of application of Article 5(1)(b) be broadly delimited in relation to Article 5(1)(a).

42 It should be noted that it is apparent from the scheme of Article 5(1) of Regulation No 44/2001 that the Community legislature adopted distinct jurisdiction rules, first, for contracts for the sale of goods and contracts for the provision of services and, secondly, for all other kinds of contracts which are not covered by specific provisions of that regulation.

43 Extending the scope of application of the second indent of Article 5(1)(b) of Regulation No 44/2001 would amount to circumventing the intention of the Community legislature in that respect and would have a negative impact on the effectiveness of Article 5(1)(c) and (a).

44 Having regard to all the above considerations, the answer to the first question referred is that the second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of that provision.

The second question

45 In the light of the answer given to the first question, it is not necessary to answer the second question.

The third question

46 By its third question, the national court asks whether, in order to determine, pursuant to Article 5(1)(a) of Regulation No 44/2001, the court having jurisdiction over an application for remuneration owed pursuant to a contract under which the owner of an intellectual property right grants to its contractual partner the right to use that right, reference must still be made to the principles which result from the case-law of the Court of Justice relating to Article 5(1) of the Brussels Convention.

47 The national court wishes to know, in particular, whether Article 5(1)(a) of Regulation No 44/2001 must be interpreted to the effect that, first, the concept of 'obligation' used in that Article refers to the obligation which arises under the contract and the non-performance of which is relied upon in support of the action and, secondly, the place where that obligation has or should be performed is to be determined in accordance with the law governing that obligation according to the conflict rules of the court before which the proceedings have been brought, as the Court has already held with regard to Article 5(1) of the Brussels Convention (see, respectively, with regard to the concept of 'obligation' referred to in Article 5(1) of the Brussels Convention, *De Bloos*, paragraph 13; Case 266/85 *Shenavai* [1987] ECR 239, paragraph 9; Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913, paragraph 23; Case C-420/97 *Leathertex* [1999] ECR I-6747, paragraph 31; and Case C-256/00 *Besix* [2002] ECR I-1699, paragraph 44, and with regard to the place of performance of that obligation within the meaning of Article 5(1) of the Brussels Convention, *Industrie Tessili Italiana Como*, paragraph 13; *Custom Made Commercial*, paragraph 26; Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-6307, paragraph 32; *Leathertex*, paragraph 33, and *Besix*, paragraphs 33 and 36).

48 It is clear that the wording of Article 5(1)(a) of Regulation No 44/2001 is identical in every respect to that of the first sentence of Article 5(1) of the Brussels Convention.

49 In that regard, Regulation No 44/2001 is very largely based on the Brussels Convention, and in adopting that approach the Community legislature aimed to ensure true continuity, as is apparent from recital 19 in the preamble to Regulation No 44/2001.

50 While Regulation No 44/2001 is intended to update the Brussels Convention, it seeks at the same time to retain its structure and basic principles and to ensure its continuity.

51 In the absence of any reason for interpreting the two provisions differently, consistency requires that Article 5(1)(a) of Regulation No 44/2001 be given a scope identical to that of the corresponding provision of the Brussels Convention, so as to ensure a uniform interpretation of the Brussels Convention and Regulation No 44/2001 (see, to that effect, Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 49).

52 As the Italian Government has argued in its observations, the provisions of the Brussels Convention which were taken up without amendment by Regulation No 44/2001 should receive the same interpretation under the regulation, and this is all the more necessary given that the regulation replaced the Brussels Convention in relations between the Member States (see, to that effect, *Henkel*, paragraph 49, and Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, paragraph 28).

53 As the United Kingdom Government has stated in its observations, the continuity of interpretation is, moreover, consistent with the requirements of legal certainty which dictate that the long-standing case-law of the Court, which the Community legislature did not intend to alter, should not be called into question.

54 In that regard, and as pointed out by the Advocate General in points 94 and 95 of her Opinion, it is apparent from the legislative history of Regulation No 44/2001, and from the structure of Article 5(1), that it was only in relation to contracts for the sale of goods and the provision of services that the Community legislature intended, first, no longer to refer to the contested obligation, but to determine the characteristic obligation of those contracts and, secondly, to define, independently, the place of performance as a connecting factor to the competent court in matters relating to a contract.

55 Consequently, it must be considered that the Community legislature intended, in relation to Regulation No 44/2001, to maintain, for all contracts other than those concerning the sale of goods and the provision of services, principles established by the Court in relation to the Brussels Convention, regarding, in particular, the obligation to take into consideration, and the determination of, the place of its execution.

56 Therefore, the scope to be given to Article 5(1)(a) of Regulation No 44/2001 should be identical to that of Article 5(1) of the Brussels Convention.

57 Having regard to all the foregoing considerations, the answer to the third question is that, in order to determine, under Article 5(1)(a) of Regulation No 44/2001, the court having jurisdiction over an application for remuneration owed pursuant to a contract under which the owner of an intellectual property right grants to its contractual partner the right to use that right, reference must continue to be made to the principles which result from the Court's case-law relating to Article 5(1) of the Brussels Convention.

Costs

58 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. **The second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, is to be interpreted to the effect that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of that provision.**

2. **In order to determine, under Article 5(1)(a) of Regulation No 44/2001, the court having jurisdiction over an application for remuneration owed pursuant to a contract under which the owner of an intellectual property right grants to its contractual partner the right to use that right, reference must continue to be made to the principles which result from the case-law of the Court of Justice on Article 5(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.**

[Signatures]