



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 23 December 2015<sup>1</sup>

**Case C-196/15**

**Granarolo SpAvAmbrosi Emmi France SA**

(Request for a preliminary ruling from the Cour d'appel de Paris (France))

(Jurisdiction in civil and commercial matters — Regulation (EC) No 44/2001 — Special jurisdiction — Article 5(1) and (3) — Abrupt termination of a business relationship — Contractual or tortious nature of an action for damages brought in that regard))

### **I – Introduction**

1. The present case offers the Court a fresh opportunity of distinguishing between the special grounds of jurisdiction that Regulation (EC) No 44/2001<sup>2</sup> lays down for the bringing of actions in matters relating to contract and to tort.
2. Specifically, the present case concerns whether jurisdiction is tortious where the action for damages is founded solely on the abrupt termination of a business relationship.

### **II – Legal framework**

#### *A – EU law*

3. 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;

<sup>1</sup> — Original language: German.

<sup>2</sup> — Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

- 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;

...

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

...'

#### B – *National law*

4. Article L. 442-6 of the French Commercial Code (code de commerce) provides:

'... Any producer, trader, manufacturer or person registered in the trades register shall be liable for, and obliged to compensate for the harm resulting from, any act which:

...5. abruptly terminates an established business relationship wholly or in part without prior written notice that takes account of the duration of the business relationship and is in accordance with the minimum notice period as determined, with regard to standard commercial practices, by inter-industry agreements. ... In the absence of such agreements, orders issued by the minister responsible for economic affairs may determine a minimum notice period for each category of goods, having regard to standard commercial practices, and may lay down conditions for the termination of the business relationship, in particular based on its duration. The above provisions shall not affect the right to terminate without notice in the event of the other party's failure to perform his obligations or in the event of *force majeure*. ...'

### III – The main proceedings and the questions referred for a preliminary ruling

5. A French undertaking had been selling as a distributor in France the food products of an Italian undertaking for approximately 25 years. That longstanding business relationship was based on neither a framework contract nor an exclusivity agreement.

6. On 10 December 2012, the Italian undertaking notified the French undertaking that, as of 1 January 2013, it was bringing that business relationship to an end.

7. The French undertaking then brought an action against the Italian undertaking before the tribunal de commerce de Marseille (Commercial Court, Marseille) for damages on the ground of abrupt termination of the business relationship. It based its action on Article L. 442-6 of the Commercial Code. Finding that the action related to tort, the tribunal de commerce de Marseille (Commercial Court, Marseille) held that it had jurisdiction under Article 5(3) of Regulation No 44/2001.

8. The Italian undertaking brought an appeal challenging the jurisdiction of the French courts.

9. In those circumstances, the Cour d'appel de Paris (Court of Appeal, Paris), before which the appeal was brought, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- (1) Must Article 5(3) of Regulation No 44/2001 be interpreted as meaning that an action for damages for the termination of an established business relationship consisting in the supply of goods over several years to a distributor without a framework contract or an exclusivity agreement is a matter relating to tort or delict?

- (2) If the answer to the first question is in the negative, is Article 5(1)(b) of that regulation applicable in determining the place of performance of the obligation at issue in the first question?

#### IV – Legal analysis

##### A – *The first question*

10. By its first question, the referring court seeks, in essence, to ascertain whether an action for damages such as that at issue in the main proceedings falls within the tortious ground of jurisdiction provided for under Article 5(3) of Regulation No 44/2001.

11. In 2014, the Court of Justice clarified the distinction between contractual and tortious jurisdiction in the judgment in *Brogstetter*.<sup>3</sup>

##### 1. Judgment in *Brogstetter*

12. In that case, the Court of Justice considered whether claims for civil liability which arise in tort under national law must nonetheless be regarded as concerning ‘matters relating to a contract’ within the meaning of Article 5(1)(a) of Regulation No 44/2001 in the light of a contract which binds the parties in the main proceedings.<sup>4</sup>

13. The Court of Justice based the distinction between tortious and contractual jurisdiction on whether ‘the interpretation of [a] contract which links the defendant to the applicant is indispensable to establish the unlawful nature of the conduct complained of against the former ...’<sup>5</sup> Such interpretation of a contract is indispensable where ‘the purpose of the claims brought by the applicant ... is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties in the main proceedings, which would make its taking into account indispensable in deciding the action.’<sup>6</sup>

14. If a contract must be interpreted jurisdiction is therefore contractual under Article 5(1) whereas, otherwise, jurisdiction is tortious under Article 5(3) of Regulation No 44/2001.

##### 2. Application of the principles developed in the judgment in *Brogstetter* to the present case

15. The present case raises a problem analogous to that in *Brogstetter*.

16. Here, too, the referring court takes as its starting point that the action for damages is, under national law,<sup>7</sup> tortious in nature.

17. In the present case, in contrast to *Brogstetter*, there is, however, no need to interpret a contract between the parties which could found contractual jurisdiction.

3 — Judgment in *Brogstetter* (C-548/12, EU:C:2014:148).

4 — Judgment in *Brogstetter* (C-548/12, EU:C:2014:148, paragraph 16).

5 — Judgment in *Brogstetter* (C-548/12, EU:C:2014:148, paragraph 25).

6 — Judgment in *Brogstetter* (C-548/12, EU:C:2014:148, paragraph 26).

7 — The referring court has not examined further whether the dispute in the main proceedings is governed by French law. That may not necessarily be the case but should in principle be determined on the basis of the relevant conflict of laws rules or rules of public policy, on which a question has not been referred to the Court of Justice and for the discussion of which the request for a preliminary ruling does not give sufficient information.

18. The claim for damages is based on the abrupt termination of an established business relationship in the course of which the French undertaking received numerous deliveries of goods. There is, however, no framework contract governing the business relationship between the parties as a whole. The decisive point of whether a reasonable period was granted when the business relationship was terminated therefore does not depend on an assessment of agreements between the parties.<sup>8</sup>

19. On the contrary, the claim for damages is by its nature independent of the contractual background. The basis for the claim is not to be found in the agreements of the parties, but in a statutory provision which, for the purposes of ensuring order in economic life, reproves any abrupt termination of business relationships and provides in such cases for claims for damages by the former business partner.

20. To a certain extent, therefore, the situation at issue here is the opposite of that at issue in the judgment in *Brogsitter*: that case concerned a claim for damages which, fundamentally, stemmed from the breach of an existing contract. By contrast, in the present case it is not existing *contracts* which provide the basis for the claim for damages but rather the *lack of conclusion of further contracts* following the abrupt termination of the business relationship. The issue is not one of breaches of contract but of the former business partner's refusal to contract. The 'basis' of the claim for damages does not therefore lie in matters relating to a contract.

21. There could (theoretically) be contractual links only if the party terminating the business relationship were to rely on any previous breaches of contract by the other party to the business relationship in order to justify the termination of the commercial relationship and avoid liability to pay damages. Such a defence — even if it were relied on in the present case, of which there is no indication — would not, however, affect the nature of the claim for damages and would not transform it into a contractual claim.

22. The present proceedings do not therefore concern 'matters relating to a contract', so that the contractual ground of jurisdiction provided for under Article 5(1) of Regulation No 44/2001 cannot be applicable here.

23. On the contrary, a claim such as that at issue in the main proceedings is, by its nature, to be characterised as tortious, as the Court of Justice has previously held in the case of claims concerning the wrongful breaking off of contractual negotiations.<sup>9</sup> Such claims are comparable to the claim at issue in the present case in so far as 'obligations freely assumed by one party towards another ...'<sup>10</sup> are also lacking here and, ultimately, the claim made is founded on the basis that a business partner has acted in bad faith.<sup>11</sup>

24. In the light of all the foregoing, the answer to the first question is that an action for damages for the termination of an established business relationship without a framework contract or an exclusivity agreement is a matter relating to tort, delict or quasi-delict and therefore falls under Article 5(3) of Regulation No 44/2001.

8 — Whether contracts had already been concluded or whether the business relationship was still at an embryonic state of pre-contractual negotiations is, as the French Government submits with reference to the case-law of the Cour de cassation (Court of Cassation), irrelevant so far as the basis of the claim is concerned.

9 — Judgment in *Tacconi* (C-334/00, EU:C:2002:499).

10 — Judgment in *Tacconi* (C-334/00, EU:C:2002:499, paragraph 27); see also, in that regard, judgment in *Kolassa* (C-375/13, EU:C:2015:37, paragraph 39).

11 — Judgment in *Tacconi* (C-334/00, EU:C:2002:499, paragraph 27).

## B – *The second question*

25. Since the first question has not been answered in the negative, it is not necessary to answer the second question by which, if — which is not the case — the tortious ground of jurisdiction is not applicable here, the referring court would like to ascertain whether Article 5(1)(b) of Regulation No 44/2001 is applicable for determining the place of performance of the obligation at issue.

26. For the sake of completeness, the second question will be discussed briefly and reference made to the Court of Justice's judgment in *Corman-Collins*<sup>12</sup> in which the question was posed whether Article 5(1)(b) of Regulation No 44/2001 is applicable to claims of a distributor for compensation in connection with the termination of an oral distribution agreement.<sup>13</sup>

27. The Court of Justice held in that regard that a distribution agreement 'characterised by a framework agreement, the aim of which is an undertaking for supply and provision concluded for the future by two economic operators, including specific contractual provisions regarding the distribution by the distributor of goods sold',<sup>14</sup> is to be classified as a contract for the provision of services (within the meaning of the second indent of Article 5(1)(b)). By contrast, it held that 'a long-term commercial relationship between two economic operators, where that relationship is limited to successive agreements, each having the object of the delivery and collection of goods', may fall under the first indent of Article 5(1)(b).<sup>15</sup>

28. Such considerations are from the outset not applicable to the present case due to the absence of a framework contract between the parties. In addition, the main proceedings do not concern a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of Regulation No 44/2001, but the abrupt termination of a business relationship without the specific contractual content of the relationship being relevant. Accordingly, Article 5(1)(b) of Regulation No 44/2001 cannot be applicable.

## V – **Conclusion**

29. In the light of the foregoing considerations, I propose that the Court should give the following reply to the questions referred for a preliminary ruling:

An action for damages for the termination of an established business relationship without a framework contract or an exclusivity agreement is a matter relating to tort, delict or quasi-delict and therefore falls under Article 5(3) 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.

12 — Judgment in *Corman-Collins* (C-9/12, EU:C:2013:860).

13 — Judgment in *Corman-Collins* (C-9/12, EU:C:2013:860, paragraph 14): herein lies the difference distinguishing the present case in which, according to the findings of the referring court, there was no framework contract.

14 — Judgment in *Corman-Collins* (C-9/12, EU:C:2013:860, paragraph 36).

15 — Judgment in *Corman-Collins* (C-9/12, EU:C:2013:860, paragraphs 35 and 36).