

JUDGMENT OF THE COURT (Third Chamber)

11 March 2010*

In Case C-19/09,

REFERENCE for a preliminary ruling under Article 68 EC and Article 234 EC from the Oberlandesgericht Wien (Austria), made by decision of 23 December 2008, received at the Court on 12 January 2009, in the proceedings

Wood Floor Solutions Andreas Domberger GmbH

v

Silva Trade SA,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, R. Silva de Lapuerta, J. Malenovský, T. von Danwitz and D. Šváby, Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 29 October 2009,

after considering the observations submitted on behalf of:

- Wood Floor Solutions Andreas Domberger GmbH, by J. Zehetner, Rechtsanwalt,
- Silva Trade SA, by K.U. Janovsky and T. Berend, Rechtsanwälte,
- the German Government, by M. Lumma and J. Kemper, acting as Agents,
- the United Kingdom Government, by S. Ossowski, acting as Agent, and A. Henshaw, Barrister,
- the Commission of the European Communities, by A.-M. Rouchaud-Joët and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2010

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of the rule of special jurisdiction for contracts for the provision of services laid down in the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) ('the regulation').
- 2 The reference has been made in the course of proceedings between Wood Floor Solutions Andreas Domberger GmbH ('Wood Floor'), established at Amstetten (Austria), and Silva Trade SA ('Silva Trade'), established at Wasserbillig (Luxembourg), relating to a claim for compensation for the termination of a commercial agency contract performed in several Member States.

Legal background

- 3 According to recital 1 in the preamble to the regulation:

'The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.'

4 Recital 2 in the preamble to the regulation provides:

‘Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this regulation are essential.’

5 According to recital 11 in the preamble to the regulation, ‘[t]he rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.’

6 The rules on jurisdiction laid down by the regulation are set out in Chapter II thereof, which consists of Articles 2 to 31.

7 Article 2(1) of the regulation, which appears in Chapter II, Section 1, entitled ‘General provisions,’ states:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

- 8 Article 3(1) of the regulation, which is also in Section 1 of Chapter II, provides:

‘Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.’

- 9 Under Article 5 of the regulation, which appears in Chapter II, Section 2, thereof, entitled ‘Special jurisdiction’:

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

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

- (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

...

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

- 10 It is apparent from the order for reference that on 21 August 2007 Wood Floor sued Silva Trade before the Landesgericht Sankt Pölten (Austria) seeking damages for termination of a commercial agency contract of EUR 27 864,65 and compensation of EUR 83 593,95.
- 11 In order to found the jurisdiction of the court seised, Wood Floor relied on Article 5(1)(b) of the regulation and claimed to have carried on business exclusively from its seat at Amstetten, the work of signing up and acquiring of clients thus taking place in Austria.
- 12 Silva Trade challenged the jurisdiction of the court seised by arguing that more than three quarters of Wood Floor's turnover was generated in countries other than Austria, and that Article 5(1) of the regulation does not expressly provide for such a case. According to Silva Trade, if the place of performance of the obligation in question cannot be established because that obligation is not subject to geographical limi-

tations, Article 5(1) is inapplicable and jurisdiction must be determined on the basis of Article 2 of the regulation.

- 13 The plea of lack of jurisdiction was rejected by the Landesgericht Sankt Pölten, which took the view, first, that commercial agency contracts are covered by the definition of ‘provision of services’ within the meaning of the second indent of Article 5(1)(b) of the regulation and, second, that, on the basis of Austrian case-law, where services are provided in a number of countries the place where services are provided is the service provider’s centre of business.
- 14 Silva Trade brought an appeal before the Oberlandesgericht Wien, before which it argued that the relevant Austrian case-law refers only to the case where different places of delivery are situated in a single Member State. It submitted that if the different places at which services are provided are located in several Member States, each court has jurisdiction only in respect of and to the extent of the obligation which must be performed within its jurisdiction. A claimant who seeks to bring all of his claims before a single court, as in this case, may act only on the basis of Article 2 of the regulation so that, in this case, the Austrian courts do not have jurisdiction.
- 15 According to the referring court, which intends to uphold the decision at first instance, the principles laid down in the judgment in Case C-386/05 *Color Drack* [2007] ECR I-3699 also apply where the different places where services are provided are located in several Member States and the ‘place of performance’, within the meaning of the second indent of Article 5(1)(b) of the regulation, has to be determined on the basis of the place of the main provision of services or the service provider’s centre of business.
- 16 In that connection, the referring court observes that, in this case, the commercial agent carried on business for the most part from Amstetten and, therefore, that is the place where the centre of his business providing services is located, determined on the basis of the time spent and the extent of the activity which was conducted there.

- 17 However, the referring court notes, first of all, that, in the judgment in *Color Drack*, the Court stated that the answers given in that case were limited solely to the situation where several places of delivery were located in a single Member State and did not pre-judge the answer to be given in the case where several places of delivery are located in several Member States.
- 18 Next, the referring court asks how to establish the place where services are provided and, if one single place where services are provided cannot be established, whether the claimant may choose to bring the whole of his claim before any court in whose jurisdiction services have been provided.
- 19 Lastly, the referring court is unsure whether Article 5(1)(a) of the regulation would apply if the Court were to hold that the second indent of Article 5(1)(b) was inapplicable where services are provided in several Member States.
- 20 In those circumstances, the Oberlandesgericht Wien decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. (a) Is the second indent of Article 5(1)(b) of [the regulation] applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?’

If the answer to that question is in the affirmative,

Should the provision referred to be interpreted as meaning that

(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;

(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?

2. If the answer to the first question is in the negative,

Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

The questions referred for a preliminary ruling

Question 1(a)

- ²¹ By Question 1(a), the referring court asks the Court essentially whether the second indent of Article 5(1)(b) is applicable where services are provided in several Member States.

- 22 In that connection, it should be noted, first of all, that in the judgment in *Color Drack* the Court held that the rule of special jurisdiction set out in Article 5(1) of the regulation in matters relating to a contract, which complements the rule that jurisdiction is generally based on the defendant's domicile, reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case (*Color Drack*, paragraph 22; Case C-204/08 *Rehder* [2009] ECR I-6073, paragraph 32; and Case C-381/08 *Car Trim* [2010] ECR I-1255, paragraph 48).
- 23 The Court also observed that, regarding the place of performance of the obligations arising from contracts for the sale of goods, the regulation, in the first indent of Article 5(1)(b), defines that criterion of a link autonomously, in order to reinforce the objectives of unification of the rules of jurisdiction and predictability. Accordingly, in such cases the place of delivery of the goods is established as the autonomous linking factor to apply to all claims founded on one and the same contract of sale (*Color Drack*, paragraphs 24 and 26; *Rehder*, paragraph 33; and *Car Trim*, paragraphs 49 and 50).
- 24 In the light of the objectives of proximity and predictability, the Court held that the rule set out in the first indent of Article 5(1)(b) of the regulation is also applicable where there are several places of delivery of goods within a single Member State, since one court must have jurisdiction to hear all the claims arising out of the contract (*Color Drack*, paragraphs 36 and 38, and *Rehder*, paragraph 34).
- 25 Second, the Court then held that the factors which it took as a basis in order to arrive at the interpretation set out in *Color Drack* are also valid with regard to contracts for the provision of services, including the cases where such provision is not effected in a single Member State (*Rehder*, paragraph 36).

- ²⁶ The rules of special jurisdiction provided for by the regulation for contracts for the sale of goods and the provision of services have the same origin, pursue the same objectives and occupy the same place in the scheme established by that regulation (*Rehder*, paragraph 36).
- ²⁷ Where the services in question are provided at several places in different Member States, a differentiated approach cannot be applied to the objectives of proximity and predictability, which are pursued by the centralisation of jurisdiction in the place of the provision of services under the contract at issue and by the determination of sole jurisdiction for all claims arising out of that contract (*Rehder*, paragraph 37).
- ²⁸ In addition to the fact that it finds no basis in the provisions of the regulation, such a differentiated approach would run counter to the purpose which determined the adoption of that regulation, which, by unifying the rules governing conflict of jurisdiction in civil and commercial matters, contributes to the development of an area of freedom, security and justice, as well as to the proper functioning of the internal market within the Community, as it is clear from recitals 1 and 2 in the preamble to the regulation (*Rehder*, paragraph 37).
- ²⁹ Having regard to all the foregoing considerations, the answer to Question 1(a) must be that the second indent of Article 5(1)(b) of the regulation is to be interpreted as meaning that that provision is applicable in the case in which services are provided in several Member States.

Question 1(b)

- ³⁰ By Question 1(b), the referring court asks essentially, on the basis of what criteria the place of performance of the obligation that is characteristic of the contract must be

established and, therefore, the court with jurisdiction to hear and determine all the claims arising out of the contract in the case where services have been provided in several Member States, in accordance with the second indent of Article 5(1)(b) of the regulation. Taking account of the factual background to the case in the main proceedings, that question must be understood as asking, in particular, on the basis of what criteria that place is to be determined in the case of a commercial agency contract.

- 31 In that connection, it must be recalled, in the first place that, in the judgment in *Color Drack*, the Court held, for the purposes of applying the rule of jurisdiction laid down in the first indent of Article 5(1)(b) of the regulation concerning the sale of goods, that where there are several places of delivery of the goods the ‘place of performance’ must be understood as the place with the closest linking factor between the contract and the court having jurisdiction and, as a general rule, it will be at the place of the principal delivery, which must be determined on the basis of economic criteria (*Color Drack*, paragraph 40).
- 32 For the reasons set out in paragraphs 25 to 28 of this judgment, the same approach is applicable, *mutatis mutandis*, in the context of the second indent of Article 5(1)(b) of the regulation.
- 33 Accordingly, for the purposes of applying the rule of special jurisdiction in matters relating to a contract, laid down in the second indent of Article 5(1)(b) of the regulation, concerning the provision of services, when there are several places of delivery of the goods the ‘place of performance’ must be understood as the place with the closest linking factor, which, as a general rule, will be at the place of the main provision of services.
- 34 In the second place, it must be stated that, in a commercial agency contract, it is the commercial agent who performs the obligation which characterises that contract and who, for the purpose of applying the second indent of Article 5(1)(b) of the regulation, provides the services.

- 35 Under Article 1(2) of 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), a commercial agent has authority to negotiate the sale or the purchase of goods on behalf of the principal, and, where appropriate, to negotiate and conclude such transactions on behalf of and in the name of that principal. In addition, under Article 3 thereof, a commercial agent ‘must ... make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of[,] communicate to his principal all the necessary information available to him [and] comply with reasonable instructions given by his principal’.
- 36 Therefore, in order to apply the rules of special jurisdiction in matters relating to a contract, laid down in the second indent of Article 5(1)(b) of the regulation, when these are several places where services are provided by the agent the ‘place of performance’ must, in principle, mean the place of the main provision of services by the agent.
- 37 Third, it is necessary to indicate the criteria according to which the place of the main provision of services must be determined, when those services are provided in different Member States.
- 38 Having regard to the objective of predictability laid down by the legislature in recital 11 in the preamble to the regulation, and taking account of the wording of the second indent of Article 5(1)(b), according to which it is the place in a 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. Thus, in the context of a commercial agency contract, the place where the agent was to carry out his work on behalf of the principal, consisting in particular in preparing, negotiating and, where appropriate, concluding the transactions for which he has authority has to be identified, on the basis of that contract.
- 39 The determination of the place of the main provision of services according to the contractual choice of the parties meets the objective of proximity, since that place has, by its very nature, a link with the substance of the dispute.

- 40 If the provisions of a contract do not enable the place of the main provision of services to be determined, either because they provide for several places where services are provided, or because they do not expressly provide for any specific place where services are to be provided, but the agent has already provided such services, it is appropriate, in the alternative, to take account of the place where he has 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 it appears from the provisions of the contract. For that purpose, the factual aspects of the case may be taken into consideration, in particular, the time spent in those places and the importance of the activities carried out there. It is for the national court seized to determine whether it has jurisdiction in the light of the evidence submitted to it (*Color Drack*, paragraph 41).
- 41 Fourth, if the place of the main provision of services cannot be determined on the basis of the provisions of the contract itself or its actual performance, the place must be identified by another means which respects the objectives of predictability and proximity pursued by the legislature.
- 42 For that purpose, it will be necessary for the purposes of the application of the second indent of Article 5(1)(b) to consider, as the place of the main provision of the services provided by a commercial agent, the place where that agent is domiciled. That place can always be identified with certainty and is therefore predictable. Moreover, it has a link of proximity with the dispute since the agent will in all likelihood provide a substantial part of his services there.
- 43 Having regard to all the above considerations, the answer to the Question 1(b) is that the second indent of Article 5(1)(b) of the regulation must be interpreted as meaning that where services are provided in several Member States, the court having jurisdiction to hear and determine all the claims based on the contract is the court within whose jurisdiction the place of the main provision of services is situated. For a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be determined on that basis, the place where the agent is domiciled.

Question 1(c) and Question 2

- ⁴⁴ In view of the answers given to Question 1(a), and (b), there is no need to answer Question 1(c) or Question 2.

Costs

- ⁴⁵ 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 second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that that provision is applicable in the case where services are provided in several Member States.**
2. **The second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that where services are provided in several Member States, the court which has jurisdiction to hear and determine all the claims arising from the contract is the court in whose jurisdiction the place of the main provision of services is situated. For a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from the provisions of the contract or, in the absence of such provisions, the**

actual performance of that contract or, where it cannot be established on that basis, the place where the agent is domiciled.

[Signatures]