Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 25 April 2013 [1]

Case C-9/12

Corman-Collins SA
v
La Maison du Whisky SA

(Request for a preliminary ruling from the Tribunal de Commerce de Verviers (Belgium))

(Jurisdiction in civil and commercial matters — Regulation (EC) No 44/2001 — Article 2 — Article 5(1)(a) and (b) — Special jurisdiction in matters relating to a contract — Concepts of 'sale of goods' and 'provision of services' — Exclusive distribution of goods agreement — Obligation in question)

I – Introduction

1. This request for a preliminary ruling, from the Tribunal de Commerce de Verviers (Commercial Court, Verviers Belgium), concerns mainly the interpretation of the rule of special jurisdiction laid down in relation to contractual matters in Article 5(1)(a) and (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] usually called 'the Brussels I Regulation'.

2. This request arises in proceedings brought by Corman-Collins SA ('Corman-Collins') a company which has its registered office in Belgium, against La Maison du Whisky SA ('La Maison du Whisky'), a company which has its registered office in France, on the basis of the termination by the latter of an exclusive distribution of goods agreement which, according to the applicant in the main proceedings, was binding on the parties.

3. The French company contests the jurisdiction of the Belgian courts to hear this case, and also the very existence of an agreement of this nature between the parties. It bases its plea of lack of jurisdiction on Article 2 of Regulation No 44/2001, which provides that a defendant established in a Member State [3] must, in principle, be sued in the courts of that Member State. In that respect, the national court raises the question, first, of whether there is any incompatibility with EU law of a rule of Belgian private international law which provides for the jurisdiction of Belgian courts where the applicant is an exclusive distributor established in Belgium which invokes the termination of an exclusive distribution agreement covering the national territory.

1 — Original language: French.

2 — OJ 2001 L 12, p. 1.

3 — In this Opinion, the term 'Member State' will refer to all the Member States of the European Union with the exception of the Kingdom of Denmark, in accordance with Article 1(3) of that regulation.

4. In the second place, and therein lies the main interest of this case, the Court is asked to rule whether a distribution agreement, pursuant to which one party purchases goods from another party in one Member State for resale in the territory of another Member State, is to be classified as 'sale of goods' or 'provision of services' within the meaning of Article 5(1)(b) of Regulation No 44/2001, a question which has given rise to divergent positions adopted both in the academic legal circles and in the case-law of several Member States.[4] If neither of those classification were to be adopted, that type of agreement may fall within the scope of the rule of jurisdiction laid down in Article 5(1)(a), in accordance with the order of application established by Article 5(1)(c).

5. Finally, the last question referred for a preliminary ruling, the import of which may only be fully understood in the light of the reasoning of the order for reference, asks the Court to determine, in the event that it is Article 5(1)(a), not Article 5(1)(b), of Regulation No 44/2001 which is applicable to an action such as that at issue in the main proceedings, whether 'the obligation in question', within the meaning of that provision, is the obligation of the seller-grantor or the buyer-distributor.

II – Legal framework

A – *European law*

1. Regulation No 44/2001

6. Article 2(1) of Regulation No 44/2001, in section 1, entitled 'General provisions', of Chapter II, relating to the rules of jurisdiction, states the principle that, '[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

7. Under Article 5(1) of Regulation No 44/2001, in Section 2 of Chapter II thereof, entitled 'Special jurisdiction', of Regulation No 44/2001,

'[a] person domiciled in a Member State may, in another Member State, be sued:

(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; …'

4 — For analyses in comparative law, see, inter alia, Berlioz, P., 'La notion de fourniture de services au sens de l'Article 5-1 b) du règlement "Bruxelles I"', *J.D.I.*, 2008, No 3, doctrine 6, p. 675; Hollander, P., *Le droit de la distribution*, Anthémis, Liège, 2009, p. 271 et seq., and also Magnus, U., and Mankowski, P. (ed.), *Brussels I Regulation,* Sellier European Law Publishers, Munich, 2012, p. 153 et seq.

2. The Rome I Regulation

8. Recital 7 in the preamble to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[5] provides that 'the substantive scope and the provisions of this Regulation should be consistent with those of Regulation [No 44/2001]'.

9. Article 4(1) of that regulation provides: 'To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

...

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

...'

B – *National law*

10. The Law of 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration[6] ('the Belgian Law of 27 July 1961') defines 'distribution agreement', in Article 1(2) as 'any agreement pursuant to which a grantor reserves, to one or more distributors, the right to sell, in their own name and for their own account, products which it manufactures or distributes'.

11. Under Paragraph 4(1) of that law:

'If an exclusive distributor has suffered damage further to the termination of a distribution agreement covering all or part of Belgian territory, he may always initiate legal proceedings against the supplier before the Belgian courts, either before the court of its own domicile or before the court of the domicile or registered office of the grantor.

In cases where the dispute is brought before the Belgian courts, they must apply Belgian law exclusively.'

III – The main proceedings, the questions referred for a preliminary ruling and the procedure before the Court of Justice

12. For about 10 years, Corman-Collins, a company having its registered office in Belgium, and La Maison du Whisky, a company having its registered office in France, had a business relationship in which the former bought from the latter whiskies of various brands, of which it took delivery in the warehouses of the French company, in order to sell them in Belgium.

5 — OJ 2008 L 177, p. 6.

6 — *Moniteur belge* of 5 October 1961, p. 7518. As amended by the Law of 13 April 1971 on the Unilateral Termination of Distribution Agreements (*Moniteur belge* of 21 April 1971, p. 4996).

13. Throughout that period, Corman-Collins used the appellation 'Maison du Whisky Belgique' and a webpage called www.whisky.be, without that causing any reaction on the part of La Maison du Whisky. Moreover, the address and telephone number of Corman-Collins were mentioned in the magazine 'Whisky Magasine' edited by a subsidiary of La Maison du Whisky.

14. In December 2010, La Maison du Whisky banned Corman-Collins from using the aforementioned appellation and closed down the aforementioned webpage. In February 2011, it informed Corman-Collins that from 1 April 2011 and 1 September 2011 respectively, it would be entrusting the exclusive distribution of two of its product brands to another Belgian company, with which Corman-Collins was invited to place its orders from then on.

15. On 9 March 2011, Corman-Collins brought an action against La Maison du Whisky before the Commercial Court of Verviers for payment, pursuant to the Belgian Law of 27 July 1961, of compensation in lieu of notice and additional compensation.

16. La Maison du Whisky challenged the territorial jurisdiction of the court before which the case had been brought, on the ground that the French courts have jurisdiction in accordance with Article 2 of Regulation No 44/2001. Corman-Collins responded to that objection by invoking Article 4 of the aforementioned Belgian Law.

17. In addition, the parties disagreed as to the status of their business relationship, it being established that they had never concluded a framework agreement in writing to define the terms of their collaboration. Cormann-Collins maintained that it is an exclusive distribution agreement within the meaning of the aforementioned Belgian Law, whereas La Maison du Whisky claimed that it is merely a question of sales agreements concluded on the basis of weekly orders, according to the wishes expressed by Cormann-Collins.

18. In its order for reference, the Commercial Court of Verviers expressly states that Corman-Collins and La Maison du Whisky 'were bound by an oral contract' and that '[i]n accordance with ... the Law of 27 July 1961, the legal relationship between the parties may be categorised as an exclusive distribution agreement, in so far as the applicant was authorised to resell in Belgium the products bought from the defendant'.

19. On the other hand, that court expresses doubts regarding the possibility of basing its jurisdiction on the rule laid down in Article 4 of the Belgian Law of 27 July 1961, in the light of the primacy of EU law and of the provisions of Regulation No 44/2001, which, in the court's view, is applicable both *ratione loci* and *ratione materiae*. It points out that, under Article 2 of that regulation, the French courts should have jurisdiction, but that Article 5(1) of the regulation may also be applied. In that regard, it asks whether, having regard to the case-law of the Court of Justice,[7] an exclusive distribution agreement is to be classified as a contract for the sale of goods and/or a contract for the provision of services, within the meaning of Article 5(1)(b) of Regulation No 44/2001. It adds that it is only if neither of those classifications is used for such an agreement that it is necessary to identify the contested obligation on which the application in the main proceedings is based, issues which implicitly relate to the provisions of Article 5(1)(a) of that regulation.

7 — The national court refers to the judgments in Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327 and Case C-19/09 *Wood Floor Solutions Andreas Domberger* [2010] ECR I-2121.

20. Against that background, by decision lodged on 6 January 2012, the Commercial Court of Verviers decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 2 of Regulation No 44/2001, where appropriate in conjunction with Article 5(1)(a) and (b), be interpreted as precluding a rule of jurisdiction, such as that set out in Article 4 of the Belgian Law of 27 July 1961, which provides for the jurisdiction of Belgian courts where the exclusive distributor has its registered office in Belgian territory and where the distribution agreement covers all or part of that territory, irrespective of where the grantor of the exclusive distribution rights has its registered office, where the latter is the defendant?

(2) Should Article 5(1)(a) of Regulation No 44/2001 be interpreted as meaning that it applies to an exclusive distribution of goods agreement, pursuant to which one party purchases goods from another party for resale in the territory of another Member State?

(3) If Question 2 is answered in the negative, should Article 5(1)(b) of Regulation No 44/2001 be interpreted as meaning that it refers to an exclusive distribution agreement, such as that at issue between the parties?

(4) If Questions 2 and 3 are answered in the negative, is the contested obligation in the event of the termination of an exclusive distribution agreement the obligation of the seller-grantor or that of the buyer-distributor?'

21. Written observations have been lodged by Corman-Collins and La Maison du Whisky, by the Kingdom of Belgium and the Swiss Confederation, and also by the European Commission.

22. At the hearing of 31 January 2013, Corman-Collins, La Maison du Whisky, the Belgian Government and the Commission were represented.

IV – Analysis

A – *The exclusion by Regulation No 44/2001 of the rule of jurisdiction laid down in Article 4 of the Belgian Law of 27 July 1961 (Question 1)*

23. By its first question, the national court asks essentially, whether a national rule of jurisdiction, such as that set out in Article 4 of the Belgian Law of 27 July 1961, may be applied against a defendant domiciled in another Member State, notwithstanding the provisions of Regulation No 44/2001.

24. It is a matter of determining, whether, under that national provision, the Belgian courts may have jurisdiction where a distributor domiciled in Belgian territory, irrespective of where the defendant has its domicile or registered office.

25. In the present case, Corman-Collins claims that it may sue La Maison du Whisky in a Belgian court on the basis of that provision, although the latter company has its registered office in France.

26. Except for Corman-Collins, all the parties which have lodged observations propose that the Court should reply that the application of such a rule of jurisdiction relating to the *lex fori* is precluded in circumstances of that kind, since they fall within the scope *ratione loci* of Regulation No 44/2001.

27. I agree with that position. The purpose of Regulation No 44/2001 is, inter alia,[8] to provide a uniform definition of jurisdiction in all disputes which contain a foreign element and the subject-matter of which relates to the matter to which it applies.[9] It is clear from recital 8 in the preamble to that regulation that, where the defendant is domiciled in one of the Member States bound by that regulation, the common rules on jurisdiction stated in the regulation should, in principle, apply and take precedence over the rules of jurisdiction in force in the various Member States.

28. Under those unified rules, if the defendant in the intended action is domiciled in a Member State, as is the case in the main proceedings, the applicant is, in principle, required to bring the proceedings before the courts of that Member State, in accordance with the general rule of jurisdiction laid down by Article 2 of Regulation No 44/2001.

29. It is apparent from Article 3(1) of Regulation No 44/2001 that the only derogations from that principle which may be accepted are those laid down by the provisions of Sections 2 to 7 of Chapter II of that regulation, relating to jurisdiction. In particular, as regards a contractual relationship such as that at issue in the main proceedings, it is the rule on special jurisdiction laid down in Article 5(1) of that regulation which is applicable, as an alternative to that contained in Article 2 thereof,[10] not the rules of jurisdiction under the law of the Member States.

30. Article 3(2) reinforces the idea that the intention of the EU legislature was to exclude the application of national rules of jurisdiction in situations falling within the scope of Regulation No 44/2001,[11] since it expressly mentions that such rules may not be invoked against a defendant domiciled in a Member State.

31. Consequently, I consider that the reply to this question should be that, where the defendant is domiciled in the territory of a Member State other than the one in which the court seised is sitting, the provisions of Regulation No 44/2001 supersede a rule of jurisdiction such as that laid down in Article 4 of the Belgian Law of 27 July 1961.

B – *Classification of an exclusive distribution agreement within the framework of Article 5(1) of Regulation No 44/2001 (Questions 2 and 3)*

1. Preliminary observations

32. It seems to me that Questions 2 and 3 are not put clearly, since the national court has apparently confused the different grounds of jurisdiction contained in Article 5(1) of Regulation No 44/2001 and has not taken fully into account the manner in which they are arranged in relation to each other.[12]

33. By these questions, the national court is asking, in essence, whether it is Article 5(1)(a) or Article 5(1)(b) of Regulation No 44/2001 which applies for the purposes of determining jurisdiction to hear a legal action based on an exclusive distribution agreement.

8 — Recital 2 in the preamble states that Regulation No 44/2001 contains 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 that regulation.

9 — The substantive scope of the regulation is defined in Article 1.

10 — Article 5, allows the applicant, in circumstances which it specifies, to bring proceedings before courts other than those of the Member State in which the defendant is domiciled.

11 — It is different, of course, if the situation giving rise to the proceedings is purely internal.

12 — The same applies to question 4, for reasons which I shall explain later.

34. In order to give a helpful reply, in view of the interaction between those two questions, I consider it is appropriate to examine them together and above all, in the light of the hierarchy established by Article 5(1)(c), to reverse their order so as to address Question 3, relating to Article 5(1)(b) first, and then Question 2, relating to Article 5(1)(a).[13]

35. At the outset, I should point out that, for the purposes of interpreting Regulation No 44/2001, the case-law of the Court of Justice relating to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels Convention')[14] is relevant where the provisions of those instruments may be regarded as equivalent, since that regulation has replaced that Convention in the relations between Member States.[15]

36. The Court has already pointed out that the wording of Article 5(1)(a) of Regulation No 44/2001 and that of the first sentence of Article 5(1) of the Brussels Convention are identical in every respect, and that continuity of interpretation between those instruments was not only expressly intended by the Community legislature[16] but is also in accordance with the principle of legal certainty, from which it follows that those provisions must be given identical scope.[17]

37. On the other hand, as regards Article 5(1)(b) of Regulation No 44/2001, the lessons to be learned from the judgments which have interpreted the Brussels Convention are less direct since the rules of jurisdiction contained in the aforementioned Article 5(1)(b) are new. The particularity of that provision has been highlighted by the Court, in the light both of the preparatory works of that regulation and of the structure of Article 5(1),[18] and it has concluded 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'[19] (emphasis added).

38. I would add that I believe that the intention of the legislature was that Article 5(1)(b) should be interpreted more broadly than Article 5(1)(a) owing to the aim of Regulation No 44/2001 of simplifying the provisions contained in the Brussels Convention. It is apparent from the preparatory works of that Regulation,[20] and from Professor Pocar's report on the 'LugaNo bis' Convention[21] the provisions of which were amended to the same effect, that the specific rules of Article 5(1)(b) were established in order to avoid difficulties in applying the rule in Article 5(1)(a) stemming from the case-law resulting from the judgments in *De Bloos* and *Tessili*.[22] However, the Court seems to have taken a relatively restrictive approach to Article 5(1)(b) in *Falco Privatstiftung and Rabitsch*.[23]

13 — The latter point is subsidiary to the former, as is apparent from Article 5(1)(c), according to which '*if* subparagraph (b) does not apply then subparagraph (a) applies' (emphasis added).

14 — OJ 1972 L 299, p. 32, as amended by the successive conventions relating to the accession of new Member States to that Convention.

15 — See, inter alia, Case C-133/11 *Folien Fischer and Fofitec* [2012] ECR, paragraph 31; Case C-543/10 *Refcomp* [2013] ECR, paragraph 18, and Case C-419/11 *Česká spořitelna* [2013] ECR, paragraph 27.

16 — See recital 19 in the preamble to Regulation No 44/2001.

17 — *Falco Privatstiftung and Rabitsch*, paragraphs 48 to 57 and the case-law cited, and *Česká spořitelna*, paragraphs 43 and 44.

18 — See the judgment in *Falco Privatstiftung and Rabitsch*, paragraph 54, referring in that regard to points 94 and 95 of the Opinion of Advocate General Trstenjak in that case.

19 — Ibid., paragraph 55. Emphasis added.

20 — See, in particular, the proposal for the regulation, COM(1999) 348 final, p. 14.

21 — Pocar, F., Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at LugaNo on 30 October 2007 (OJ 2009 C 319, p. 1, paragraphs 49 to 51). That Convention binds the Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation.

22 — Case 14/76 *De Bloos* [1976] ECR 1497 and Case 12/76 *Industrie Tessili Italiana Como* [1976] ECR 1473.

23 — In paragraph 43, the Court held that '[e]xtending 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)'.

39. It is important for another rule of interpretation of Regulation No 44/2001 to be kept in mind, namely the rule relating to the need to interpret the concepts it contains, particularly those concerning the rules of jurisdiction it lays down, independently, by reference principally to the scheme and objectives of the regulation, in order to ensure that it is applied uniformly in all the Member States. [24] That means, in principle, not referring to the law of the Member States and particularly that of the court seised, [25] and not making unjustified comparisons between those concepts and those used in other rules of EU law. [26]

40. That line of conduct is particularly important in the context of the present case because the concept of 'exclusive distribution agreement' used by the national court in the questions it has referred for a preliminary ruling, [27] is not a concept which has been defined in EU law [28] and may refer to different situations in the law of the Member States, assuming that they all know that form of agreement. [29] Moreover, I note that, in *De Bloos*, which already concerned the determination of jurisdiction to hear an action for compensation for failing to give notice of termination of a distribution agreement concerning a Belgian party and a French party, neither the Court nor the Advocate General had defined that concept, either in the light of the national laws concerned or in an abstract and general manner.

41. In view of the diversity of distribution agreements, it is easier to give them a negative definition [30] that a positive one. However, it is possible to isolate certain elements which are typically associated with that type of agreement, [31] namely that the purpose of the agreement is the sale of the products concerned in the territory covered by the agreement; that the distributor is selected by the grantor; that the distributor is, at the very least, authorised to sell the grantor's products and even enjoys an exclusive right; that the contractual relationship is long-standing, that there may be exclusivity of supply and/or provision for the grantor, that the distributor may have an obligation to purchase or sell; and that the parties may opt for the joint deployment of promotional techniques. [32]

42. I would add that even though the classification as distribution agreement which is given, in the light of Belgian law, by the national court to the legal relationship at issue is contested by La Maison du Whisky, and may be disputed in the light of the information in the file, the Court cannot itself assess or classify the facts or the corresponding provisions of national law, in accordance with settled case-law. [33]

24 — Inter alia, *Česká spořitelna*, paragraph 25 and the case-law cited.

25 — Ibid., paragraph 45 and the case-law cited.

26 — In particular, it has been held that the concept of 'freedom to provide services' within the meaning of Article 56 TFEU is not equivalent to that of 'provision of services' within the meaning of Article 5(1)(b) of Regulation No 44/2001. Concerning the rejection of the intended analogy, see *Falco Privatstiftung et Rabitsch*, paragraphs 15, 33 et seq., and the Opinion of Advocate General Trstenjak in that case, points 59 et seq.

27 — I note that that court considers that the contractual relationship on which Corman-Collins bases its action corresponds to that type of agreement. It states in its second question that the company's claim concerns an exclusive distribution agreement 'pursuant to which one party purchases goods from another party for resale in the territory of another Member State'.

28 — Contrary to what there is, inter alia, for another type of distribution agreement, which is the commercial agency contract (Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17).

29 — Although some national laws, following the example of Belgian law (Article 1(2) of the Law of 27 July 1961) have adopted a legislative or statutory definition of the distribution agreement and conferred a specific status on that agreement, in other Member States, that contractual device is basically inferred from practice, which does not facilitate the emergence of a uniform concept.

30 — Those agreements clearly differ from commercial agency contracts in that the distributor does not have the power to represent the grantor, and from franchise agreements in that the distribution agreement is not based on the grantor making his technical or administrative know-how available to the distributor.

31 — I would point out that some of those elements are considered in the law of certain Member States and by some authors as elements which are necessary for classification as an exclusive distribution agreement, whereas others simply reflect the intention of the parties but, in my view, those approaches are too variable to be able to identify any really consistent features.

32 — The authorisation to sell and its possible exclusive nature require a selectivity granted by the grantor which is based either on intellectual property rights or on a selective distribution policy.

33 — In preliminary ruling proceedings, any assessment of the facts in the case is a matter for the national court, although the Court of Justice may, in a spirit of cooperation with national courts, provide it with all the guidance that it considers necessary. See, in particular, 52/76 *Benedetti* [1977] ECR 163, paragraph 10, Case C-545/07 *Apis-Hristovich* [2009] ECR I-1627, paragraph 32.

43. It is in the light of all these considerations that it is necessary to reply to the second and third questions referred by the national court.

44. The interpretation of Article 5(1) of Regulation No 44/2001 for the purposes of replying to these questions requires, in my view, an examination, in accordance with the order established by the wording of that provision, of whether a cross-border distribution agreement falls either within the category of sale of goods within the meaning of the first indent of Article 5(1)(b), or within that of provision of services within the meaning of the second indent of Article 5(1)(b) or, if not, whether it is one of the other forms of agreement governed by Article 5(1)(a). I would mention, at the outset that I consider that the second of those three options should be adopted, for the reasons given below.

2. Rejection of classification as a contract for the sale of goods within the meaning of the first indent of Article 5(1)(b) of Regulation No 44/2001

45. La Maison du Whisky argues that the first indent of Article 5(1)(b) of Regulation No 44/2001 is applicable to the contractual relationship at issue. After pointing out that, in order to distinguish contracts for the sale of goods from contracts for the provision of services, it is necessary to refer to the characteristic obligation of those contracts,[34] La Maison du Whisky maintains that an exclusive distribution agreement is characterised by the grantor's obligation to provide the distributor with the products which are the subject of the agreement, an obligation which is a corollary of the distributor's right to sell those products in a given territory. It infers from that that an exclusive distribution agreement can relate only to the sale of goods, which, in its view, ought to lead to the definitive exclusion of classification as a contract for the provision of services. That approach concurs with that of the Corte suprema di cassizione (Italy) (Italian Court of Cassation),[35] which bases its arguments mainly on the United Nations Convention signed in Vienna on 11 April 1980,[36] contrary to the position taken by other national courts.[37]

46. Given that, in order to classify a contract for the purpose of applying Article 5(1)(b) of Regulation No 44/2001, the Court has in fact adopted a criterion relating to an investigation of the obligation which characterises the contract,[38] it is necessary for the sales operation to constitute the very essence of a distribution agreement for that agreement to fall within the scope of the provisions of the first indent of Article 5(1)(b).

47. However, in my view that is not the situation, in the light of the considerations set out above concerning the elements which typically constitute a distribution agreement, and of the fact that that would be to omit the particular circumstance that there is usually in that kind of business relationship a framework distribution agreement which differs from the subsequent contracts of sale.[39]

34 — Judgment in Case C-381/08 *Car Trim* [2010] ECR I-1255, paragraphs 31 et seq.

35 — See, inter alia, the judgment of the Corte di cassazione of 14 December 1999, No 895, critical commentary by Ferrari, F., in *Giustizia civile*, 2000, I, p. 2333 et seq.

36 — Convention on Contracts for the International Sale of goods.

37 — French, Hungarian, Netherlands, Swiss and American courts seised of that question have excluded from the scope of that convention distribution agreements in general and distribution agreements for the sale of goods in particular (see Ferrari, F., op. cit, p. 2338; et Witz, D., *Rec. Dalloz*, 2008, p. 2620 et seq.).

38 — *Falco Privatstiftung and Rabitsch*, paragraph 54.

39 — See, to that effect, point 1517 of the Opinion of Advocate General Lenz in *De Bloos*. That distinction, which is widely acknowledged in the law of the Member States, stems from the differences which exist as regards the methods of concluding agreements (orders pursuant to a framework agreement are usually placed by means of purchase orders, letters or electronic mail, rather than by means of addenda to the original agreement), as regards the aims (the objective of distributing products in a territory in order to conquer that market is absent in an isolated contract of sale), and as to the legal regimes applicable (particularly with regard to the limited effects of a jurisdiction clause in one of those agreements).

48. I would point out that evidence of the conclusion of such a framework agreement cannot be based only on the existence of a stable relationship reflected by successive sales, without written or verbal agreements. Moreover, it is possible that a framework agreement concluded between a manufacturer and a wholesaler, or a wholesaler and a retailer, does not come under the classification of exclusive distribution agreement. [40]

49. Accordingly, I consider that if it is established that the parties have indeed concluded a distribution agreement, the court seised of a dispute relating to that contractual relationship cannot base its jurisdiction on the criterion of the link with the place in which the goods sold were delivered, in accordance with the first indent of Article 5(1)(b) of Regulation No 44/2001.

3. Acceptance of classification as a contract for the provision of services within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001

50. The Commission maintains that the second indent of Article 5(1)(b) of Regulation No 44/2001 is applicable to the contractual relationship at issue. I endorse that view, assuming that, in the present case, there is actually an exclusive distribution agreement and not merely a long-term sales relationship. I shall return to that fundamental difference.

51. In *Falco Privatstiftung and Rabitsch*, the Court stressed the need for an independent interpretation of the concept of 'provision of services' within the meaning of that provision and held that 'the concept of service implies, at the least, that the party who provides the service [on the one hand] carries out a particular activity [and, on the other, does so] in return for remuneration'. [41]

52. To my knowledge, this case is the first opportunity the Court has had to apply the application criteria it has thus identified and, if necessary, to specify their scope. [42]

53. I consider that it is necessary, in the interest of the consistency of the case-law, to respect the elements of the definition given by the Court in that judgment, but without, however, adopting too restrictive an approach to the concept at issue, [43] having regard inter alia to the objectives which guided the adoption of that provision. Since the aim of the drafters of Regulation No 44/2001 was to simplify the rules of jurisdiction relating to contractual matters, [44] it is important not to deprive of their effectiveness the specific provisions of Article 5(1)(b), which are designed to avoid the application of the complex mechanism involved in the implementation of the more general rule contained in Article 5(1)(a) of that regulation.

40 — For example, if a company undertakes, by a framework agreement, to buy several thousand unbranded computers each year, but on the basis of monthly contracts of sale, which will be separate in that they will be concluded for each delivery, such an agreement constitutes not a distribution agreement but merely a long-term sales relationship.

41 — Paragraphs 29 to 33.

42 — It is true that in point 59 of her Opinion in *Wood Floor Solutions Andreas Domberger*, Advocate General Trstenjak had already applied those criteria to the commercial agency contract, but the Court, which was not seised of that question, refrained from doing so.

43 — In her Opinion in *Falco Privatstiftung and Rabitsch*, point 54, Advocate General Trstenjak also expressed herself in favour of a broad acceptance of that concept.

44 — See point 38 of this Opinion.

54. As regards the first criterion laid down by the Court in the words noted above, it requires positive actions, not merely abstentions. [45] In that regard, it seems to me that the exclusive distribution agreement satisfies that requirement [46] in the light of the essential service which is carried out by the distributor for the grantor, namely to distribute the latter's products in such a way that the grantor need not set up its own distribution network in the territory covered or accept that the sales are made by independent parties. I would point out that, within the framework of the privileged relationship he enjoys with the grantor, the distributor provides an added value in relation to the activities of mere retailers in that, in general, he offers continuity of supply needs for the grantor's products as a result of stockpiling, he provides after-sales services if those goods are durable, and/or he is likely to promote those products by means of special offers. [47]

55. As regards the second criterion, relating to the 'remuneration' which must be granted in consideration for such an activity, I consider that it cannot be taken in the strict sense, which may imply the payment of a pecuniary emolument, because that approach denies the existence of services which are provided without financial compensation and which indisputably fall within the concept of 'provision of services' within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001. [48]

56. As regards more particularly exclusive distribution agreements, I take the view that the financial consideration accorded to the distributor, in return for his aforementioned activity, stems in particular from the characteristic advantage afforded to him by the grantor, namely territorial exclusivity, or at least the guarantee that a limited number of distributors will have the opportunity to sell the grantor's products in a given territory. Moreover, the grantor usually places the distributor in a more favourable position than mere retailers by offering him payment facilities and/or the transfer of know-how by means of training. That selectivity and those other prerogatives represent an economic value for the distributor, which encourages him to agree to enter into the privileged relationship with the grantor and wholeheartedly to promote the marketing of his products.

57. Consequently, an exclusive distribution agreement may, in my view, be classified as a contract for the 'provision of services' for the purposes of the application of the rule of jurisdiction laid down in the second indent of Article 5(1)(b) of the aforementioned regulation.

58. That position is confirmed by the provisions of the Rome I Regulation, which must be taken into account as far as possible in interpreting Regulation No 44/2001, [49] although the Court is not required to do so automatically. [50] I note that recital 17 in the preamble to the Rome I Regulation classifies 'distribution contracts', which include exclusive distribution agreements, as 'contracts for services', and calls for the same interpretation to be given to Regulation No 44/2001. I will not go as far as considering, as the Commission does, that the Community legislature thereby opted for an overall

45 — In *Falco Privatstiftung and Rabitsch*, paragraph 31, the Court excluded from classification as 'provision of services' a contract under which the only obligation which the owner of the intellectual property right granted undertook with regard to its contractual partner was not to challenge the use of that right by the latter, on the ground that, in granting the use to that right, it did not perform any service and undertook merely to permit the licensee to exploit that right freely.

46 — Advocate General Trstenjak had proposed a different approach, considering that the provision of services meant that the person performs 'some activity or active conduct' and illustrating *a contrario* that argument by a reference to an academic work stating that an exclusive distribution agreement is neither a contract of sale nor a provision of services (see point 57 and footnote 56 of her Opinion in *Falco Privatstiftung and Rabitsch*).

47 — A teleological analysis of distribution contracts, such as exclusive distribution agreements, highlights the fact that they 'are designed to provide a *service* to conquer and exploit the local market' (Sindres, D., 'De la qualification d'un contrat-cadre de distribution au regard des règles communautaires de compétence', *Rev. crit. D.I.P.*, 2008, p. 863, point 12, and the legal literature cited).

48 — That is the case of services provided free (for example, the activities which a lawyer may carry out *pro boNo* for an asylum seeker). Some academic lawyers even consider that the requirement for remuneration may not be an essential element (see Magnus, U., and Mankowski, P., *op. cit.*, p. 155, and the authors cited in footnote 474 of that work).

49 — The legislature's intention that such consistency should be ensured is stated in recital 7 in the preamble to the Rome I Regulation.

50 — I note that in *Falco Privatstiftung and Rabitsch*, although the Advocate General had pointed out in her Opinion the need for a uniform interpretation of Regulation No 44/2001 and the Rome I Regulation in points 67 to 69 of her Opinion, the Court did not incorporate that consideration into the grounds of its judgment.

assimilation of distribution contracts to contracts for the provision of services, because although that recital states that distribution contracts are contracts for services, it points out *in fine* that they are special contracts for services for which specific rules are laid down in Article 4 of the Rome I Regulation.[51] However, I am in favour of the Court taking expressly into consideration the approach followed by the legislature in the Rome I Regulation and adopting a method of interpretation which ensures that that Regulation is consistent with Regulation No 44/2001, in the same way as it did in the judgment in *Koelzsch*.[52]

59. Specifically, it is for the national court to examine, in the dispute which has been brought before it, whether there is an exchange of obligations equivalent to a provision of services, that is to say, which goes beyond the stage of a mere stable business relationship, in order to confirm that the second indent of Article 5(1)(b) of Regulation No 44/2001 is indeed the provision which applies in the present case.

60. A long-term supply relationship between a manufacturer or wholesaler and a trader is, in my view, comparable to a simple contract for the sale of goods, and therefore falls within the scope of the first indent of Article 5(1)(b) of that regulation, even if that relationship is *de facto* exclusive or has long-term stability. On the other hand, if the supposed buyer-distributor clearly has specific contractual obligations[53] and these are based on the financial consideration payable by the seller-grantor,[54] it may be considered that that exclusive distribution agreement is equivalent to a provision of services within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001.

61. I would point out that the burden of proving, to the court seised, that those elements, which are decisive for establishing jurisdiction, are actually present in the circumstances of the case lies with the party which invokes the existence of an exclusive distribution agreement, which involves a provision of services which may be distinguished from a simple contract of sale. I would add that such a classification must be based on a specific analysis of the contractual relationship, and not on the definition of that type of contract which may be contained in the *lex fori*.

62. If the required evidence is duly adduced and the classification as a provision of services is thus acquired, the court seised of a dispute relating to an exclusive distribution agreement will be able to establish its jurisdiction on the criterion of a link to the place in which the services have been or should have been provided, on the basis of the second indent of Article 5(1)(b).

4. Exclusion of the application of Article 5(1)(a) of Regulation No 44/2001

63. In its second question, which is examined after the third question for the reasons stated above, the national court wishes to know whether an exclusive distribution agreement, pursuant to which one party purchases goods from another party for resale in the territory of another Member State, falls within the scope of Article 5(1)(a) of Regulation No 44/2001.

51 — Article 4(1) contains rules of conflict of laws for contracts for services (Article 4(1)(b)) which are different from those laid down for distribution contracts (Article 4(1)(f)).

52 — In that judgment in Case C-29/10 *Koelzsch* [2011] ECR I-1595, paragraph 33 et seq., the Court held that Article 6(2)(a) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, from which the Rome I Regulation derives, was to be interpreted in the light of the interpretation of the criteria laid down in Article 5(1) of the Brussels Convention, from which Regulation No 44/2001 stems, where those criteria fix the rules for determining jurisdiction for the same matters and set out similar concepts.

53 — Obligations such as to hold stocks, to provide an after-sales service or to carry out marketing operations.

54 — That consideration may take the form, inter alia, either of special discounts and/or payment facilities linked to the success of the distribution, or of aid provided in distribution or marketing.

64. Corman-Collins and the Belgian Government reply in the affirmative, on the basic premise, which is largely unsubstantiated, that exclusive distribution agreements are neither contracts of sale nor contracts for the provision of services, or at least, according to the Belgian Government, do not fall 'only' into one of those two categories of contract covered by Article 5(1)(b) of that regulation. That position has been adopted by the case-law of certain Member States and is upheld by some academic lawyers. [55]

65. Various arguments have been adduced in support of that proposition. One of them is that only a literal interpretation of the concepts can culminate in the standardisation of the rules of jurisdiction within the European Union. Another is that the classification cannot lead to the selection of too simplistic an approach, which disregards the multiple forms which the exclusive distribution agreement may take and fails to take into account the specific features it may have in the law of the various Member States. However, I am not convinced by those arguments, given that most commercial contractual arrangements are variable in form and lend themselves with difficulty to a classification which unifies concepts, and that a purely comparative approach cannot be taken for interpreting the concepts contained in Regulation No 44/2001, and therefore to say what kinds of dispute fall within its scope, since the Court has repeatedly held that those concepts had to be defined independently.

66. For my part, I consider, on the contrary, that an exclusive distribution agreement must be classified as a contract for the provision of services, within the meaning of Article 5(1)(b) of Regulation No 44/2001, for the reasons stated above.

67. It is apparent from Article 5(1)(c) of that regulation that the rule of jurisdiction in Article 5(1)(a) is designed to take effect only as an alternative if the rules of jurisdiction in Article 5(1)(b) do not apply. In those circumstances, there is, in my view, No need to consider further the application of the first of those two series rules in the present case.

68. However, certain criteria for the interpretation of Article 5(1)(a) of Regulation No 44/2001 will be provided in the alternative in the reply to the fourth question referred for a preliminary ruling which, even though its wording does not expressly indicate it, relates in fact to the interpretation of that provision.

69. As regards the second and third questions referred for a preliminary ruling, I therefore propose that the Court answer that the second indent of Article 5(1)(b) of Regulation No 44/2001 is the provision of that regulation which is applicable for the purposes of determining which court has jurisdiction to hear an action based on a cross-border exclusive distribution agreement, which entails specific contractual obligations concerning the distribution by the distributor of the goods sold by the grantor, and that that type of contract is a contract for the provision of services within the meaning of that provision.

C – *Identification of the obligation in question within the meaning of Article 5(1)(a) of Regulation No 44/2001 (Question 4)*

70. The fourth question referred for a preliminary ruling is worded as follows:

'If Questions 2 and 3 are answered in the negative, is the contested obligation in the event of the termination of an exclusive distribution agreement the obligation of the seller-grantor or that of the buyer-distributor?'

55 — See, inter alia, the judgments of the Court of Cassation (France) of 23 January 2007 (appeal No 05-12.166, *La semaine juridique*, general ed., note T. Azzi), of 5 March 2008 (appeal No 06-21.949, *Rec. Dalloz*, 2008, p. 1729, note H. Kenfack) and of 9 July 2008 (appeal No 07-17.295, *Rev. crit. D.I.P.*, 2008, p. 863, note D. Sindres), and references cited in footnote 4 of this Opinion.

71. This wording is, to say the least, unclear, having regard to the provisions for which an interpretation is sought.[56] In spite of that ambiguity, I consider that the Court is able to give a useful reply to the fourth question put to it, in view of the express reasons for it contained in the order for reference. The referring court states that '[i]t is only if the exclusive distribution agreement is not regarded as a contract for the sale of goods or a contract for the provision of services that it is necessary to identify the contested obligation on which the present application is based'.[57] It is apparent from the reasoning thus stated that the question contains a clerical error, since the court intended to refer to a situation in which it was impossible to apply not either Article 5(1)(a) or (b) of Regulation No 44/2001 but, in fact, either the first or second indent of Article 5(1)(b).[58]

72. Since the Court has sufficient information for the purpose, the question may be reformulated[59] as meaning that the national court wishes to know, in essence, whether, if – contrary to what I propose the reply should be – the main proceedings do not fall within the scope of Article 5(1)(b) of Regulation No 44/2001, 'the obligation in question', within the meaning of Article 5(1)(a) is the obligation of the seller-grantor or that of the buyer-distributor.

73. In that regard, Corman-Collins maintains that since the obligation of the grantor is to allow the distributor to exercise his exclusive right of sale in a given territory, it is before the courts sitting in that judicial district that the action for compensation should be brought.[60]

74. I consider, as does the Commission, that the answer to that question must be found in the case-law of the Court of Justice concerning the interpretation of the first sentence of Article 5(1) of the Brussels Convention. I would point out that the wording of Article 5(1)(a) of that regulation is exactly the same as that of that provision in the Convention and that it has previously been held that the former of those provisions must therefore be accorded the same scope as the latter.[61]

75. The abundant case-law of the Court relating to Article 5(1) of the Brussels Convention, to which reference must therefore continue to be made, in spite of the difficulties which have been pointed out with regard to its implementation,[62] provides a series of criteria for designating the court which has jurisdiction in contractual matters, which are relevant particularly with regard to the obligation to be taken into consideration for that purpose and to the determination of its place of performance.

76. One of those rules established by the case-law is that the concept of 'obligation in question' in Article 5(1)(a) of Regulation No 44/2001, corresponds to the obligation arising under the contract at issue[63] the non-performance of which is alleged by the applicant to justify his legal action.[64] In particular, the Court has already held that in a case where the plaintiff is an exclusive distributor

56 — La Maison du Whisky considers that it is impossible to reply to the question thus posed on the ground that it is based on several confusions.

57 — See the final recital in the order for reference.

58 — It should be noted that those first and second indents refer respectively to the 'sale of goods' and the 'provision of services'.

59 — The cooperation procedure laid down by Article 267 TFEU authorises the Court to reformulate a question referred to it in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it (inter alia, Case C-243/09 *Fuß* [2010] ECR I-9849, paragraph 39).

60 — The Belgian Government also expressed that view, in its reply to the second question referred.

61 — *Falco Privatstiftung and Rabitsch*, paragraphs 48 to 57 and the case-law cited, and *Česká spořitelna*, paragraphs 43 and 44.

62 — In his report on the 'LugaNo bis' Convention (op. cit., paragraphs 44 et seq.), Professeur Pocar draws attention to the methods which have been proposed, unsuccessfully, to try and remedy them. I note that Article 7(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 rewriting Regulation No 44/2001 has not put an end to the complex and unwieldy mechanism resulting from that case-law (OJ 2012 L 351, p. 1).

63 — In my view, the obligation in question may stem either from the contract itself or from the effects which the applicable law ascribes to it. See the Opinion of Advocate General Reischl in *De Bloos*, p. 1518 '[T]he main obligation of the [grantor] forms the subject of the proceedings even if the consequences of the breach of this obligation are prescribed by law'.

64 — See, inter alia, *De Bloos*, paragraphs 9 to 14; Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913, paragraph 23), and *Česká spořitelna*, paragraph 54 and the case-law cited.

asserting his right to be paid damages or seeking the cancellation of the contract on the ground of the wrongful conduct of the other party, that concept refers to the grantor's obligation which corresponds to the contractual right on which that application is based.[65] It is for the national court seised of the main proceedings, and not the Court of Justice, to define the precise content of that obligation.

77. Moreover, although the question is not posed as such by the national court, I think it is necessary, in order to give it proper guidance, to draw its attention to the fact that the determination of the place of performance of the obligation on which the application is based has also been the subject of several judgments of the Court of Justice. It is apparent that the place in which the contractual obligation at issue 'has been or should have been performed', within the meaning of Article 5(1)(a) of Regulation No 44/2001, is to be determined by the law governing that obligation according to the conflict rules applicable in the Member State of the court seised.[66]

78. Finally, as the Commission points out, the Court has stated that if it is established that a plaintiff's action is based not on a single obligation but on a number of obligations arising under the same contract and that the place of performance is not the same for all of them under the applicable law, the national court, when determining whether it has jurisdiction, must be guided by the maxim *accessorium sequitur principale*.[67] If those obligations are of equal rank, in that none of them appears to take precedence over the others, the Court has held that the court seised has jurisdiction only to hear that part of the action relating to the obligations for which the place of performance is in the national territory, and not those which were to be performed in another Member State.[68] It will be for the national court to determine if that is the situation in the case pending before it.

79. In conclusion, if Article 5(1)(a) of Regulation No 44/2001 is the rule of jurisdiction which the Court declares applicable in a case such as that in the main proceedings, I consider that the answer to the fourth question referred for a preliminary ruling, as reformulated, should be that 'the obligation in question', within the meaning of that provision, is the contractual obligation of the grantor the non-performance of which is invoked by the distributor in support of its legal action.

V – Conclusion

80. In the light of all the foregoing considerations, I propose that the Court should give the following answers to the questions referred by the Commercial Court of Verviers:

(1) Article 2 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, read in conjunction with Articles 3, 4 and 5(1) of that regulation, is to be interpreted as precluding the application against a defendant domiciled in another Member State of a national rule of jurisdiction such as that in Article 4(1) of the Belgian Law of 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration, as amended by the Law of 13 April 1971 on the Unilateral Termination of Distribution Agreements, which provides for the jurisdiction of Belgian courts where a distributor established in Belgian territory sues a grantor for terminating their exclusive distribution agreement covering all or part of that territory, irrespective of where the defendant is established.

65 — *De Bloos*, paragraphs 14 and 15; it should be noted that, in that case, the Court also had to rule on a reference for a preliminary ruling from a Belgian court in proceedings relating to an exclusive distribution agreement.

66 — *Custom Made Commercial*, paragraph 26; Case C-420/97 *Leathertex* [1999] ECR I-6747, paragraph 33, and *Česká spořitelna*, paragraph 54 and the case-law cited.

67 — In Case 266/85 *Shenavai* [1987] ECR 239, paragraph 19, it is added that 'in other words, where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction'.

68 — *Leathertex*, paragraphs 39 to 42. In that case, concerning the termination of a commercial agency contract, the Belgian court considered, in accordance with the case-law of the Court of Justice, that the obligation to pay compensation in lieu of notice was to be performed in Belgium, whereas the obligation to pay commissions was to be performed in Italy.

(2) The second indent of Article 5(1)(b) of Regulation No 44/2001, concerning jurisdiction in matters relating to a contract for the provision of services, applies for the purposes of determining which court has jurisdiction to hear a legal action by which a plaintiff established in one Member State asserts, against a defendant established in another Member State, rights arising under an exclusive distribution agreement, which requires that the contract binding the parties actually contains specific contractual obligations concerning the distribution by the distributor of the goods sold by the grantor.

(3) In the alternative, if Article 5(1)(a) of Regulation No 44/2001 is applicable in circumstances such as those of the main proceedings, in which a buyer-distributor sues a seller-grantor for terminating their contractual relationship, the obligation in question, within the meaning of that provision, is the obligation of the seller-grantor which arises under the contract at issue and the non-performance of which is invoked to justify the plaintiff's action.