Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

10 September 2015 *

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Jurisdiction and the enforcement of judgments in civil and commercial matters — Regulation (EC) No 44/2001 — Article 5(1) — Jurisdiction in matters relating to a contract — Article 5(3) — Jurisdiction in matters relating to tort or delict — Articles 18 to 21 — Individual employment contract — Company director's contract — Termination of the contract — Grounds — Poor performance and wrongful conduct — Action for a declaratory judgment and for damages — Definition of 'individual contract of employment')

In Case C-47/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 24 January 2014, received at the Court on 30 January 2014, in the proceedings

Holterman Ferho Exploitatie BV,

Ferho Bewehrungsstahl GmbH,

Ferho Vechta GmbH,

Ferho Frankfurt GmbH

v

Friedrich Leopold Freiherr Spies von Büllesheim,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader (Rapporteur), E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 January 2015,

after considering the observations submitted on behalf of:

— Holterman Ferho Exploitatie BV, Ferho Bewehrungsstahl GmbH, Ferho Vechta GmbH and Ferho Frankfurt GmbH, by P.A. Fruytier, advocaat,

* Language of the case: Dutch.

— Mr Spies von Büllesheim, by E. Jacobson and B. Verkerk, advocaten,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the European Commission, by A.-M. Rouchaud-Joët, M. Wilderspin and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 May 2015,

gives the following

Judgment

1 This request for a preliminary ruling relates to the interpretation of Article 5(1) and (3), and Chapter II, Section 5 (Articles 18 to 21), and Article 60(1) 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 request has been made in proceedings between, on the one hand, Holterman Ferho Exploitatie BV ('Holterman Ferho Exploitatie'), Ferho Bewehrungsstahl GmbH ('Ferho Bewehrungsstahl'), Ferho Vechta GmbH ('Ferho Vechta') and Ferho Frankfurt GmbH ('Ferho Frankfurt') (together 'the four companies') and, on the other, Mr Spies von Büllesheim concerning the latter's liability as manager of those companies and a claim that he be ordered to pay damages.

Legal context

EU law

The Brussels Convention

3 Article 5 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by the successive conventions on the accession of new Member States to that Convention, ('the Brussels Convention') reads as follows:

'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; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated

...'

Regulation No 44/2001

4 Recital 13 in the preamble to Regulation No 44/2001 reads as follows:

'In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules'.

5 Article 5 of Regulation No 44/2001 is worded as follows:

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

(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 point (b) does not apply then point (a) applies;

(2) ...

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

...'

6 Article 18(1), which forms part of Section 5 entitled 'Jurisdiction over individual contracts of employment' of Chapter II of Regulation No 44/2001, provides:

'In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.'

7 Article 20(1) of that regulation provides:

'An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.'

8 Article 60(1) of Regulation No 44/2001 provides:

'For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.'

Netherlands law

9 In the Civil Code (Burgerlijk Wetboek, 'the BW'), Book 2, entitled 'Legal Persons', provides in Article 2:9:

'1. Every manager has an obligation vis-à-vis the legal person to perform properly the duties assigned to him. All management tasks that have not been assigned to one or more other directors, by or pursuant to the law or the articles of association, shall come within those duties.

2. Every manager is responsible for the general conduct of the business. He is liable for the full consequences of poor management, unless, having regard in particular to the duties assigned to others, he cannot reasonably be criticised for that poor management, and he did not act negligently in taking measures to avert the consequences of that poor management.'

10 In Book 6 of the BW, dealing with the 'General Rules of the Law of Obligations', Title 3, entitled 'Tort, delict and quasi-delict', provides in Article 6:162:

'1. A person who commits a wrongful act against another, for which he may be held liable, must remedy the loss or harm suffered by the latter.

2. An infringement of a right, or an act or omission contrary to a legal obligation or to an unwritten rule laying down what is generally accepted in social life shall be regarded as a wrongful act, save where there are grounds for justifying that infringement, act or omission.

3. A wrongful act may be attributed to its perpetrator if it is due to his fault or to a circumstance for which he must answer by virtue of the law or the views held by society.'

11 In Book 7 of the BW, entitled 'Particular contracts', Title 10 on 'Employment contracts' provides in Article 7:661:

'1. An employee who, in the performance of his contract, causes loss or harm to his employer or to a third party to whom the employer is liable to pay damages, is not liable in that respect vis-à-vis the employer unless the loss or harm results from his deceit or recklessness. Having regard, in particular, to the nature of the contract, a different conclusion from the one reached in the previous sentence may be drawn from the circumstances of the case.

2. Any derogation from paragraph 1 above or from Article 6:170(3) to the disadvantage of the employee is possible only by written agreement and only if the employee is insured in that respect.'

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

12 It is clear from the request for a preliminary ruling that Holterman Ferho Exploitatie is a holding company established in the Netherlands. It has three subsidiaries under German law, that is to say, Ferho Bewehrungsstahl, Ferho Vechta and Ferho Frankfurt, all established in Germany.

13 By decision of 25 April 2001, taken at the shareholders' meeting of Holterman Ferho Exploitatie, Mr Spies von Büllesheim, a German national with an address in Germany and who was also manager and a person with authority to sign on behalf of the three German subsidiaries, was appointed a director of that company.

14 On 7 May 2001, Holterman Ferho Exploitatie and Mr Spies von Büllesheim concluded an agreement, drafted in German, confirming his appointment as director ('Geschäftsführer') and setting out his rights and obligations in that respect ('the contract of 7 May 2001').

15 On 20 July 2001, Mr Spies von Büllesheim became manager of Holterman Ferho Exploitatie.

16 As is clear from the information provided by the parties at the hearing, Mr Spies von Büllesheim also held shares in Holterman Ferho Exploitatie; however, the majority of the shares in that company were held by Mr Holterman.

17 On 31 December 2005, the contract between Mr Spies von Büllesheim and Ferho Frankfurt was terminated, and on 31 December 2006 his contracts with Holterman Ferho Exploitatie, Ferho Bewehrungsstahl and Ferho Vechta were also terminated.

18 On the basis of allegedly serious misconduct in the performance of his duties, the four companies brought an action for a declaratory judgment and damages against Mr Spies von Büllesheim before the Rechtbank Almelo (Netherlands).

19 Those companies claim, primarily, that Mr Spies von Büllesheim performed his duties as manager improperly and that, on that basis, he is liable to them under Article 2:9 of the BW. They also invoked his deceit or recklessness in the performance of his contract under Article 7:661 of the BW. In the alternative, the four companies claim that Mr Spies von Büllesheim's misconduct in the performance of his duties constitutes wrongful conduct under Article 6:162 du BW.

20 Mr Spies von Büllesheim contends that the Netherlands courts do not have the jurisdiction to hear the action.

21 The Rechtbank Almelo held that it had no jurisdiction under either Article 5(1) or (3) of Regulation No 44/2001.

22 The Gerechtshof te Arnhem upheld the judgment of the Rechtbank Almelo.

23 With regard to the claim by Holterman Ferho Exploitatie, based on Mr Spies von Büllesheim's mismanagement of that company, the Gerechtshof te Arnhem held that Regulation No 44/2001 does not designate any particular forum, so that in principle it is the rule in Article 2(1) of Regulation No 44/2001 that applies. Therefore, Mr Spies von Büllesheim can be sued only in the German courts.

24 With regard to the claim by Holterman Ferho Exploitatie, based on Mr Spies von Büllesheim's liability for poor performance of the contract of 7 May 2001, the Gerechtshof te Arnhem considers that that contract must be classified as an 'individual contract of employment' for the purposes of Article 18(1) of Regulation No 44/2001. Under Article 20(1) of that regulation, the employer's action may be brought only before the courts of the Member State in which the employee resides. Since Mr Spies von Büllesheim resides in Germany, the Netherlands courts have no jurisdiction to hear the actions brought in respect of that claim.

25 According to the Gerechtshof te Arnhem, that reasoning also applies to the extent that the action brought by Holterman Ferho Exploitatie is based on tort, delict or quasi-delict. An action based on tort, delict or quasi-delict which is linked to the claim relating to 'individual contracts of employment' for the purposes of Article 18 of Regulation No 44/2001 cannot lead to the Netherlands courts having jurisdiction, since Chapter II, Section 5 of that regulation contains a special rule on jurisdiction which derogates from the rules in Article 5(1) and (3) of that regulation.

26 The four companies brought an appeal on a point of law against the judgment of the Gerechtshof te Arnhem before the referring court.

27 In their appeal, the four companies allege that the Gerechtshof te Arnhem erred in law or gave inadequate reasons for its judgment. Their criticisms concern the interpretation and application of the relevant rules on jurisdiction laid down in Regulation No 44/2001, that is to say, the provisions of

Article 5(1)(a), read in conjunction with Article 5(3), Article 18(1) and Article 20(1) of that regulation. In particular, they criticise the Gerechtshof te Arnhem for holding that the Netherlands courts had no jurisdiction, in that their claims are based on the failure by Mr Spies von Büllesheim to fulfil his duties as director of Holterman Ferho Exploitatie.

28 The Hoge Raad der Nederlanden states that under Netherlands law a distinction must be made between, on the one hand, a person's liability in his capacity as a manager of a company on the basis of a breach of his duty to perform his tasks properly under company law pursuant to Article 2:9 of the BW or on the basis of 'wrongful conduct' for the purposes of Article 6:162 of the BW and, on the other, that person's liability as an 'employee' of that company, quite apart from his capacity as a manager, on the basis of deceit or recklessness in the performance of his contract of employment for the purposes of Article 7:661 BW.

29 The question whether or not the Netherlands courts have jurisdiction to hear and determine the case requires, in the opinion of the Hoge Raad der Nederlanden, an examination of the relationship between, on the one hand, the rules on jurisdiction in Chapter II, Section 5 (Articles 18 to 21) of Regulation No 44/2001 and, on the other, the rules on jurisdiction laid down in Article 5(1)(a) and Article 5(3) of that regulation. More particularly, the question arises as to whether Section 5 precludes the application of Article 5(1)(a) and Article 5(3) in a case such as the present where the defendant is being sued by a company, not only in his capacity as manager on the basis that he performed his duties improperly or that he acted wrongfully, but also, quite apart from that capacity, on the basis of his deceit or recklessness in the performance of the contract of employment concluded with that company.

30 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the provisions of Chapter II, Section 5 (Articles 18 to 21) of Regulation (EC) No 44/2001 be interpreted as precluding the application by the courts of Article 5(1)(a) and Article 5(3) of that Regulation in a case such as the present where the defendant is being sued by the company of which he is the manager, not only in his capacity as manager on the basis that he improperly fulfilled his duties or that he acted wrongfully, but also, quite apart from that capacity, on the basis of his deceit or recklessness in the performance of the contract of employment concluded with that company?

(2) (a) If the answer to question 1 is in the negative, must the term 'matters relating to a contract' in Article 5(1)(a) of Regulation (EC) No 44/2001 then be interpreted as applying in particular to a case such as the present where a company is suing a person in his capacity as manager of that company on the basis of a breach of his obligation to perform his duties properly under company law?

(b) If the answer to question 2(a) is in the affirmative, must the term 'place of performance of the obligation in question' in Article 5(1)(a) of Regulation (EC) No 44/2001 then be interpreted as referring to the place where the director performed or should have performed his duties under company law, which, as a rule, will be the place where the company concerned has its central administration or its principal place of business for the purposes of Article 60(1)(b) and (c) of that Regulation?

(3) (a) If the answer to question 1 is in the negative, must the term 'matters relating to tort, delict or quasi-delict' in Article 5(3) of Regulation (EC) No 44/2001 therefore be interpreted as applying to a case such as the present where a company sues a person in his capacity as manager of that company on the basis of the improper performance of his duties under company law or on the basis of his wrongful conduct?

(b) If the answer to question 3(a) is in the affirmative, must the term 'place where the harmful event occurred or may occur' in Article 5(3) of Regulation (EC) No 44/2001 be interpreted as referring to the place where the director performed or should have performed his duties under company law, which, as a rule, will be the place where the company concerned has its central administration or its principal place of business for the purposes of Article 60(1)(b) and (c) of that Regulation?'

Consideration of the questions referred

31 As a preliminary point, it must be observed that the referring court, inasmuch as it is hearing an appeal, in accordance with the rules of national law, alleging the liability of a person both in his capacity as director and as manager of a company, and on the basis of tort or delict, is asking the Court for an interpretation of the provisions of Regulation No 44/2001 concerning, respectively, jurisdiction in relation to individual contracts of employment for the purposes of Chapter II, Section 5 (Articles 18 to 21) of Regulation No 44/2001, 'contracts' for the purposes of Article 5(1) of that regulation and 'tort, delict or quasi-delict' for the purposes of Article 5(3) of that regulation.

32 In that regard, the mere fact that an applicant sets out several claims for liability in his application is not sufficient for such an action to be considered capable of coming within the scope of each of the provisions relied on. That is the case only where the conduct complained of may be considered a breach of the obligations resulting from those provisions (see, by analogy, judgment in *Brogsitter*, C-548/12, EU:C:2014:148, paragraph 24).

The first question

33 By its first question, the referring court asks, in essence, whether the provisions of Chapter II, Section 5 (Articles 18 to 21) of Regulation No 44/2001, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which a company sues a person, who has performed the duties of director and manager of that company, in order to establish misconduct on the part of that person in the performance of those duties and to obtain redress from him, they preclude the application of Article 5(1) and (3) of that regulation.

34 It must be stated at the outset that the issue of the application of the special rules for determining jurisdiction, laid down in that section of Regulation No 44/2001, arises in the present case only if Mr Spies von Büllesheim can be considered to be bound, through an 'individual contract of employment' for the purposes of Article 18(1) of that regulation, to the company of which he was a director and manager, and could thus be classified as a 'worker' for the purposes of Article 18(2).

35 It must be noted, first, that Regulation No 44/2001 does not define either 'individual contract of employment' or 'worker'.

36 Secondly, the issue of classifying the connection between Mr Spies von Büllesheim and that company cannot be resolved on the basis of national law (see, by analogy, judgment in *Kiiski*, C-116/06, EU:C:2007:536, paragraph 26).

37 In order to ensure the full effectiveness of Regulation No 44/2001, in particular Article 18, the legal concepts that regulation uses must be given an independent interpretation common to all the Member States (judgment in *Mahamdia*, C-154/11, EU:C:2012:491, paragraph 42).

38 Inasmuch as Regulation No 44/2001 replaces the Brussels Convention, the interpretation provided by the Court in respect of the provisions of the Brussels Convention is valid also for those of that regulation whenever the provisions of those Community instruments may be regarded as equivalent (judgment in *Zuid-Chemie*, C-189/08, EU:C:2009:475, paragraph 18).

39 With regard to Article 5(1) of the Brussels Convention, a provision which was used as the basis for adopting Articles 18 to 21 of Regulation No 44/2001, the Court has already held that contracts of employment have certain particularities: they create a lasting bond which brings the worker to some extent within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements (judgment in *Shenavai*, 266/85, EU:C:1987:11, paragraph 16).

40 That interpretation is borne out by paragraph 41 of the Report by Mr Jenard and Mr Möller on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Lugano on 16 September 1988 (OJ 1990 C 189, p. 57), according to which, in relation to the independent concept of a 'contract of employment', it may be considered that it presupposes a relationship of subordination of the employee to the employer.

41 Furthermore, as regards the term 'employee', the Court has held in its interpretation of Article 45 TFEU and a number of EU legislative acts, such as Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), that the essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he receives remuneration (see, in the context of the freedom of movement for workers, judgment in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraphs 16 and 17, and, in the context of Directive 92/85, judgment in *Danosa*, C-232/09, EU:C:2010:674, paragraph 39).

42 It is also necessary to take those factors into account as regards the notion of 'employee' for the purposes of Article 18 of Regulation No 44/2001.

43 With regard to the purpose of Chapter II, Section 5 of Regulation No 44/2001, suffice it to note that, as is clear from the thirteenth recital, the regulation aims to provide the weaker parties to contracts, including contracts of employment, with enhanced protection by derogating from the general rules of jurisdiction.

44 In that respect, it is important to recall that the provisions in Section 5 are not only specific but also exhaustive (judgment in *Glaxosmithkline and Laboratoires Glaxosmithkline*, C-462/06, EU:C:2008:299, paragraph 18).

45 It is in the light of the foregoing considerations that the referring court must determine, on the basis of the criteria set out in paragraphs 39 and 41 above, whether in the present case Mr Spies von Büllesheim, in his capacity as director and manager of Holterman Ferho Exploitatie, for a certain period of time performed services for and under the direction of that company in return for which he received remuneration and was bound by a lasting bond which brought him to some extent within the organisational framework of the business of that company.

46 More specifically, with regard to the relationship of subordination, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties (judgment in *Balkaya*, C-229/14, EU:C:2015:455, paragraph 37).

47 It is for the referring court to examine the extent to which Mr Spies von Büllesheim, in his capacity as a shareholder in Holterman Ferho Exploitatie, was able to influence the will of that company's administrative body of which he was the manager. In that case, it will be necessary to establish who had authority to issue him with instructions and to monitor their implementation. If it were to turn out that Mr Spies von Büllesheim's ability to influence that body was not negligible, it would be appropriate to conclude that there was no relationship of subordination for the purposes of the Court's case-law on the definition of a worker.

48 If, after examining all the factors mentioned above, the referring court were to find that Mr Spies von Büllesheim, in his capacity as director and manager, had a bond with Holterman Ferho Exploitatie through an individual contract of employment for the purposes of Article 18(1) of Regulation No 44/2001, it would be for that court to apply the rules on jurisdiction laid down in Chapter II, Section 5 of Regulation No 44/2001.

49 In the light of all the foregoing considerations, the answer to the first question is that, in a situation such as that at issue in the main proceedings in which a company sues a person, who performed the duties of director and manager of that company, in order to establish misconduct on the part of that person in the performance of his duties and to obtain redress from him, the provisions of Chapter II, Section 5 (Articles 18 to 21) of Regulation No 44/2001 must be interpreted as meaning that they preclude the application of Article 5(1) and (3) of that regulation, provided that that person, in his capacity as director and manager, for a certain period of time performed services for and under the direction of that company in return for which he received remuneration, that being a matter for the referring court to determine.

The second question

50 By its second question, the referring court asks, in essence, whether Article 5(1) of Regulation No 44/2001 must be interpreted as meaning that an action brought by a company against its former manager on the basis of an alleged breach of his obligations under company law comes within the concept of 'matters relating to a contract'. If the answer is in the affirmative, the referring court asks whether the place where the obligation that is the basis for the claim was performed or ought to have been performed corresponds to the place referred to in Article 60(1)(b) and (c) of that regulation.

51 That question is relevant for the purposes of the decision in the main proceedings if the referring court were to find, after examining the evidence provided in response to the first question referred, that Mr Spies von Büllesheim did not perform his duties as an employee of Holterman Ferho Exploitatie.

52 In order to reply to the first part of the second question, it must be stated that, in accordance with settled case-law, the concept of 'matters relating to contract', referred to in Article 5(1) of Regulation No 44/2001, presupposes the existence of an obligation freely assumed by one party towards another (see judgment in *Česká spořitelna*, C-419/11, EU:C:2013:165, paragraph 46).

53 As the Advocate General stated in point 46 of his Opinion, Mr Spies von Büllesheim and Holterman Ferho Exploitatie freely assumed mutual obligations in that Mr Spies von Büllesheim chose to manage and administer that company, and the company undertook to remunerate him for those services, so that their relationship may be regarded as being contractual in nature, and consequently the action brought by the company against its former manager on the basis of the alleged breach of his obligation to perform his duties properly under company law comes within the concept of 'matters relating to contract' for the purposes of Article 5(1) of Regulation No 44/2001.

54 In that regard, it appears that the activity of a manager creates close links of the same kind as those which are created between the parties to a contract and that, as a consequence, the action brought by the company against its former manager on the basis of the alleged breach of his obligation to perform

his duties properly under company law may legitimately be considered to come within the concept of 'matters relating to contract' for the purposes of Article 5(1) of Regulation No 44/2001 (see, by analogy, judgment in *Peters Bauunternehmung*, 34/82, EU:C:1983:87, paragraph 13).

55 With regard to the issue of the 'place', within the meaning of Article 5(1) of Regulation No 44/2001, where the obligation that is the basis for the claim was performed or ought to have been performed, it is necessary to determine whether that action is covered by Article 5(1)(a) or by the second indent of Article 5(1)(b) of that regulation.

56 In that regard, it must be observed that, taking account of the hierarchy established between points (a) and (b) by point (c) of that provision, the rule of jurisdiction laid down in Article 5(1)(a) of Regulation No 44/2001 is intended to apply only in the alternative and by default with respect to the other rules of jurisdiction in Article 5(1)(b) of that regulation (judgment in *Corman-Collins*, C-9/12, EU:C:2013:860, paragraph 42).

57 It is clear from the case-law of the Court that a contract which has as its characteristic obligation the provision of services will be classified as a 'provision of services' within the meaning of the second indent of Article 5(1)(b) of that regulation (judgment in *Car Trim*, C-381/08, EU:C:2010:90, paragraph 32). The concept of 'services' requires at least that the party who provides the service should carry out a particular activity in return for remuneration (judgment in *Falco Privatstiftung and Rabitsch*, C-533/07, EU:C:2009:257, paragraph 29).

58 In the context of company law, since the characteristic obligation of the legal relationship between the manager and the company being managed requires a particular activity in return for remuneration, that activity must be classified as a 'provision of services' within the meaning of the second indent of Article 5(1)(b) of Regulation No 44/2001.

59 It is in the light of those considerations that the Court must determine the place where the obligation that is the basis for the claim was performed or ought to have been performed.

60 Taking account of the wording of the second indent of Article 5(1)(b) of Regulation No 44/2001, according to which it is the place in the Member State where, 'under the contract', the services were provided or should have been provided which is decisive, the place of the main provision of services must be deduced, in so far as possible, from the provisions of the contract itself (judgment in *Wood Floor Solutions Andreas Domberger*, C-19/09, EU:C:2010:137, paragraph 38).

61 In the case in the main proceedings, it is common ground that the contract of 7 May 2001 did not contain any clause requiring Mr Spies von Büllesheim to carry out his activities in a specific place.

62 However, it is for the referring court to verify in the articles of incorporation of Holterman Ferho Exploitatie, or in any other document that defines the obligations of the manager vis-à-vis that company, whether it is possible to ascertain the place where the services were mainly provided by Mr Spies von Büllesheim.

63 If neither the provisions of the articles of association of Holterman Ferho Exploitatie, nor any other document defining the obligations of the manager vis-à-vis the company, make it possible to determine the place where the services were mainly provided by Mr Spies von Büllesheim, it will, in such a case, be necessary to take into consideration the fact that those services were provided on behalf of that company.

64 As the Advocate General stated in point 57 of his Opinion, in the absence of any derogating stipulation in the articles of association of the company, or in any other document, it is for the referring court to determine the place where Mr Spies von Büllesheim in fact, for the most part, carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary

to the parties' intentions as indicated by what was agreed. For that purpose, it is possible to take into consideration, in particular, the time spent in those places and the importance of the activities carried out there, it being a matter for the national court to determine whether it has jurisdiction in the light of the evidence submitted to it.

65 In the light of the foregoing considerations, the answer to the second question is that Article 5(1) of Regulation No 44/2001 must be interpreted as meaning that an action brought by a company against its former manager on the basis of an alleged breach of his obligations under company law comes within the concept of 'matters relating to a contract'. In the absence of any derogating stipulation in the articles of association of the company, or in any other document, it is for the referring court to determine the place where the manager in fact, for the most part, carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary to the parties' intentions as indicated by what was agreed.

The third question

66 By its third question, the Hoge Raad der Nederlanden asks, in essence, whether Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, inasmuch as the applicable national law makes it possible to commence legal proceedings simultaneously on the basis of a contractual relationship and of tort, delict or quasi-delict, that provision covers a situation such as that at issue in the main proceedings in which a company is suing a person both in his capacity as manager of that company and on the basis of wrongful conduct. If the answer is in the affirmative, the referring court wishes to know whether the place where the harmful event occurred or may occur corresponds to the place referred to in Article 60(1)(b) and (c) of that regulation.

67 As with the second question referred, the third question is relevant for the purposes of the decision in the main proceedings in the event that the referring court were to find, after examining the evidence provided in response to the first question referred, that Mr Spies von Büllesheim did not perform his duties as an employee of Holterman Ferho Exploitatie.

68 It is settled case-law that Article 5(3) of Regulation No 44/2001 applies to all actions which seek to establish the liability of a defendant and do not concern 'matters relating to a contract' within the meaning of Article 5(1) of the regulation (see, inter alia, judgment in *Brogsitter*, C-548/12, EU:C:2014:148, paragraph 20 and the case-law cited).

69 Thus, as is clear from the reply to the second question, the legal relationship between a company and its manager must be classified as coming under 'matters relating to a contract' for the purposes of Article 5(1) of Regulation No 44/2001.

70 Consequently, inasmuch as national law makes it possible to base a claim by the company against its former manager on allegedly wrongful conduct, such a claim may come under 'tort, delict or quasi-delict' for the purposes of the jurisdiction rule set out in Article 5(3) of Regulation No 44/2001 only if it does not concern the legal relationship of a contractual nature between the company and the manager.

71 If the conduct complained of may be considered a breach of the manager's contract, that being a matter for the referring court to determine, it must be concluded that the court which has jurisdiction to rule on that conduct is the one specified in Article 5(1) of Regulation No 44/2001. If not, the jurisdiction rule set out in Article 5(3) of that regulation applies (see, by analogy, judgment in *Brogsitter*, C-548/12, EU:C:2014:148, paragraphs 24 to 27).

72 In that regard, it should be recalled that Article 5(3) of Regulation No 44/2001 must be interpreted independently and strictly (judgment in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 37 and the case-law cited). As regards the place where 'the harmful event occurred or may occur' in Article 5(3) of Regulation No 44/2001, it must be recalled that that expression is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places (judgment in *Coty Germany*, C-360/12, EU:C:2014:1318, paragraph 46).

73 According to settled case-law, the rule of special jurisdiction laid down in Article 5(3) of that regulation is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (judgment in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 39 and the case-law cited).

74 In matters relating to tort, delict or quasi-delict, the courts for the place where the harmful event occurred or may occur are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence (judgment in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 40).

75 Identification of one of the linking factors recognised by the case-law set out in paragraph 72 above must therefore make it possible to establish the jurisdiction of the court objectively best placed to determine whether the elements that constitute liability do in fact exist, so that only the court within whose jurisdiction the relevant linking factor is situated may validly be seised (judgment in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 41 and the case-law cited).

76 As far as the place of the event giving rise to the damage is concerned, it is necessary, as the Advocate General stated in point 65 of his Opinion, to bear in mind that that place may be situated in the place where Mr Spies von Büllesheim carried out his duties as manager of the Holterman Ferho Exploitatie company.

77 With regard to the place where the damage occurred, it is clear from the case-law of the Court, that that is the place where the damage alleged by the company actually manifests itself (see, to that effect, judgment in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraphs 52).

78 In the present case, in order to determine where Mr Spies von Büllesheim's wrongful conduct in the exercise of his duties as manager could have caused the damage, the referring court must, on the basis of the evidence at its disposal, take into account the fact that the term 'place where the harmful event occurred' cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually taking place elsewhere.

79 In the light of the foregoing considerations, the answer to the third question is that, in circumstances such as those at issue in the main proceedings in which a company sues its former manager on the basis of allegedly wrongful conduct, Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that that action is a matter relating to tort or delict where the conduct complained of may not be considered to be a breach of the manager's obligations under company law, that being a matter for the referring court to verify. It is for the referring court to identify, on the basis of the facts of the case, the closest linking factor between the place of the event giving rise to the damage and the place where the damage occurred.

Costs

80 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 (Third Chamber) hereby rules:

1. **The provisions of Chapter II, Section 5 (Articles 18 to 21) of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in a situation such as that at issue in the main proceedings in which a company sues a person, who performed the duties of director and manager of that company in order to establish misconduct on the part of that person in the performance of his duties and to obtain redress from him, must be interpreted as meaning that they preclude the application of Article 5(1) and (3) of that regulation, provided that that person, in his capacity as director and manager, for a certain period of time performed services for and under the direction of that company in return for which he received remuneration, that being a matter for the referring court to determine.**

2. **Article 5(1) of Regulation No 44/2001 must be interpreted as meaning that an action brought by a company against its former manager on the basis of an alleged breach of his obligations under company law comes within the concept of 'matters relating to a contract'. In the absence of any derogating stipulation in the articles of association of the company, or in any other document, it is for the referring court to determine the place where the manager in fact, for the most part, carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary to the parties' intentions as indicated by what was agreed.**

3. **In circumstances such as those at issue in the main proceedings in which a company is suing its former manager on the basis of allegedly wrongful conduct, Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that that action is a matter relating to tort or delict where the conduct complained of may not be considered to be a breach of the manager's obligations under company law, that being a matter for the referring court to verify. It is for the referring court to identify, on the basis of the facts of the case, the closest linking factor between the place of the event giving rise to the damage and the place where the damage occurred.**

[Signatures]